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Abstract

First Chamber of the Second Senate
Order of 13 August 2013
2 BvR 2660/06, 2 BvR 487/07

Headnotes (non-official):

The Federal Republic of Germany has no obligation to pay compensation in connection with civilian casualties in a NATO air raid on the bridge in the Serbian town of Varvarin on 30 May 1999 in the Kosovo War.

Summary:

I.

The Federal Constitutional Court has decided on constitutional complaints relating to the killing and injuring of civilians in the destruction of a bridge in the Kosovo War.

On 30 May 1999, during the air operation “Allied Force”, two NATO combat aircraft attacked a bridge over the river Velika Morava in the Serbian town of Varvarin and destroyed it by firing a total of four missiles. As a result of this attack, ten persons were killed and thirty injured; seventeen of them seriously. All of them were civilians. Planes of the Federal Republic of Germany were not directly involved in destroying the bridge, but were in action on the day of the attack. Whether and to what extent the German reconnaissance aircraft deployed on that day also provided cover for the attack on the Varvarin bridge has remained disputed between the applicants and the Federal Republic of Germany in the proceedings before the regular courts.

The applicants seek compensation for their damages and for the pain and suffering they experienced in connection with the killing of their family members and their own injuries. Their actions before the civil courts were unsuccessful in all instances. The applicants challenge this in their constitutional complaints.

II.

The Federal Constitutional Court did not admit the constitutional complaints for decision. They are inadmissible in part and in any event unfounded.

1) The constitutional complaints are unfounded in so far as claims under international law are concerned.

It is true that a constitutional complaint can, in principle, assert that civil-court judgments are not part of the constitutional order within the meaning of Article 2.1 of the Basic Law (Grundgesetz - GG) because they disregard the rules of customary international law. There is, however, no general rule of international law stating that in case of breaches of international humanitarian law, an individual has a claim to compensation against the responsible state. In general, only the home state of the injured person is entitled to such claims or may assert them. Article 3 of the Hague Convention (IV) and Article 91 of Additional Protocol I do not create direct individual rights to compensation in connection with breaches of international humanitarian law. It may therefore be left undecided whether these provisions have acquired the status of customary international law.

Nor does a failure to submit the matter to the Federal Constitutional Court mean that the applicants’ right, equivalent to a fundamental right, to their lawful judge (second sentence of Article 101.1 GG) is violated.

It is true that Article 100.2 GG requires a submission to the Federal Constitutional Court if the deciding court encounters serious doubts when debating whether a rule of international law applies and if so, to what extent. In such cases, the Federal Constitutional Court is the lawful judge within the meaning of the second sentence of Article 101.1 GG. However, in the present case no submission to the Federal Constitutional Court was required; indeed, it would even have been inadmissible.

Undoubtedly there is no general provision of international law that gives individuals a direct claim to compensation against the responsible state in the case of breaches of international humanitarian law.

2) In so far as the applicants assert violations of fundamental rights because their public liability claims were rejected, it is obvious that the applicants would be unsuccessful even if the matter were remitted to the regular courts. Admittedly, there are constitutional objections against the decisions of the Higher Regional Court (Oberlandesgericht) and the Federal Court of Justice (Bundesgerichtshof) in so far as they give the Federal Government latitude of judgment in the selection of military targets and assume that the applicants have an unlimited burden of producing evidence and burden of proof with regard to the subjective liability criteria.

However, it must be taken into account that when the Varvarin bridge was included in the list of targets without objection by the Federal Republic of Germany – the act challenged as a breach of official liability – no final decision was made yet as to whether the actual attack on the bridge was lawful, nor could such a decision be made. Consequently, generating the lists of targets was from the outset subject to a different standard of care than the actual operational decision. According to the facts of the case and the status of the dispute, everything suggests that this standard of care is ultimately no different from that developed by the Higher Regional Court and the Federal Court of Justice.