German/European Law Conversation Series

Supported by the DAAD, Washington & Lee University Law School, and the GLJ

Criminal Responsibility of German Soldiers in Afghanistan: The Case of Colonel Klein

By Constantin von der Groeben[*]

A. Introduction

On 4 September 2009 an officer of the German *Bundeswehr* (German Army) in Afghanistan, Colonel Georg Klein, ordered an airstrike against two gas tanker trucks hijacked by the Taliban. In this airstrike, carried out by U.S. Air Force pilots, up to 140 people were killed,[1] among them not only members of the Taliban but also many civilians.[2] This raises the question of criminal responsibility of German soldiers who operate in Afghanistan. The *Generalbundesanwalt* (General Public Prosecutor) investigated the case and recently decided to terminate the investigations against Colonel Klein.[3] Despite this decision not all questions are answered. I will present a more comprehensive analysis of the case, not only commenting on the decision of the *Generalbundesanwalt*, but also applying different factual hypotheses leading to a different legal assessment of the case. At the outset I will look back at the line of cases known as the "Road Block Cases," and seek to explain how the criminal responsibility of German soldiers has been dealt with in the past.

B. Retrospective: The "Road Block Cases"

Before focusing on the case of Colonel Klein, it is imperative to look at an earlier case where German soldiers fired at Afghan civilians at a road block in October 2008.[4]

---

[*] Ph.D. Candidate in International Humanitarian Law, University of Cologne. LL.M. Candidate in International Legal Studies, New York University. The author is grateful to Tom Gerety, Claus Kreß and Rahela Khorakiwala for comments and helpful advice. The views expressed are solely those of the author. Email: constantin.vondergroeben@law.nyu.edu

[1] Numbers range from 50 up to 140 people who were killed depending on the source.

[2] *Die Schweigespirale*, DER SPIEGEL, 30 Nov. 2009, at 23; *Bomben, Lügen, Rücktritte*, ZEIT ONLINE, 25 Feb. 2010, http://pdf.zeit.de/politik/ausland/2010-02/kundus-chronologie.pdf.

[3] *See* Press Release, *Generalbundesanwalt,* http://www.generalbundesanwalt.de/de/showpress.php?newsid=360 (19 Apr. 2010).

[4] For an in-depth analysis of this case, *see* Helmut Frister, Marcus Korte & Claus Kress, *Die strafrechtliche Rechtfertigung militärischer Gewalt in Auslandseinsätzen auf der Grundlage eines Mandats der Vereinten Nationen*, 65 JURISTEN ZEITUNG 10 (2010).

I. Background to the "Road Block Cases" and the Applicable Law

On 24 October 2008 a car approached a road block of the German *Bundeswehr* near Kundus. When the car, driving at a high speed, did not stop even after warning shots and stop signals, the German soldiers opened fire and injured five Afghan civilians.[5] What were the legal consequences for the German soldiers that injured the civilians? A similar case took place on 17 January 2010, when soldiers of the German *Bundeswehr* fired at a car that speedily approached a road block and did not react to stop signals or warning shots. In this case one of the occupants was killed while another was severely injured.[6]

In general, according to § 1a.2 *Wehrstrafgesetzbuch* (German Military Criminal Code) German Criminal Law is applicable to acts committed abroad by a German national. Any German soldier in Afghanistan or elsewhere in the world is therefore generally responsible under German Criminal Law. In addition to the criminal responsibility under German criminal law, a German soldier can be responsible under the *Völkerstrafgesetzbuch* (German Code of Crimes against International Law) if his act was committed in relation to an international or non-international armed conflict and if it amounts to an act of genocide, crime against humanity or a war crime.

The previous approach of the German authorities was that Germany is not engaged in an "armed conflict" in Afghanistan, but rather in a stabilization mission.[7] Accordingly, the German soldiers' right to use force was regulated by law enforcement rules and criminal law was applicable. According to the German *Strafprozessordnung* (StPO—Code of Criminal Procedure), §§ 152.2, 160.1 the public prosecutor has to start an investigation whenever he finds sufficient factual indications that a crime may have been committed (*Anfangsverdacht*). Thus in every case where German soldiers resorted to the use of force and harmed civilians an investigation against the respective soldiers had to be performed. Because there is no special military prosecutor in Germany, the competent prosecutor is

[5] StA Zweibrücken Beschl. v. 23.01.2009–4129 Js 12550/08 NEUE ZEITSCHRIFT FÜR WEHRRECHT, 169 (2009); *Warnzeichen ignoriert*, SPIEGEL ONLINE 28 Oct. 2008, http://www.spiegel.de/politik/ausland/0,1518,586889,00.html.

[6] *Bundeswehr erschießt Zivilisten in Afghanistan*, FRANKFURTER ALLGEMEINE ZEITUNG, 17 Jan. 2010, http://www.faz.net/s/RubDDBDABB9457A437BAA85A49C26FB23A0/Doc~EB5BA966188304A8BBF8BBA00BE5E21F0~ATpl~Ecommon~Scontent.html.

[7] *See* Interview with Franz Josef Jung, Minister of Defense, ZDF MORGEN MAGAZIN, 2 July 2009, http://www.zdf.de/ZDFmediathek/beitrag/video/788366/Jung-Afghanistan-Einsatz-kein-Krieg#/beitrag/video/788366/Jung-Afghanistan-Einsatz-kein-Krieg.

the prosecutor of the area where the soldier is stationed.[8] So far, investigations have been completed in 61 cases.[9]

The investigation in the case of October 2008 gives a classic example of how most of these investigations are handled. Once the investigation begins, the public prosecutor decides whether the investigation should be terminated or whether an indictment should be submitted to the competent court. According to § 170 StPO the public prosecutor is obligated to submit a bill of indictment to the competent Court if the investigations reveal sufficient grounds.[10] Sufficient grounds for an accusation are only established if the suspect is likely to be convicted (*hinreichender Tatverdacht*). Hence in order to decide whether or not a suspect has to be accused, the prosecutor has to run through a legal analysis of the case, and inquire whether the acts committed by the soldiers constitute an offense under German Criminal Law. The public prosecutor considered whether the action of the German soldiers constituted the following acts under the *Strafgesetzbuch* (StGB—German Criminal Code):[11] acts of *versuchten Totschlags* (attempted murder, § 212 StGB), g*efährlicher Körperverletzung* (causing bodily harm by dangerous means, § 224 StGB) and *Sachbeschädigung* (criminal damage, § 303 StGB).[12]

II. The Decision of the Public Prosecutor in the "Road Block Case"

In the Road Block Cases, the German soldiers fulfilled the objective and subjective elements of the crimes: They fired and they intended to fire at the car—they accepted that the injury and even the death of the occupants as well as the destruction of the car was a possibility. However, their action might have still been lawful if they were justified. The question at issue was, therefore, how they were justified. The public prosecutor had to consider two reasons for justification: acting under a justifying mandate and acting out of self-defense.

First, the soldiers acted under a Mandate of the United Nations (UN). This is a valid justification within German Criminal Law through Art 24.2 of the *Grundgesetz* (German Constitution) because the German *Bundestag* (Lower House of Parliament) endorsed this

[8] Frister, Korte, Kreß, *supra* note 4, at 10.

[9] *Welt-Streit ums Töten*, DER SPIEGEL, 30 Nov. 2009, at 28, 30.

[10] All German legal terms are translated according to the unofficial translations issued by the German Federal Ministry of Justice, *available at* http://www.gesetze-im-internet.de/Teilliste_translations.html. The translation of the *Strafprozessordnung* (StPO—German Code of Criminal Procedure) was originally provided by Brian Duffett and Monika Ebinger.

[11] The translation of the *Strafgesetzbuch* (StGB—German Criminal Code) was originally provided by Prof. Dr. Michael Bohlander. *See* MICHAEL BOHLANDER, THE GERMAN CRIMINAL CODE (2008).

[12] StA Zweibrücken Beschl., *supra* note 5, at 169 *et seq.*

Mandate.[13] The UN mandate in this case was the Security Council's Resolution 1386 (2001), creating the ISAF, together with Resolution 1510 (2003) expanding the mission from Kabul to all of Afghanistan along with some other Resolutions for the extensions of the ISAF-Mandate. Despite the existence of this mandate, however, the public prosecutor did not assume that the soldiers could rely on it to justify their action because in his opinion the soldiers did not act in order to fulfill the mandate but only out of self-defense.[14] According to the prosecutor, acting out of self-defense precludes the possibility of acting to fulfill the mandate at the same time.[15] This, admittedly not a very convincing reason, caused the prosecutor to focus on the second possible justification: self-defense. According to § 32.2 StGB self-defense means any defensive action that is necessary to avert an imminent unlawful attack on oneself or another ("*die Verteidigung, die erforderlich ist, um einen gegenwärtigen rechtswidrigen Angriff von sich oder einem anderen abzuwenden*"). The problem in this case was that there had been no attack. The soldiers simply believed that they were being attacked. In German Criminal Law, intending to defend oneself, when in fact no attack is underway, is called *Putativnotwehr* (putative self-defense).[16] It is a subcategory of the doctrine called *Erlaubnistatbestandsirrtum* (mistake of justifying facts).[17] This is a mistake as to facts that would, if true, justify the action. It is not an error of law, for the actor does not assume a justification that does not exist but rather falsely assumes facts for an existing justification. If the actor cannot be blamed for having mistaken the facts, because objective criteria indicated the reality of the threat, he is excused and will not be punished for his action.[18]

For the German soldiers at the road block this is exactly how the public prosecutor saw it: under the circumstances the soldiers had no choice but to think that they were being attacked. The car approached the roadblock quickly and did not react to the warning signals. The soldiers cannot be blamed for their mistake. They acted in an unavoidable *Erlaubnistatbestandsirrtum*. The prosecutor came to the conclusion that the Court would not convict them but would excuse their unlawful action on the basis of their mistake. Accordingly, the public prosecutor decided to terminate the investigations.

---

[13] For further details of how the justification is implemented in domestic law in Germany, see Frister, Korte & Kreß, *supra* note 4, at 13–14.

[14] StA Zweibrücken Beschl., *supra* note 5, at 171–72.

[15] *Contra* Frister, Korte & Kreß, *supra* note 4, at 17.

[16] Thomas Fischer, STRAFGESETZBUCH UND NEBENGESETZE 306 para. 50 (55th ed. 2008).

[17] *Id.* at para. 51.

[18] This outcome is in fact very much debated in the literature on German Criminal Law. I have presented here just the majority opinion, which has been endorsed by the jurisprudence. For further details, see CLAUS ROXIN, 1 STRAFRECHT ALLGEMEINER TEIL 622 *et seq.* (4th ed. 2006).

III. A Comment on the Decision of the Public Prosecutor in the "Road Block Case"

In my view, the decision of the prosecutor not to accuse the soldiers but to terminate the proceedings is right in its outcome: the investigation was properly ended. But its reasoning is debatable. The soldiers acted as they had to, and as was necessary according to the ISAF-Mandate. The creation of the road block fell under the ISAF-Mandate, and accordingly its enforcement, even through the use of force, was covered by the mandate. Hence the soldiers should not only be excused but justified. The public prosecutor would have come to the same conclusion had he not contended that a parallel or even dominant motivation to act out of self-defense precludes the possibility of an act in fulfillment of the Mandate. There is no reason for the two justifications (or the justification and the exculpation, to be precise) to be mutually exclusive.

C. The Case of Colonel Klein

Having looked back on this case in which the action of soldiers was the subject matter of a criminal investigation, I shall now look at what seems to be a new dimension of German involvement in military violence—the air strike of 4 September 2009. I will focus my legal analysis on the criminal responsibility of Colonel Klein as the commanding officer during the operation.

I. Ambiguity of Facts and Applicable Law

1. The Facts of the Case

The major obstacle to a legal analysis of the air strike is that the facts remain unclear. What we know is that Taliban hijacked two gas tanker trucks and that a German officer, Colonel Georg Klein, ordered an air strike against these trucks, a strike conducted by two U.S. pilots on 4 September 2009. At the time of the air strike the trucks were stuck in a sandbank near the German camp. Between 50[19] and 140[20] people died in that air strike. Although then Minister of Defense Franz Josef Jung stated on 6 September 2009 that no civilians were harmed, it later turned out that many civilians were among the dead.[21] Precisely what happened is not known to the public. Currently, a committee of the German *Bundestag* is inquiring into the case but the work of the committee takes place in closed sessions. However, it has been revealed that not only ordinary German soldiers under the command of Colonel Klein were involved in the operation, but also a German

[19] Press Release, *Generalbundesanwalt, supra* note 3.

[20] *Was über die Kundus-Affäre bisher bekannt ist*, ZEIT ONLINE, 11 Dec. 2009, http://www.zeit.de/politik/ausland/2009-12/kundus-fragen-offen.

[21] *Die Schweigespirale*, DER SPIEGEL, 30 Nov. 2009, at 24.

task force consisting of members of the *Kommando Spezialkräfte* (German Special Forces).[22] It has been alleged that members of this task force kept information from Colonel Klein, specifically failing to inform him about the exact content of the radio traffic between the German operator and the U.S. pilots.[23] It has also been alleged that the U.S. pilots were misinformed about a contact between *Bundeswehr* soldiers and enemy forces ("troops in contact").[24] Furthermore, it is not quite clear why Colonel Klein ordered the air strike. Did he want to prevent a threat from the *Bundeswehr* camp[25] or did he want to annihilate the Taliban near the tanker,[26] or perhaps both? Finally, we do not know whether he knew of the civilians near the trucks.

Several reports dealing with the air raid exist, most important of which are the reports of the German *Feldjäger* (military police), a NATO inquiry commission, and the Red Cross. All these reports are classified and not open to public, although some newspapers have gained access to them.[27] Therefore, the only sources available are media reports. However, the *Generalbundesanwalt* has in the meantime closed his investigation of the case. Based on the facts that he found, he has reached the conclusion that Colonel Klein bears no criminal liability. The details of what he found and his sources are again not open to public, but we can suppose that he based his decision on the following facts. Two hijacked gas tanker trucks were stuck in a sandbank. They were stuck near the German camp but not driving towards it or even attacking it. There were members of the Taliban along with many civilians near the trucks. Colonel Klein ordered an air strike on these trucks, and the strike was conducted by U.S. Air Force pilots. He relied on the information from an Afghan informant on the ground and an airplane surveying the situation until a

---

[22] *Geheime Komandosache Kundus*, ZEIT ONLINE, 29 Jan. 2010, http://www.zeit.de/politik/ausland/2010-01/afghanistan-kundus-ksk?page=all.

[23] *Klein spricht und sorgt für neue Fragen*, ZEIT ONLINE, 10 Feb. 2010, http://www.zeit.de/politik/deutschland/2010-02/klein-untersuchungsausschuss?.

[24] *Schwere Vorwürfe gegen Oberst Klein*, SUEDDEUTSCHE.DE, 19 Sept. 2009, http://www.sueddeutsche.de/politik/842/488241/text/; *Oberst Klein räumt Falschinformationen ein*, SUEDDEUTSCHE.DE, 16 Jan. 2010, http://www.sueddeutsche.de/politik/75/500342/text/.

[25] This seems to be the result from his inquiry before the investigation committee of the German Bundestag, see *Klein spricht und sorgt für neue Fragen*, *supra* note 23.

[26] This follows from a report that Klein wrote to General Schneiderhan a day after the airstrike in which he writes "*Am 4. September um 1.51 Uhr entschloss ich mich zwei am Abend des 3. September entführte Tanklastwagen sowie an den Fahrzeugen befindliche INS (Insurgents, zu Deutsch: Aufständische) durch den Einsatz von Luftstreitkräften zu vernichten.*" (On 4 September at 1:51 AM I decided to annihilate two gas tanker trucks hijacked in the evening of 3 September as well as insurgents near those trucks through the use of air strikes); *see Zehn Fragen an das Kriegskabinett*, SPIEGEL ONLINE, 16 Dec. 2009, http://www.spiegel.de/politik/deutschland/0,1518,667010-2,00.html.

[27] *Die Schweigespirale*, DER SPIEGEL, 30 Nov. 2009, at 23, 25.

few hours before the air strike.[28] He rejected the suggestion of the Air Force pilots to perform a low-level flight ("Show of Force") to disperse the Taliban and to warn civilians near the truck. Instead, he ordered the attack to be performed without any form of warning.[29]

In addition to these facts, the state of mind of Colonel Klein and the motivation for his actions are important. The *Generalbundesanwalt* assumes that Klein did not know about the presence of the civilians near the trucks and that he had done everything possible to assure him of the absence of civilians from the area of attack. I can follow this assumption, but consider it helpful to also present an alternative assumption in order to see how this might change the result of the case. Therefore, in the following legal analysis, I will also apply the hypothesis that Colonel Klein knew about the presence of at least some civilians near the trucks.

2. The Applicable Law in the Case

The ambiguity of the facts follows an ambiguity in the applicable laws. The problem with the air strike is that it was unclear whether it had been performed as part of a non-international armed conflict in Afghanistan or just as part of a stabilization mission below the threshold of "armed conflict." In other words, is the *Völkerstrafgesetzbuch* applicable or do we just have to deal with ordinary criminal law?

In a recent government declaration, the German Foreign Minister Guido Westerwelle has stated that the German government views the situation in Afghanistan as an "armed conflict."[30] He has thereby reiterated and made official what has been said before by Germany's Defense Minister Karl-Theodor zu Guttenberg as a personal assessment of the situation.[31] If the situation does in fact amount to an "armed conflict"—a non-international armed conflict to be precise—that does not depend on a government's assessment but on the actual characteristics of the conflict. But since the notion of "armed conflict" is not clearly defined in International Law and, accordingly, it is not absolutely clear when the threshold of "armed conflict" is met,[32] the assessment by a government carries weight.

---

[28] *Id.*

[29] *Schwere Vorwürfe gegen Oberst Klein*, *supra* note 24.

[30] *See* Government Statement, 10 Feb. 2010, *available at* http://www.auswaertiges-amt.de/diplo/de/Infoservice/Presse/Reden/2010/100210-BM-BT-Afghanistan.html.

[31] "*Krieg*," ZEIT ONLINE, 12 Nov. 2009, http://www.zeit.de/2009/47/Kriegsbegriff.

[32] On the notion of non-international armed conflict, *see* Christopher Greenwood, *Scope of Application of Humanitarian Law, in* HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 54 *et seq.* (Dieter Fleck ed., 2d ed. 2008).

The *Generalbundesanwalt* has classified the situation at the time of the air strike as an armed conflict and seems to have finally decided the controversy between the armed conflict approach and the stabilization mission approach. I will follow him in this classification of the situation in Afghanistan and only in the end present a brief summary of how a classification as a stabilization mission could have made a difference.

II. The Armed Conflict Approach

Since the situation in Afghanistan is classified as a non-international armed conflict, International Criminal Law and ordinary criminal law have to be taken into account.

1. International Criminal Law

First, International Criminal Law comes into play. This special body of criminal law encompasses and describes war crimes that are especially grave violations of the rules and principles of the Laws of Armed Conflict, also called International Humanitarian Law (IHL).

a) The War Crime of Causing Disproportionate Harm to Civilians

The relevant principle of IHL in this case is the prohibition of attacks that cause disproportionate incidental harm to civilians or civilian objects. This is an essential pillar of IHL, laid down in the Additional Protocol I to the Geneva Conventions (AP I), Articles 51(4) and (5) and 85(3) (b). Although AP I is directly applicable only to international armed conflicts and not to non-international armed conflicts, many provisions and especially the one dealing with the protection of the civilian population have become Customary International Law and are therefore applicable also to non-international armed conflicts.[33]

The transfer from a principle of IHL to a crime under International Criminal Law is carried out by the Statute of the International Criminal Court (ICC Statute), the *Völkerstrafgesetzbuch*, and Customary International Law. In the ICC Statute the crime is formulated in Art 8(2)(b)(iv); in the *Völkerstrafgesetzbuch* it is laid down in § 11(1) Nr. 3. The difference between the ICC Statute and the *Völkerstrafgesetzbuch* is that the provision in the ICC Statute applies only to international armed conflicts whereas the German provision applies to both international and non-international armed conflicts. However, since the IHL principle has become Customary International Law, a violation of this prohibition is recognized to be a war crime under Customary International Law;[34] hence it

[33] For an overview on the current status of Customary International Law in IHL, see JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (International Committee of the Red Cross ed., 2005).

[34] GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 352 para. 1048 (2005); Explanatory Memorandum of the German Code of Crimes Against International Law, BTDrucks 14/8524, *available at* http://dip21.bundestag.de/dip21/btd/14/085/1408524.pdf.

is a war crime in international as well as in non-international armed conflicts. The omission in the ICC Statute is therefore of only minor significance.

In any event, since in this case the alleged soldier is a German soldier, the German provision has priority over the international one.[35] Relevant for this case is therefore the *Völkerstrafgesetzbuch*.[36]

Colonel Klein could be held criminally liable for a violation of Art 11 (1) Nr. 3 *Völkerstrafgesetzbuch*:

> *Wer im Zusammenhang mit einem internationalen oder nichtinternationalen bewaffneten Konflikt mit militärischen Mitteln einen Angriff durchführt und dabei als sicher erwartet, dass der Angriff die Tötung oder Verletzung von Zivilpersonen oder die Beschädigung ziviler Objekte in einem Ausmaß verursachen wird, das außer Verhältnis zu dem insgesamt erwarteten konkreten und unmittelbaren militärischen Vorteil steht*.

In translating this provision we can basically refer back to the provision in the ICC Statute: "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[37] Although Colonel Klein did not fly the airplanes himself he can be criminally liable for the air strike either as a *Täter* (principal) or as a *Teilnehmer* (participator). The qualification of Colonel Klein as *Täter* or *Teilnehmer* depends upon the criminal liability of the pilots. I assume that only Colonel Klein had a full overview of the situation and that the pilots could hence not know about the possible disproportionality of the attack and are therefore not criminally liable. Due to his *Wissensherrschaft* ("controlling knowledge") of the situation Colonel Klein has acted

[35] The usual subordination of the German Code, regulated in § 153f StPO, is hence not relevant in this case.

[36] For an application of the ICC-Statute to the case of Colonel Klein, see Christoph Safferling & Stefan Kirsch, *Die Strafbarkeit von Bundeswehrangehörigen bei Auslandseinsätzen: Afghanistan ist kein rechtsfreier Raum*, 42 JURISTISCHE ARBEITSBLÄTTER, 81, 85 (2010).

[37] The only difference between the two provisions lies in the two words *clearly* and *overall* in the text of the ICC Provision. The German translation, although identical in every other aspect does not adopt these two concretizations but follows the wording of Art 51(5)(b) AP I: "An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." The concrete effect of the difference could arguably be that the threshold for criminality under the ICC Provision is higher, meaning that the alleged soldier must have done worse (clearly excessive) and can find broader excuses (overall advantage). For a critique of this formulation of the ICC-Statute, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 96 (2d ed. 2008).

"through" the pilots according to § 25 (1) StGB and has to be qualified as a (indirect) *Täter*.[38]

Art 11(1) Nr. 3 *Völkerstrafgesetzbuch* consists of three objective elements: an attack, the causation of civilian harm, and the disproportionality of that harm with respect to the anticipated military advantage. On the subjective level the soldier must have acted with the knowledge of all these elements.

Since we know that Colonel Klein had ordered an attack and that this attack caused civilian casualties, the relevant questions are: Did he know about the civilians' presence in the combat zone? Were the casualties disproportionate to the anticipated military advantage? And, if so, did he act knowing that the attack was disproportionate?

aa) Klein's Knowledge of the Civilians

The *Generalbundesanwalt* comes to the conclusion that Klein did not know about the presence of civilians near the trucks, and he further states that Klein had exhausted every means to clarify the situation; therefore, Klein cannot be blamed for his false assessment of the situation. On this basis Klein cannot have violated Art 11(1) Nr. 3 *Völkerstrafgesetzbuch*.

Unfortunately this procedure of the *Generalbundesanwalt* leaves no opportunity to inquire into important questions such as the actual aim behind the attack and the proportionality of it. Since I do not have better sources available than the *Generalbundesanwalt*, I cannot really challenge his assessment of the knowledge of Colonel Klein. However, for the sake of the exercise, I think it useful to assume that Colonel Klein had known of the presence of at least some civilians near the battlefield. Would that change the outcome concerning his criminal liability?

[38] *Id.* at 84. If we presume that the pilots had a full overview over the situation Colonel Klein could either still be liable as *Täter* according to a model in the German Criminal Law doctrine called *Täter hinter dem Täter (principle behind the principle)* or he would be responsible as an abettor for ordering the air strike (§ 26 StGB).

bb) Disproportionality of the Attack

The answer to this question depends on whether the attack as such was disproportionate. In order to determine that we have to look at the military advantage that Colonel Klein pursued with the air strike. As mentioned above it is not clear what Colonel Klein's military aim was when he ordered the air strike. Two alternatives come into consideration.

First, Colonel Klein could have just wanted to defend the camp. His aim would be best described as defending the *Bundeswehr* camp by preventing a later attack by the Taliban by depriving them of the hijacked gas. His predominant intention therefore would have not been to kill the Taliban near the trucks but rather to destroy the gas tanker trucks. The military advantage from the destruction of these trucks has to be considered "with regard to the military actions in general, above and beyond the concrete attack."[39] That means the anticipated advantage would have not only been the immediate advantage of depriving the Taliban from the captured gas. The military advantage would have also encompassed preventing the Taliban from attacking the camp in the future (which the captured gas would have enabled them to do) and thereby increasing the security of the German soldiers in the area.

The alternative possible military aim could have been an offensive one, namely the killing of the Taliban who were among the trucks. These Taliban could have been high-level targets and killing them could have meant a significant military advantage with regard to the conflict in general.

The decisive question now is whether the harm caused to civilians was excessive in relation to the military advantage and whether it makes a difference if the military advantage was a defensive or an offensive one.
The civilians' presence as such is not enough to render an attack on a military objective,[40] here the gas-tanker trucks, illegal.[41] Even if the civilians had been used as human shields or forced to draw off the gas from the trucks that would have not per se rendered the attack illegal, for the trucks would have still been military objectives.[42] It is only when the expected civilian loss is disproportionate, that the attack becomes illegal. The difficult

[39] WERLE, *supra* note 34, at 351.

[40] For the definition of military objective, see Art 52.2 AP I ("In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.").

[41] Stefan Oeter, *Methods and Means of Combat, in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 33, at 186 *et seq.*

[42] Art 51.7 API; Michael N. Schmitt, *The Law of Targeting*, *in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 146 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

practical question is how to assess proportionality. When are the civilian losses excessive in relation to the military advantage? The rule of proportionality has long been in existence in customary law, but when and how it has been applied remains ambiguous.[43] Apart from some very plain cases, e.g. destroying a village of 500 to kill a single enemy combatant,[44] it is impossible to determine clearly the proportionality or disproportionality of an attack. Some argue that proportionality should be assessed from the viewpoint of a "reasonable military commander."[45] This emphasizes the general idea that in cases of "armed conflict" it is necessary to think in military rather than civilian terms.[46] Unfortunately, beyond this general notion the introduction of the notion of a "reasonable military commander" does not bring much clarity to the issue but merely substitutes one term for another. We are hence left with the conclusion that in fact "objective standards for the appraisal of expected collateral damage and intended military advantage are virtually non-existent."[47] But without objective standards the proportionality of an attack has to be assessed by the attacker himself, in which case he enjoys not only a great margin of discretion,[48] but in fact an unlimited margin. This undermines the value of the prohibition—for a prohibition that leaves the definition of its content to its addressee does in fact not prohibit anything at all.[49]

It can be argued that the function of this provision is ultimately only that of a moral appeal.[50] The "law" in this case would provide no binding rules; it would allow for an executive decision by the commanding officer. The case of Colonel Klein seems to suggest exactly this result. However, I cannot agree with that result. A clear notion of proportionality has not yet been developed. But a case like the one before us should be seen as an opportunity to close this loophole. Almost 30 years ago, it has been stated that "an enormous amount of research into contemporary military history . . . is necessary

---

[43] *See* William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 125–27 (1982).

[44] W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 168 (1990).

[45] Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *Final Report to the Prosecutor*, at http://www.icty.org/x/file/Press/nato061300.pdf.

[46] For a critical view towards the concept of a military view and the notion of "reasonable military commander," see Michael Bothe, *The Protection of the Civilian Population and the NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12 EUR. J. INT'L L. 531, 535 (2001).

[47] Oeter, *supra* note 41, at 205.

[48] Parks, *supra* note 44, at 175; Oeter, *supra* note 41, at 205.

[49] Reinhard Merkel, *Die Schulde des Oberst*, ZEIT ONLINE, 21 Jan. 2010, http://www.zeit.de/2010/04/P-oped?page=all ("*Aber ein Verbot, das die Feststellung der Voraussetzungen seiner Anwendbarkeit dem Urteil seines Adressaten anheimgibt, verbietet diesem in Wahrheit gar nichts.*").

[50] *Id.*

before an assessment can be made of when and how the rule of proportionality has been applied in the past."[51] This can no longer be legitimately deferred. Courts have the authority to define proportionality. Determining proportionality and providing more legal clarity should not be deferred out of a fear that it may be challenged or overruled by another authority such as a higher court. It must not be and very likely will not be the final word on proportionality, but it would at least treat the law in question as binding.

Let me thus try to shape a formula to assess the proportionality in cases like the one of Colonel Klein: If the military advantage is the protection of soldiers against a non-imminent threat, the attack is disproportionate if the number of civilians who are likely to be killed exceeds the number of soldiers' lives that are likely to be threatened. This formula consists of three elements: the aim to protect soldiers, the non-imminence of the threat, and the comparison between civilians' and soldiers' lives. These three elements are based on three principle arguments. First, if the anticipated military advantage is primarily the protection of soldiers, then the acceptability of civilian casualties must be even lower. Here I rely on the argument made by Michael Walzer that soldiers generally have to accept risks in order to save civilians.[52] This obligation follows from their corresponding rights as soldiers during "armed conflicts."[53] This obligation is even more important when a campaign is launched for humanitarian purposes.[54] In Afghanistan, the purpose of the ISAF-mission is, other than Operation Enduring Freedom, not the hunt for terrorists but the support of the people in Afghanistan, their protection and security.[55] Second, without the threat of an imminent attack it is hard to demonstrate the necessity of the attack. Other options can be considered, like attacking at a later point of time with a lower risk of civilian casualties and without the risk of being attacked in the meantime. Also, without an imminent threat, the soldiers' deaths are less likely than the possible harm to civilians. Third, in order to determine ultimately the proportionality of an attack and to address the problem that "[o]ne cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective,"[56] we need to find a way to relate the civilian

---

[51] Fenrick, *supra* note 43, at 125.

[52] MICHAEL WALZER, JUST AND UNJUST WARS 151 (4th ed. 2006).

[53] *Id.* at 155.

[54] For a tentative contestation of traditional considerations of military necessity and military advantage in humanitarian interventions see Bothe, *supra* note 46, at 535.

[55] *See, e.g.*, the information of the German defense ministry on the ISAF-mission at http://www.*Bundeswehr*.de/fileserving/PortalFiles/C1256F200023713E/W2763FP2146INFODE/02_ISAF_Afghanistan_100304.pdf, 2 ("*Unverändertes Ziel des ISAF-Einsatzes ist die Unterstützung Afghanistans bei der Aufrechterhaltung der Sicherheit und der Schaffung eines sicheren Umfeldes für den Wiederaufbau und die humanitäre Arbeit der afghanischen Staatsorgane, der Vereinten Nationen und anderer internationaler Organisationen im gesamten Territorium des Landes.*").

[56] *Report to the Prosecutor*, *supra* note 45, at para. 48.

casualties to the military objective. When the latter is the protection of the soldiers involved in the conflict, the comparison between the expected civilian casualties of an attack and the number of soldiers' lives that are at stake serve as a good starting point. It at least allows us to put numbers on both sides of the equation.

The suggested formula is of course a very tentative attempt to clarify the notion of proportionality, and it is only applicable where an attack is intended to protect soldiers' lives. But it shows that the proportionality test can go beyond just describing the evident cases.

If we assume that Colonel Klein acted out of a defensive motivation with the intent to protect German soldiers, the formula is applicable and the result is rather clear. An attack on the German camp was not imminent and even if it had been performed later it is unsure whether it would have caused casualties among the German soldiers. Furthermore, according to the German Ministry of Defense, 19 German soldiers were killed during the ISAF mission through *Fremdeinwirkung* (external force) till the end of 2009.[57] Experience therefore shows that attacks on the German soldiers cause casualties below the number of civilians that were killed in the air strike so a reason would be necessary to suddenly assume a significantly higher threat. Without this, one has to contend that the threat to German soldiers in Afghanistan is, although certainly undeniable and severe, no comparison to the number of civilians who have lost their lives in the air strike. Applying the above presented formula to the case of Colonel Klein shows that the attack was in fact disproportionate. This result is hardly surprising. In fact it accords with the latest assessment of the situation by the German Defense Minister Karl-Theodor zu Guttenberg.[58]

Surprisingly the result is less clear if Colonel Klein had acted out of an offensive motivation. Here, the developed formula does not apply. Intuitively one would expect that if Colonel Klein acted out of this offensive motivation, it would be more difficult for him to explain the proportionality of his act because one generally assumes that an offensive act of war that causes many civilian casualties is harder to justify than a defensive one. But the legal reality of IHL is counterintuitive in this respect. If Colonel Klein's aim was, for example, to kill a high-level Taliban or Al Qaeda leader who presented a high risk to the security in Afghanistan and its population, this could have meant a significant military advantage that could go well beyond the advantage of protecting German soldiers. To give an extreme example, the prospect of killing Osama Bin Laden or Mullah Omar could have justified a

[57] *See* homepage of the German Ministry of Defense at http://www.*Bundeswehr*.de/portal/a/bwde/streitkraefte/grundlagen?yw_contentURL=/C1256EF4002AED30/W27Q3DTU941INFODE/content.jsp.

[58] *Verteidigungsminister zu Guttenberg bewertet Luftangriff in Kundus neu*, Tagesthemen, 3 Dec. 2009, *available at* http://www.tagesschau.de/inland/angriffkundus100.html.

high number of civilian casualties, for the death of one of these leading figures is likely to significantly determine the outcome of the whole conflict. It would of course be necessary to demonstrate the importance of taking out the specific targets while risking civilian lives, but as long as this is done sufficiently the attack could be proportionate.

So it does make a difference which military aim Colonel Klein pursued and it is quite remarkable how the *Generalbundesanwalt* can come to the conclusion that the attack was not disproportionate without determining the military aim Colonel Klein was pursuing.

cc) Knowledge of the Disproportionality

Assuming that Colonel Klein had known about the civilians' presence near the trucks and that his military aim was the protection of his soldiers in the camp a Court would probably have deemed the attack disproportionate. However, it still would have to be asked whether Colonel Klein acted in the knowledge of this disproportionality. Since a clear notion of proportionality remains to be elaborated, it follows that in fact Colonel Klein could have not known in advance that his action was disproportionate. Holding Colonel Klein criminally responsible in spite of the ambiguity of the notion of proportionality would violate the principle of *nulla poena sine lege certa* (no punishment without clear law).

In the end, despite the possible disproportionality of the attack, Colonel Klein did not act in the knowledge of this disproportionality and, because this knowledge is a necessary element of the war crime of causing disproportionate harm to civilians, he is not liable for that crime.

b) The Need for Precautionary Measures

Colonel Klein has not committed the war crime of causing disproportionate harm to civilians. However, an essential element of IHL has been left out so far—the obligation in IHL to take precautionary measures. According to Art 57(2)(a)(ii),(iii) AP I:

> [T]hose who plan or decide upon an attack shall:
> (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects . . . .

In addition, Art 57 (2) (c) AP I states that "[e]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit." According to these provisions the attacker is obliged to inquire before the attack if the target is indeed a military object and whether civilians will be harmed. He also has to give an effective advance warning to the civilian population unless circumstances do not permit. Although the provisions from AP I only apply directly to international armed conflicts, they have become part of Customary International Law and are as such applicable also in non-international armed conflicts.

As far as we know, Colonel Klein had an Afghan informant on the ground and pictures from the surveillance cameras on board of a plane. Although one might argue that these were not sufficient safeguards,[59] they do show his effort to understand the situation. But Colonel Klein did not order a low-level flight over the trucks ("Show of Force") to warn the civilians, as was suggested by the pilots.

The *Generalbundesanwalt* states lapidarily "*Der beschuldigte Klein durfte davon ausgehen, dass keine Zivilisten vor Ort waren. Deshalb war er nicht verpflichtet, Warnhinweise vor dem militärischen Angriff zu geben*" (The accused Klein was allowed to assume that there were no civilians present, hence he was not obliged to take precautionary measures before the attack).[60] I disagree with this understanding of the obligation to give an advance warning. Art 57 (2) AP I distinguishes between the obligation to verify that the objects to be attacked are not civilians and the obligation to give an advance warning, and Art 57 (2) (c) AP I speaks of attacks which "may" affect civilians not of an attack which definitively does affect civilians. Although Colonel Klein might not have had any indication of civilians present near the trucks, it has to be acknowledged that his means to clear the situation were fairly limited. Art 57 (2) (c) AP I was designed to provide protection to civilians also in situations of doubt. Only if Colonel Klein had been absolutely sure that there were no civilians near the trucks he would have been allowed to omit precautionary measures. Apart from these absolutely clear situations the only exemption from taking precautionary measures is given when circumstances do not permit to take them ("unless circumstances do not permit"). Since the situation in Kundus can hardly be described as absolutely clear, the decisive question is whether a "Show of Force" would have endangered the military aim of the attack.

If the military aim was defensive and just to prevent an attack of the camp by destroying the trucks this would have still been possible even after that warning, for the trucks were stuck in the sandbank and could not be moved. Under these circumstances, Colonel Klein violated his obligation under IHL to take precautionary measures to warn the civilian population. However, if the military aim was to kill the Taliban near the trucks it is

[59] *Die Schweigespirale*, DER SPIEGEL, 30 Nov. 2009, at 23, 25.

[60] Press Release, *Generalbundesanwalt*, *supra* note 3.

arguable that precautionary measures were not possible without endangering that military aim, because the Taliban would have been warned as well. Hence, as long as the attack legitimately pursued an offensive military aim and was as such proportionate, precautionary measures could have been omitted because they might have endangered that military aim. It is again interesting to note that an offensive military aim would have permitted Colonel Klein to take more extensive measures.

In any event, even if Colonel Klein was obliged to take preliminary measures because he had acted out of a defensive motivation, the question is what criminal consequences are attached when an attacker fails to take precautionary measures? The obligation to take precautionary measures could be understood as clarifying the proportionality requirement and is often discussed in this context.[61] The taking of precautionary measures would thus be a necessary procedural requirement to claim the proportionality of an attack. This is because proportionality presupposes necessity and, since an attack with warning would be less harmful than an attack without warning, the latter is not necessary when a warning can be given. Accordingly, where precautionary measures were not taken, although the circumstances would have permitted them, an attack resulting in civilian deaths and injuries would have to be deemed disproportionate and illegal.

However convincing this approach may seem, it does not accord with existing International Criminal Law. The obligation to take precautionary measures stands as an individual obligation under IHL. At the same time the violation of this obligation has not been made into an individual offense. Art 85 AP I, listing those violations of the Protocol that amount to grave breaches, does not mention the failure to take precautionary measures. Art 85 AP I refers to Art 57 AP I only with respect to the definitions contained in it. The failure to take precautionary measures does not therefore amount to a grave breach of IHL and does not constitute a war crime. Consequently neither Art 8 ICC Statute nor Art 11 *Völkerstrafgesetzbuch* refer to the obligation to take precautionary measures.

In the end, the violation of the IHL obligation to take precautionary measures does not affect the criminal responsibility of Colonel Klein with respect to war crimes. However, it leaves some moral doubt that might be reflected in another body of law, also applicable in this case, to which I will now turn.

---

[61] *See, e.g.*, William J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 EUR. J. INT'L L. 489, 498 (2001); Safferling & Kirsch, *supra* note 36, at 84.

2. Ordinary Criminal Law

In addition to International Criminal Law ordinary criminal law is in principle applicable.[62] This means that a war crime can at the same time constitute an offense under ordinary criminal law. The rules for multiple offenses regulate these situations. However, where the act was permissible as an act of war under international law the punishability under ordinary criminal law is precluded.[63]

The order of an air strike that leads to the death of up to 140 people definitely fulfills the objective elements of murder according to §§ 212, 25 (1) StGB.[64] The decisive question is, as in the Road Block Case, whether the act was justified.

The first justification that comes to mind would be self-defense (§ 32 StGB). In order to invoke the right of self-defense, however, the air strike must have been performed to meet an imminent and unlawful attack and must not exceed actions necessary to avert that attack. Unlike in the Road Block Case, the trucks were not moving towards the German camp. Even if we assume that the Taliban were trying to draw off the gas to use it for a later attack against the German camp—this seems to be Colonel Klein's defense[65]—this later attack would not meet the immanency criteria. Hence, a justification through self-defense is precluded and would be precluded even if there had been no civilians near the truck.

However, a justification for Colonel Klein's action could be found in IHL. The fact that the situation amounted to an "armed conflict" makes IHL applicable. So as long as Colonel Klein acted legally under IHL he is justified[66] and cannot be held criminally responsible for what he did. To determine the legality it is important to apply an *ex ante* perspective of the attacker during the time of the attack.[67] As far as the killed Taliban are concerned Colonel Klein was indeed justified through IHL for it permits the killing of enemy

---

[62] Explanatory Memorandum of the German Code of Crimes Against International Law, *supra* note 34; Frister, Korte & Kreß, *supra* note 4, at 12 n.24; Safferling & Kirsch, *supra* note 36, at 85.

[63] Explanatory Memorandum of the German Code of Crimes Against International Law, *supra* note 34. ("*Allerdings ist zu beachten, dass die Vornahme völkerrechtlich zulässiger Kampfhandlungen, etwa die Tötung oder Verwundung gegnerischer Kombattanten im bewaffneten Konflikt nach allgemeinen Grundsätzen nicht strafbar ist und dann auch nicht etwa nach §§ 211 ff. StGB bestraft werden kann.*").

[64] For reasons of simplification, murder shall be focused on here, although other crimes like the causing of bodily harm (§ 223 StGB) are also likely to have been committed.

[65] *Oberst Klein räumt Falschinformationen ein*, SUEDDEUTSCHE.DE, 16 Jan. 2010, http://www.sueddeutsche.de/politik/75/500342/text/.

[66] Safferling & Kirsch, *supra* note 36, at 85.

[67] *See* Press Release, *Generalbundesanwalt, supra* note 3.

combatants.[68] With respect to the civilians the situation is more complicated. His criminal liability could follow from the omission of precautionary measures. As has been shown, this violation of IHL did not lead to criminal liability under International Criminal Law. However, as the Explanatory Memorandum of the *Völkerstrafgesetzbuch* clearly states,[69] this does not necessarily preclude criminal liability under ordinary criminal law. In fact, the Explanatory Memorandum gives the example of a pilot who violates the obligation to take precautionary measures laid down in Art 57.2 AP I. Although not punishable under International Criminal Law, such a pilot might well be liable for manslaughter under ordinary criminal law.[70] The case of Colonel Klein is analogous to this. We have already seen that in case Colonel Klein pursued an offensive military aim, he could have acted in accordance with IHL and would therefore have been justified. But what if he acted out of a defensive motivation? Here the result differs with respect to Colonel Klein's knowledge about the presence of the civilians.

If Colonel Klein knew about the civilians near the trucks and accepted their deaths as unavoidable collateral damage, hence acting intentionally with respect to their deaths,[71] he would have been obliged under IHL to order a "Show of Force" before ordering to perform the attack. Having violated this obligation he cannot rely on IHL as a justification. Taking precautionary measures is an additional requirement for a legitimate attack, just like a warning shot that has to be performed in a case of self-defense as long as it is possible.[72] IHL can therefore not justify an attack that was performed without giving a possible warning. If Colonel Klein had known about the civilians and acted out of a defensive motivation, he would be liable for intentional manslaughter.

If we assume, like the *Generalbundesanwalt*, that Colonel Klein did not know about the civilians, he could still be liable for negligent manslaughter. The *Generalbundesanwalt* states that we cannot blame Colonel Klein for his false assumption that there were no civilians near the trucks. But I do not claim that the negligence follows from this false assessment of the situation. The negligence follows from the omission of precautionary

---

[68] The technical term of combatant does not exist in non-international armed conflicts; however, it can be applied more or less parallel. *See* International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991, 1006 *et seq.* (2008).

[69] Explanatory Memorandum of the German Code of Crimes Against International Law, *supra* note 34.

[70] *Id.* ("*So kann etwa ein Flugzeugpilot, der die völkerrechtlich gebotenen Vorsichtsmaßnahmen (vgl. etwa Artikel 57 Abs. 2 Zusatzprotokoll I) nicht getroffen und deshalb beim Abwurf von Bomben Zivilpersonen getötet hat, nach deutschem Recht - sofern dieses nach §§ 3 bis 7 StGB anwendbar ist - wegen vorsätzlicher Tötung strafbar sein, auch wenn das Völkerstrafrecht sein Verhalten nicht unter Strafe stellt.*").

[71] The form of intention in cases like this where the perpetrator does not want the death of the victim but accepts it as necessary consequence is described as *dolus directus zweiten Grades* (direct intent of second degree); *cf.* Roxin, *supra* note 18**Error! Bookmark not defined.**, at 444.

[72] *Id.* at 674.

measures. Colonel Klein had the *Sorgfaltspflicht* (duty to take care) to give an advance warning and not following this was a violation of this *Sorgfaltspflicht* which leads to an act of negligence. Colonel Klein had no intention to kill the civilians because he assumed there were no civilians but, even though he could legitimately assume that there were no civilians, he should still have ordered the "Show of Force." As already stated above, I disagree with the conclusion of the *Generalbundesanwalt* that Colonel Klein had no obligation to order a warning only because he assumed that there were no civilians anyway. Precautionary measures are mandatory in any event, as long as permissible under the circumstances of the concrete situation to assure the protection of civilians in case the attacker has wrongly assessed the situation. Nothing demonstrates the essentiality of this *Sorgfaltspflicht* better then the tragic case before us, with so many civilian casualties.

Summarizing, under ordinary criminal law Colonel Klein would be criminally liable for manslaughter and his action would not be justified through IHL since he violated his obligation to take precautionary measures. If he acted knowing about the civilians, he has acted intentionally; whereas, if he acted not knowing of the civilians, he has acted negligently. Only if Colonel Klein demonstrates that he had no obligation to take precautionary measures, because he legitimately pursued an offensive military aim, he would not be criminally liable. The *Generalbundesanwalt* failed to inquire into this question.

3. Intermediate Result

A broader legal analysis of the case of Colonel Klein shows that even under different assumptions regarding his state of mind and the actual intent of the attack Colonel Klein is not criminally liable under International Criminal Law for the attack itself.

However, under ordinary criminal law Colonel Klein bears criminal responsibility. The difference lies in the omission of precautionary measures. While not criminally relevant under International Criminal Law, the omission carries weight under ordinary German criminal law. Due to this omission Colonel Klein is liable for either intentional or negligent manslaughter as long as he does not demonstrate that he fulfilled his *Sorgfaltspflicht* to take precautionary measures. The decision of the *Generalbundesanwalt* is, in my view, superficial here for it does not consider the relevant question of the actual military aim behind the attack.

III. The Stabilization Mission Approach

In order to analyze the legal significance of qualifying the conflict as a non-international armed conflict, let me briefly demonstrate the differences that would occur following the Stabilization Mission Approach, according to which the German *Bundeswehr* is not involved in an armed conflict in Afghanistan, but is rather performing a stabilization mission below the threshold of an armed conflict. This is the legal situation that the public

prosecutor assumed when he decided the Road Block Cases. The applicable law is ordinary German criminal law. Since ordinary criminal law was also applicable in the Armed Conflict Approach, the criminal offenses that are relevant are essentially the same as those discussed above. The order of Colonel Klein fulfills the elements of the crime of manslaughter (§§ 212, 25 (1) StGB). The question is how Colonel Klein can be justified if he has not acted in an "armed conflict." As we have shown above, the airstrike was not justified as an act of self-defense according to § 32 StGB for there was no imminent attack. It is also not possible in this situation to draw directly on to IHL, because IHL only applies to armed conflicts.

1. Justification through Rules of Engagement

However, as in the Road Block Case, it is possible to argue that the ISAF-Mandate of the United Nations together with the *Bundestag*-Mandate justified Colonel Klein's actions. This Mandate asks the ISAF to assist the Afghan Authorities in improving the security situation.[73] The concrete responsibilities for German soldiers are laid down in the *Antrag der Bundesregierung* (request of the German government)[74] which was accepted by the *Bundestag*.[75] According to this, the soldiers are authorized to use all necessary means including the use of military force to implement the Security Council's Mandate.[76] Given this rather broad Mandate, the question is what rules guide the soldiers' concrete action when fulfilling the Mandate? Since the situation does not constitute an armed conflict, IHL is not applicable. However, the authorization to use armed violence must have some limits. Unfortunately, these limits are neither laid out in the Security Council Resolution nor in the decision of the *Bundestag*. In fact, there is little *legal* guidance at all, but a massive legal gray area, or a gap.[77] However there is *practical* guidance for the soldiers in the form of the Rules of Engagement (RoE).[78] The legal nature of these Rules is unclear and, therefore, it is questionable whether they can serve as a legal justification at all.

[73] S.C. Res. 1386, U.N. Doc. S/RES/1386 (20 Dec.2001); S.C. Res. 1833, U.N. Doc S/RES/1833 (22 Sept. 2008).

[74] BTDrucks 16/10473, *available at* http://dipbt.bundestag.de/dip21/btd/16/104/1610473.pdf.

[75] Plenarprotokoll 16/183, *available at* http://dipbt.bundestag.de/dip21/btp/16/16183.pdf.

[76] BTDrucks 16/10473, *available at* http://dipbt.bundestag.de/dip21/btd/16/104/1610473.pdf, para. 7 ("*Die Internationale Sicherheitsunterstützungstruppe ist autorisiert, alle erforderlichen Maßnahmen einschließlich der Anwendung militärischer Gewalt zu ergreifen, um das Mandat gemäß Resolution 1833 (2008) durchzusetzen"*).

[77] Antonio Cassese speaks of the "rudimentary character of the international enforcement machinery"; *see* CASSESE, *supra* note 37, at 353.

[78] On RoE, see generally Peter Dreist, *Rules of Engagement in multinationalen Operationen*, NEUE ZEITSCHRIFT FÜR WEHRRECHT *passim* (2007).

2. RoE as Legal Justification in the Case of Colonel Klein

If we assume that the RoE serve as legal justifications, then through them the principles of IHL are introduced into such situations, as long as these principles do not exceed the limits set by the Mandate. As has been stated above, the purpose of the ISAF-Mission is, other than Operation Enduring Freedom, not primarily to hunt terrorists and operate offensively against the Taliban. It is therefore, I believe, not possible to legitimately pursue an offensive military aim like killing the Taliban.[79] In this respect the legal analysis would differ from the one under an armed conflict paradigm, where there is in general no limit to setting military aims. Hence, Colonel Klein would have not been allowed to perform an offensive attack from the beginning. He could only rely on the argument that he wanted to defend the camp and that he did not know about the civilians. Then, it is problematic that he did not order precautionary measures. We have seen that even if he had believed that there were no civilians near the truck he would have been obliged to order precautionary measures. Having not done so, Colonel Klein would be liable for manslaughter—intentional manslaughter if he knew about the civilians or negligent manslaughter if he did not know about the civilians.

3. Critique of the Legal Significance of RoE

In the case of Colonel Klein the RoE could have served as a justification for the attack had he not omitted the precautionary measures. However, I doubt that the RoE have any real legal significance. That question cannot be decided here, but a few concerns that stand in the way of recognizing the RoE as being legally binding might be presented. First, they are secret and not known to public. This is problematic for an Afghan can never know if a soldier that resorts to force is actually justified, and, hence, the Afghan will be unsure if he himself has the right to resist that violence. Second, the RoE are not proper statutes adopted by the Legislature, in this case the German *Bundestag*, but rather administrative guidelines. So, their legal authority is weak. This is in stark contrast to what they would authorize, namely the killing of human beings, even innocent civilians, as long as the proportionality requirement is met. Without attempting to give a final answer I would argue that these deficiencies disqualify the RoE as legally valid justifications. Of course, one could argue that the soldiers should be able to rely on the RoE and that they need legal security when they are sent into a conflict. However, this reasoning cannot affect the current legal significance of the RoE, but it demonstrates the need to rethink the current situation and either to make the RoE legally binding by making them public and subject to a legislative decision or to give another legal guidance to the soldiers during conflicts that are below the threshold of "armed conflicts."

---

[79] *Verteidigungsministerium sieht gezieltes Töten nicht von Mandat gedeckt*, ZEIT ONLINE, 18 Dec. 2009, http://www.zeit.de/politik/deutschland/2009-12/mandat-verteidigungsministerium-kundus.

4. The Difference between the Armed Conflict and the Stabilization Mission Approach

The parallel analysis of the Armed Conflict Approach and the Stabilization Mission Approach with regard to Colonel Klein's criminal liability has revealed that there are some differences in the outcome. The doctrinal difference in the two approaches is that, in the Armed Conflict Approach, IHL is directly applicable and serves as a justification whereas, in the Stabilization Mission Approach, the principles of IHL are only introduced through the Mandates of the UN and the German *Bundestag*. This doctrinal difference becomes of practical relevance if the ISAF-Mandate is interpreted conservatively as not allowing offensive military actions. This means under a Stabilization Mission Approach it would be difficult for Colonel Klein to justify his attack given the omission of precautionary measures. Qualifying the situation in Afghanistan as a stabilization mission therefore means a significant limitation of the authorization of the soldiers on the ground. It is therefore crucial for the soldiers on the ground and especially the commanding officers, to know how to classify legally the conflict in Afghanistan. Only if it is classified as a non-international armed conflict can offensive military aims be legitimately pursued without doubt. This demonstrates the importance of the recent paradigm shift towards the Armed Conflict Approach.

D. Conclusion

The *Generalbundesanwalt* has made his decision on facts which are not open to the public. I have demonstrated that the criminal liability of Colonel Klein strongly depends on these facts and have shown in the hypotheses how different the outcome could have been.

In one point, namely with regard to the omission of precautionary measures, I think the *Generalbundesanwalt* has interpreted the law too leniently in favor of Colonel Klein. It is simply not enough to assume that there are no civilians and hence a warning is not necessary, if the means to clear the situation are as limited as they were then. Here, the actual military aim of the attack could have made a difference and the *Generalbundesanwalt* should have inquired into that. It is after all an unacceptable situation that the real reasons for the attack are still unknown; an attack that has caused so many civilian lives and whose political aftermath has forced the then Minister of Defense to resign and led to the dismissal of the highest ranked German military officer and another senior official in the Defense Ministry.

Finally, the characterization as non-international armed conflict, although probably right in the end and supported by the political branch, could have been more extensively reasoned because we have seen that it makes a difference whether the attack is seen as performed during an armed conflict or just as part of a stabilization mission under UN Mandate.