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The Appeals Judgment in the case of the Varvarin bridge: One step further for state liability for violations of humanitarian law

Replies and Comments

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Focus

Higher Regional Court at Cologne (Oberlandesgericht)
Judgment of 28 July 2005
Case No. 7 U 8/04
(http://www.olg-koeln.nrw.de – in German)

District Court at Bonn
Judgment of 10 Dec. 2003
Case No. 1 O 361/02
(http://www.lg-bonn.nrw.de – in German)

Federal Supreme Court
„Distomo"
Judgment of 26 June 2003
Case No. III ZR 245/98
(published in:
Neue Juristische Wochenschrift 2003, p. 3488 ff.)

Concerning the judgment of the District Court of Bonn see:

N. Quénivet
BOFAX No. 267E
of 27 December 2003

P. Herrmann
Aktueller Fall
Humanitäres Völkerrecht – Informationsschriften 2004, p. 79 ff.

For the applicable German law see:
http://www.iuscomp.org/gla/

In July 2005 the Higher Regional Court at Cologne, Germany, dismissed an appeal concerning the responsibility of the German state for alleged violations of humanitarian law during the Kosovo campaign, and upheld a judgment of the District Court at Bonn, which in 2003 had rejected claims stemming from the destruction of a bridge in the town of Varvarin in Serbia. However, it is significant that the Regional Court accepted the claim in principle, and only ruled against it under the facts of the case at hand.

In May 1999 the bridge, which had no military function at the time, was destroyed by a NATO air raid. Ten civilians were killed and another 30 injured. Subsequently, 35 victims brought a civil law suit against the state of Germany, seeking compensation. While German planes were not directly involved in the attack, the claims were based on the facts that Germany was a member of the NATO coalition; that it had generally contributed to air surveillance in the area; and that it should not have consented to the designation of the bridge as a military target.

In the first judgment, the District Court at Bonn had dismissed the case as a matter of principle, since it did not recognise any legal basis for a compensation claim. It held that any entitlement based on public international law only existed between states. Individuals could pursue their claims through their home state (diplomatic protection). The District Court recognised the existence of exceptions from this principle in some areas of the protection of human rights, but not so in humanitarian law. Neither would German law provide a basis for such a claim; in particular, the German law on state liability was held to be inapplicable to armed conflicts. The District Court thus followed the German Federal Supreme Court, which had ruled in the *"Distomo"*-case, also decided in 2003, that at least during the WW II period, German law did not recognise individual claims for state compensation for violations of humanitarian law.

In its appellate ruling, the Higher Regional Court at Cologne confirmed that an individual claim to compensation could not be derived from the applicable rules of humanitarian law (i. e., Art. 3 of the 4th Hague Convention of 1907 and Art. 91 AP I). However, in contrast to the lower court, it did not exclude the possibility of claims based on national law *per se*. Rather, it held that the German law on compensation for wrongful acts committed by government authorities (presently Art. 34 of the *Basic Law* in conjunction with sect. 839 of the German civil code) had developed since WW II and that now it applied both in times of peace and war. This different result follows from a construction of the basic rights of the 1949 constitution. In support of this ruling, the Regional Court furthermore referred to recent developments in public international law, such as the continuing codification of rules protecting the individual in the areas of human rights and humanitarian law, the jurisprudence on the ECHR, and the statute of the ICC.

However, the Regional Court denied that the German state bore any responsibility in the instant case. German officials had not violated any laws by their indirect involvement in the bombing. Given the "need to know" principle applicable to NATO decision-making, as well as the wide margin of appreciation accorded to government officials in issues related to foreign policy and security, only gross misconduct could trigger such liability. The Regional Court found this not to be the case here, as a presumption of lawfulness existed for the actions of Germany's allies.

In the press the judgment was criticised for leaving unanswered the basic questions of the legality of the Kosovo campaign and the air raid on the bridge. Furthermore, the margin of appreciation of the government was considered too broad. However, the legal import of this second judgment should not be underestimated: First, the decision, if upheld on subsequent appeal, closes a *lacuna* in the German law on state liability. Second, the judgment can contribute to a developing rule of customary international law that recognises an individual's right to compensation. Lastly, a high German court has acknowledged new developments concerning the recognition of individuals as subjects of international law. In this sense, the judgment provides further evidence of the rejection of the so-called "object theory".

The judgment is not final. Leave for further appeal to the Federal Supreme Court, the highest court in civil matters in Germany, has been granted. Still, the present judgment opens some new ground. We must wait further to learn whether German civil courts can serve as indirect enforcement mechanisms for international law.

Responsibility

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