FEDERAL COURT OF JUSTICE

ON BEHALF OF THE PEOPLE

JUDGMENT

III ZR 140/15

Announced on:
6 October 2016
C o m p e t i o n
o f c o m p e t i t i
o n
as clerk of the court

in the suit

Nachschlagewerk: yes
BGHZ: yes
BGHR: yes

GG Art. 34; BGB § 839 Fk; Geneva Convention 1st Additional Protocol Art. 51, 57; Geneva Ab-
come 2nd Additional Protocol Art. 13

a) Claims for damages under international law for acts contrary to international law committed by a state against foreign nationals continue to be available in principle only to the home state (confirmation of the Senate ruling of 2 November 2006 - III ZR 190/05, BGHZ 169, 348).

b) The German law on official liability (§ 839 BGB in conjunction with Article 34 GG) does not apply to damage caused to foreign citizens during the armed deployment of German armed forces abroad, even under the provisions of the Basic Law (continuation of the Senate's ruling of 26 June 2003 - III ZR 245/98, BGHZ 155, 279).

c) A soldier does not commit a breach of official duty if he could not foresee or avoid a violation of international law for factual reasons.

d) In assessing whether there has been a (culpable) violation of international humanitarian law, the standard of care to be observed is not the ex post view. Rather, it depends on the knowledge that is available to a commander ex ante when planning and executing a military action.

Federal Supreme Court, ruling of 6 October 2016 - III ZR 140/15 - OLG
Cologne
LG Bonn

ECLI:DE:BGH:2016:061016UIIIZR140.15.0

The III Civil Senate of the Federal Court of Justice responded to the oral hearing of October 6, 2016, by the presiding judge Dr. Herrmann, the judges Tombrink, Dr. Remmert and Reiter as well as the judge Pohl

has been found to be correct:

The plaintiffs' appeal against the judgment of the 7th Civil Senate of the Cologne Higher Regional Court of 30 April 2015 is dismissed.

Orders the applicant to pay 1 44 % of the costs of the appeal proceedings and the applicant 2 56 % of the costs of the appeal.

By law

Facts

1 The applicants are Afghan nationals. They assert a claim for damages and compensation for pain and suffering against the defendant Federal Republic of Germany in connection with an air attack which was carried out on the order of a member of the German Federal Armed Forces within the framework of the NATO-led ISAF mission in Afghanistan.

2 Following the fall of the Taliban regime in Afghanistan through the intervention of US troops, the United Nations Security Council, by Resolution 1386 of 20 December 2001, established an International Security Assistance Force (ISAF) led by the North Atlantic Treaty Organisation (NATO) to assist the elected government of Afghanistan in the establishment and reconstruction of the country.

to support the maintenance of a secure environment. ISAF forces were allowed to take all necessary measures, including the use of armed force, in view of their mission. On 22 December 2001, the German Bundestag decided on the participation of German armed forces in the ISAF troops. The area of operations of the German ISAF contingent was defined as the Kabul and North regions by resolution of the German Bundestag on 28 September 2005.

3 In April 2009, the then Colonel i.G. K. took command of the Provincial Reconstruction Team (PRT) Kunduz. In operational terms, he was under the command of the ISAF Commander and ultimately the NATO Supreme Allied Commander Europe (SACEUR), in terms of troops, the Bundeswehr Operations Command and ultimately the Federal Minister of Defence.

4 In the afternoon of 3 September 2009, a group of Taliban fighters seized two tankers about 15 kilometres south of the city of Kunduz and about eight kilometres south-southwest of the PRT Kunduz camp. In an attempt to move the tankers to the west side of the Kunduz River, they got stuck in the mud on a sandbank in the middle of the river about seven kilometres as the crow flies from the Kunduz PRT camp at around 6.15 pm.

5 Around 8.30 p.m., Colonel K. received the information about the hijacking of the two tank trucks. By using a reconnaissance plane the vehicles could be tracked down around midnight. After the aircraft had left the airspace over the sandbank at about 0:48 am due to lack of fuel, Colonel K. requested air support from ISAF headquarters at about 1:00 am. A short time later, two US fighter planes

F 15 planes entered the area and, from 1:17 a.m. onwards, transmitted infrared aerial photographs of what was happening on the sandbank in real time to the operations center in the Kunduz field camp, where Colonel K. was staying. On the instructions of the air traffic control centre, the aircraft initially remained in the background, but were in constant radio contact with the Joint Terminal Attack Controller (JTAC). At the same time, the PRT commander was repeatedly confirmed by a military informant - via a liaison officer - that there were only insurgents and no civilians on the sandbank. Around 1:40 am Colonel K. gave the order to use weapons. Thereupon the fighter planes dropped two 500-pound bombs. This destroyed the two tankers and killed or injured many people who were in the area of the vehicles. Among them were also civilians.

6 The plaintiffs have argued that the bombing attack was carried out in violation of international humanitarian law because the presence of civilians was evident to the PRT commander. The first plaintiff, an Afghan farmer, claimed to have lost two of his sons in the air raid. He is seeking damages and compensation for pain and suffering in the amount of
40.000 €. The second plaintiff lives in a village near Kunduz and demands payment of maintenance damages in the amount of 50,000 €, claiming that her husband and father of their six children died in the air raid.

7 The Regional Court dismissed the action. The appeal of the plaintiffs was unsuccessful. With their appeal allowed by the Higher Regional Court they continue to pursue their claims.

Reasons for the decision

8 The applicants' admissible appeal is unfounded. The court of appeal rightly denied the claims.

I.

9 The court of appeal, whose decision is published in BWV 2015, 202, has essentially stated the reasons for its decision:

10 An individual claim for damages by the plaintiffs did not arise directly from international law. It was also in line with international law practice that secondary law claims for damages on account of unlawful acts of a state against foreign nationals were in principle only due to the injured party's state of origin. In particular, an individual claim to damages did not arise from Article 3 of the Fourth Hague Convention of 18 October 1907 on the Laws and Customs of War on Land (RGBl. 1910 p. 107) and Article 91 of the First Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949 on the Protection of Victims of International Armed Conflicts (ZP I, Federal Law Gazette 1990 II p. 1551). Nor could claims by individuals be based on customary international law or Article 25 sentence 2 half-sentence 2 of the Basic Law.

11 Sacrificial claims would not be considered, since this legal institution does not cover the consequences of armed conflicts.

12 As far as claims from official liability according to § 839 BGB in connection with Article 34 of the Basic Law, it can remain open whether the national (German) public liability law is applicable.

The Court held that the provisions of international humanitarian law on the protection of the civilian population had third-party protective effect and that in the case of breaches of official duties by soldiers of the Bundeswehr in the context of a NATO-led deployment of international troops, liability was transferred to the Federal Republic of Germany as the body responsible for employment. In any case, a claim would fail because the PRT commissioner had not committed any culpable violation of official duties. On the basis of the binding findings made by the Regional Court under § 529.1 no. 1 of the Code of Civil Procedure, Colonel K. did not violate the prohibition of attacks against civilians (in particular Article 13.2 sentence 1 of the Second Additional Protocol to the Geneva Conventions of 12 December 1990). August 1949 on the protection of the victims of non-international armed conflicts - ZP II, Federal Law Gazette 1990 II p. 1637), nor did Colonel K culpably violate the international law requirement of military intelligence (Article 57.2 letter a [i] ZP I). The two hijacked tankers and the Taliban fighters present in their area had been legitimate military targets. The PRT commander had taken all reconnaissance measures that were practically possible in the concrete planning and decision-making situation. From the commander's authoritative ex ante perspective, it was objectively not recognizable that civilians were also present at the bomb site in addition to the Taliban fighters. The Rules of Engagement (RoE) issued by the ISAF Commander were of no significance for the assessment of any claims for damages by the plaintiffs. No official obligations to protect third parties would result from these and other rules of engagement of ISAF, NATO or the Bundeswehr. Since, from the perspective of an objectively dutiful commander in the position of PTR commander, the presence of civilians in the target area of the attack was not to be expected, there was also no (guilty) obligation to pay compensation.

(ii) ZP I), the principle of proportionality (Article 57(2)(a)(iii) ZP I), the principle of warning (Article 57(2)(c) ZP I) and the prohibition of indiscriminate attacks (Article 51(4) and (5) ZP I).

II.

13 These comments stand up to legal scrutiny.

14 The plaintiffs are not entitled to direct compensation under international law. Nor do they have any claim for damages under national (German) law. The law of public liability (§ 839 BGB in connection with Art. 34 GG) is not applicable to military actions of the Bundeswehr within the scope of foreign missions. In addition - assuming the applicability of German official liability law in the present case - violations of official duties by German soldiers or agencies must be denied.

15 1. the lower courts correctly assumed that the applicants have no direct claim for damages or compensation under international law against the defendant

16 a) There is still no general rule of international law that individuals are entitled to compensation or reparation for violations of international humanitarian law. Notwithstanding the - constantly progressing - developments at the level of human rights protection, which have led to the recognition of a partial subjectivity of the individual under international law and to the establishment of contractual individual complaints procedures, a comparable development in the area of secondary claims

not to be proven. In principle, only the home state continues to be entitled to claims for damages for acts of a state against foreign nationals that are contrary to international law (Senate, judgment of 2 November 2006 - III ZR 190/05, BGHZ 169, 348 marginal no. 6 et seq.; BVerfG, NJW 2006, 2542, 2543 and BeckRS 2013, 55213 marginal 41 ff, 46; BeckOGK/Dörr, BGB, § 839 marginal 416 [as of 1 July 2016]; Jutzi, FS Schlick, pp. 31, 36). In the case of treaties in the field of international law, the liability obligation is limited to the international law relationship between the states concerned. It exists only between the contracting parties and differs from the primary claim of the persons concerned to compliance with the prohibitions of international humanitarian law (BVerfG, NJW 2004, 3257, 3258 and BeckRS 2013 loc. cit.) According to this still valid conception of international law as an intergovernmental law, the aggrieved individual is granted indirect international protection by his or her state of origin asserting, by way of diplomatic protection, his or her own right to the observance of international law vis-à-vis its nationals (Senate, judgments of 26 June 2003 - III ZR 245/98, BGHZ 155, 279, 291 and of 2 November 2006, ibid. para. 6; BVerfG, NJW 1996, 2717, 2719). This is an objective legal obligation of the state to grant protection. In this respect, the individual is entitled to a subjective claim against his or her home state to the error-free exercise of discretion (Schmahl, ZaöRV 66 [2006], 699, 711; von Woedtke, Die Ver- responsability Deutschlands für seine Streitkräfte im Auslandseinsatz und die Zusammen- resultierende Schadensersatzansprüche von Einzelpersonen als Opfer deutscher Militärhandlungen, p. 322).

17 b) According to these principles, the plaintiffs cannot claim damages or compensation under Article 3 of the IV Hague Convention of 18 October 1907 concerning the Laws and Customs of War on Land

or Article 91 of the First Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949 concerning the protection of victims of international armed conflicts. Although these provisions establish a special international liability regime for violations of international humanitarian law of war, they do not, however, constitute grounds for individual claims for damages or compensation. This only reinforces the general principle under international law of a liability obligation between the contracting parties (Senate, judgment of 2 November 2006, ibid. marginal 9 et seq.; BVerfG, NJW 2004, 3257, 3258; NJW 2006, 2542, 2543 and BeckRS 2013, 55213 marginal 45 et seq.)

18 2. the Court of Appeal was equally correct in rejecting claims for compensation on the grounds of sacrifice. The idea of self-sacrifice based on §§ 74, 75 Einl. ALR was developed for circumstances of everyday administrative action ("normal case") and cannot be applied to war damage. These are not an expression of "genuine" administrative legal activity, but the consequence of a state of affairs to be assessed according to international law (BVerfG, NJW 2006, 2542, 2544). State exceptional circumstances, such as namely wars and extensive deployments of the armed forces abroad in association with other states, cannot be regulated in their effects, in particular with regard to possible civil damage, by means of the general right to sacrifice, but require special compensation systems and standards of compensation which are to be laid down in corresponding laws (see Ossenbühl/Cornils, Staatshaftungsrecht, 6th ed,

p. 127 directly in relation to claims for sacrifice, but probably to be understood in a general liability context).

19 3 The court of appeal also rightly ruled against a claim for damages by the plaintiffs under § 839, Subsection 1, Sentence 1, BGB, in conjunction with Article 34, Sentence 1, GG.

20 a) The national (German) official liability law does not apply to damage caused to foreign citizens during the armed foreign deployment of German armed forces.

21 (aa) However, the "exclusivity" of international claims settlement does not preclude any individual ("civil") compensation claims of the last persons under national law. The basic principle of diplo- matic protection by the home state does not exclude a claim which the national law of the infringing state grants to the injured party outside of international law obligations and which is in addition to the international law claims of the home state ("parallelism of claims" instead of "exclusivity of international law"). The state that violates international law is thus free to grant the violated person claims on the basis of its own national law (Senate, judgment of 26 June 2003 - III ZR 245/98, BGHZ 155, 279, 293; BVerfG, NJW 1996, 2717, 2719). There is also no rule of customary international law to the effect that compensation arrangements in connection with the consequences of war could only be made within the framework of international law treaties, in particular peace treaties, or that existing treaties on such compensation would be final (BVerfG loc. cit.). However, national law does not grant individual persons any claims for compensation for damages resulting from combat operations of German soldiers abroad.

22 bb) If German soldiers culpably violate primary rules of international law during armed foreign missions, which are intended to protect the civilian population, and if this results in damage to property or personal injury, claims for compensation in accordance with the wording of § 839 Para. 1 BGB (German Civil Code) may be considered, however, according to the principles of official liability. With regard to foreign missions of the German Federal Armed Forces, restrictions can be inferred from this point of view, in accordance with § 839 BGB and Art. 34 GG.

23 (1) Accordingly, a part of the case law of the courts and of the literature affirms the applicability of German official liability law for foreign missions of the Bundeswehr in the context of armed conflicts. Even in times of war or when participating in armed conflicts, the state is bound by law, especially international law. To observe the international law of war ("ius in bello") was a state obligation that served precisely the purpose of developing its effect instead of the otherwise applicable civil legal system. Insofar as these provisions claimed validity in times of war, they also required sanctions (OLG Cologne, NJW 2005, 2860, 2862). Individual protection of secondary law before the national courts - based on national public liability law - was an effective means of enforcing the primary rules of international law and was particularly appropriate from the perspective of international law, which increasingly emphasises the protection of the individual (see Dutta, AöR 133 (2008), 191, 210 f; von Woedtke loc. cit. p. 318). In addition, the applicability of the law on public liability is also supported by the values of the Basic Law (decision in favour of international cooperation under Article 23 et seqq. of the Basic Law, protection of human dignity and personality, Article 1.1, Article 2.1 of the Basic Law) and the principle of the rule of law (Dutta loc.cit. pp. 211 et seq.; Schmahl loc.cit. p. 712; von Woedtke loc.cit. p. 319). If the individual concerned were given the option of becoming liable to public authorities, the

were to be blocked, this would result in an inadmissible restriction of the scope of warranty under Article 34 GG (Huhn, Amtshaftung im bewaffneten Auslandseinsatz, p. 63; Woedtke ibid.) Furthermore, it is argued that there is no legal power to suspend the law of tort outside the case of defence in the sense of Article 115a et seqq. of the Basic Law (Dutta ibid. pp. 217 f; von Woedtke ibid. p. 320). The Reich Civil Servants Liability Act in its current version and the laws enacted after 1949 to compensate for National Socialist injustice (in particular § 8.1 of the Federal Indemnification Act, § 16 of the Law on the Establishment of a Foundation "Remembrance, Responsibility, Future") assumed the fundamental validity of the law of official liability in the case of armed foreign missions of German armed forces (Dutta ibid. p. 219; Surholt, Amtshaftung für Handlungen in Auslandseinsätzen der Bundeswehr, pp. 89 f).

24 (2) The counter-opinion, however, which generally excludes the applicability of German public liability law in the case of damage caused by armed conflicts, sees the international liability regime as a lex specialis in comparison to public liability law (MüKoBGB/Paper, 6th ed., § 839 marginal no. 187a; Jutzi, FS Schlick, pp. 31, 40; Raap, NVwZ 2013, 552, 554; BWV 2016, 125, 128). National state liability law was overlaid by international humanitarian law. Armed conflicts constitute a state of emergency under international law, which largely suspends the legal system applicable in peace (LG Bonn, NJW 2004, 525, 526; Raap ibid.) The legislative competences regulated in the Basic Law (Article 74.1 No. 1 of the Basic Law on the one hand and Article 73.1 No. 13 of the Basic Law on the other) suggested that the codification of special norms of compensation was required domestically to regulate the consequences of armed conflicts. The genesis of
§ 839 BGB and Art. 34 GG also speak against the applicability of German official liability law to hostilities in armed conflicts

(Raap iaO). The (globally unique) granting of official liability claims in the context of armed conflicts would unduly restrict the Federal Republic of Germany in its necessary foreign policy room for manoeuvre and ultimately its ability to form alliances (Raap, NVwZ 2013 ibid.). The national courts are not authorised to close an (alleged) gap in liability law by interpreting ordinary law. The extension of the scope of application of the public liability provisions was the sole responsibility of the parliamentary legislature (Jutzi loc.cit. pp. 37 ff).

25 (cc) (1) In the case of "Distomo", in which an SS unit incorporated into the German Wehrmacht burned down a village in occupied Greece in 1944 after a previous armed conflict with partisans as a measure of reprisal and killed its inhabitants, the recognizing senate has official liability claims pursuant to § 839 BGB in conjunction with § 839 BGB. Article 131 WRV was denied (judgement of 26 June 2003 - III ZR 245/98, BGHZ 155, 279). In doing so, he did not doubt that the elements of facts of Article 839 para. 1 sentence 1 BGB were all fulfilled according to the wording of the provision. However, he was of the opinion that according to the understanding and overall context of the law in force in 1944, the military acts attributable to the German Reich under international law during the war abroad were not covered by the official liability - triggering a domestic responsibility of the state - of § 839 of the Civil Code in conjunction with § 839 of the Civil Code. Art. 131 WRV is excluded. At that time, war was seen as a state of emergency under international law, which by its very nature was geared to the collective use of force and largely suspended the legal system applicable in peace. The responsibility for the beginning of a war and the consequences of the collective use of force that was inevitably associated with it, as well as the liability for individual war crimes of the persons belonging to the armed powers, was

have been regulated at the level of the belligerent states or have been considered in need of regulation. From this view of the war as a first-line collective act of violence, which had been understood as a "relationship from state to state", the idea was - at least at that time - far from being conceivable that a belligerent state could (also) make itself directly liable to pay damages to the victims by offences of its armed power during the war abroad (also) (ibid. pp. 295 ff). The Senate saw its view confirmed by further provisions of the law applicable at the time (loc. cit. pp. 297 et seq.), in particular by the exclusion of liability under § 7 of the Law on the Liability of the Reich for its Civil Servants - Reich Civil Servants' Liability Act (Reichsbeamtenhaf- tungsgesetz - RBHG) - of 22 May 1910 (Reich Law Gazette p. 798). According to this provision (in the version applicable until 30 June 1992), the nationals of a foreign state were only entitled to a claim for compensation on the basis of this law if, according to an announcement of the Reich Chancellor (Federal Minister of Justice) contained in the Reich Law Gazette (Federal Law Gazette), reciprocity was guaranteed by the legislation of the foreign state or by an international treaty (which was lacking in the relationship with Greece). The Federal Constitutional Court (NJW 2006, 2542, 2543) left it open whether a claim according to § 839 BGB in connection with § 839 BGB was valid. Art. 131 WRV had been overlaid by the specific international liability regime between the states. It considered the denial of a claim for official liability to be justified in any case with regard to Article 7 RBHG aF.

26 (2) In the case of "Varvarin", which concerned the destruction of a bridge by NATO fighter planes during the Kosovo conflict, in which ten civilians were killed and 30, some of them seriously injured, the Senate (ruling of 2 November 2006 - III ZR 190/05, BGHZ 169, 348 marginal no. 20) left open whether, for the period after the entry into force of the Basic Law, the Federal Constitutional Court's decision on its

"Distomo", that military (war) activities abroad are excluded from official liability. For the official liability claim asserted by the plaintiffs at the time failed in any case because in connection with the attack on the bridge no violations of official duties by German soldiers or departments in the sense of concrete culpable violations of rules of hu-manitarian (war) international law for the protection of the civilian population were established without legal error. The Federal Constitutional Court (BeckRS 2013, 55213 marginal no. 52 et seq.) did not accept the constitutional complaints filed against this and did not consider the question of the applicability of the law on official liability to such cases to be relevant for the decision.

27 dd) The Senate now rejects the question, which has so far been left open, as to whether the German law on official liability is applicable under the Basic Law to foreign deployments of German armed forces in the context of armed conflicts. Neither constitutional nor international law requires an extension of the traditional understanding of official liability law as set out above. Rather, the unaltered wording of § 839 of the Civil Code and Article 34 of the Basic Law, the history of the provision, the purpose of the law derived from it and systematic considerations (concerning the relationship to international law) speak against extending the scope of application of the rules on official liability to combat operations of German armed forces abroad. A further development of the law by the judiciary beyond this would be opposed by the fact that such fundamental decisions are to be made by the legislature alone.

28 (1) The wording of the public liability provisions (§ 839 BGB, Art. 34 GG) does not explicitly exclude - as already mentioned - the applicability of the public liability law. However, this does not automatically lead to an affirmation of the

State liability in cases like the present one. For the historical context in which a norm has been formulated must always be taken into account (Jutzi, FS Schlick, pp. 31, 39).

29 (a) When creating § 839 of the Civil Code, which came into force together with the entire Civil Code on January 1, 1900, the legislator obviously did not consider that damage caused by military actions abroad should also be compensable. Such considerations are not documented in the legislative materials (Raap, NVwZ 2013, 552, 554; BWV 2016, 125, 128; mwN; see also Staudinger/Wurm, BGB [2007],
§ 839 marginal no. 1 ff on the history of the origins of § 839 BGB). According to the traditional understanding of official liability and international law, until the end of the Second World War there was no question in law that military (war) operations abroad were legally exempt from the official liability situation at the time (§ 839 BGB i.in connection with Article 131 WRV) and that the consequences of military actions abroad had to be compensated in the "relationship between state and state" (Se- nat, judgment of 26 June 2003 - III ZR 245/98, BGHZ 155, 279, 295 ff).

30 (b) When drafting the provision of Article 34 of the Basic Law and when the Basic Law came into force, the historical legislator had neither the establishment of German armed forces nor their participation in hostilities abroad in mind. In particular, the current extent of Germany's international integration, to which foreign missions of the Bundeswehr for international conflict prevention and crisis management have been added since the 1990s, could not be foreseen in 1949 by the Parliamentary Council entrusted with the drafting of the Basic Law. It can therefore be ruled out that when the Basic Law came into force it was intended to extend the right of official liability to cases of damage in connection with foreign deployments of German armed forces (von Woedtke ibid. p. 321). Since

damage caused by military operations abroad did not fall within the scope of application of the law on official liability according to the traditional understanding anyway, there was no reason, in the view of the legislator at the time, to explicitly exclude such military operations from the classic official liability.

31 (c) No legislative decision has been taken subsequently to extend the scope of official liability to military combat operations abroad. The wording of the relevant provisions of the law on official liability has remained unchanged to this day. An extension of the scope of application of the law on official liability cannot be derived, in particular, from the fact that § 7 RBHG was amended by Article 6 of the Foreign Use Act of 28 July 1993 - AuslVG (BGBl. I
p. 1394) was substantially amended with effect from 1 July 1992. Pursuant to § 7 para. 1 sentence 1 RBHG nF, which literally repeals § 35 para. 1 sentence 1 of the nullified State Liability Act of 26. Pursuant to § 7 para. 1 sentence 1 RBHG nF, which literally corresponds to § 35 para. 1 sentence 1 of the nullified State Liability Act of 26 June 1981, the Federal Government may determine by statutory order in order to establish reciprocity that a foreign state and its nationals who do not have a domicile or permanent residence in the area of application of this Act shall not be entitled to claims under this Act if the Federal Republic of Germany or Germans under foreign law do not receive equivalent compensation from the foreign state for comparable damage. Whereas under earlier law it was necessary to make a notice of the existence of reciprocity in order to establish the liability of the state, the assumption of liability by the state is now considered to be the rule, which is only lifted if a corresponding statutory instrument is issued - which has not been the case so far (BeckOGK/Dörr, BGB, § 839 marginal no. 720 f [as of 1 July 2016]). As can be seen from the explanatory memorandum to the Act, the

Foreign Employment Act to take account of the need for Germany to participate more in humanitarian and support measures abroad (draft of the parliamentary groups of the CDU/CSU, SPD and F.D.P. of a law on employment regulations for special employment abroad, BT-Drucks. 12/4749 S. 1, 8). The new version of § 7 RBHG was intended to prevent the official administrators used abroad from being exposed to personal liability, as it could result from § 839 BGB under the previous regulatory system (resolution recommendation and report of the Committee on Internal Affairs, BT-Drucks. 12/5142 S. 15). The new provision had no specific military connection. At that time, foreign combat missions of the Bundeswehr were not foreseeable. Consequently, there was no reason to take this into account when amending § 7 RBHG. The new regulation of the provision therefore does not address the question of the applicability of the official liability law to armed foreign missions of the Bundeswehr.

32 The same applies to § 8 para. 1 BEG and § 16 para. 1 of the law on the establishment of a foundation "Remembrance, Responsibility, Future". It does not follow from the fact that any competing claims for damages are excluded therein that since the entry into force of the Basic Law, the national law on official liability has been applicable to armed foreign missions of German armed forces, especially since both laws refer to damages that occurred before.

33 (2) With regard to the general right to sacrifice, which presupposes an intervention by the public authorities in rights that are not worthy of special sacrifice (but not fault), it is recognised by the highest court of justice that this basis for the right to sacrifice has been developed for circumstances of everyday administrative action and is based on war and violence.

damages cannot be applied. These are not an expression of "genuine" administrative law activity, but the consequence of a state of emergency to be assessed under international law (BVerfG, NJW 2006, 2542, 2544; see also Ossenbühl/Cornils, Staatshaftungsrecht, 6th ed., p. 127; Raap, BWV 2016, 126, 129). For the general (fault-based) official liability claim under § 839 para. 1 sentence 1 BGB in conjunction with Article 34 sentence 1 of the Basic Law cannot apply (see Raap, NVwZ 2013, 552, 554). The provision of § 839 BGB is, as its history shows (see Staudinger/ Wurm, BGB [2007], § 839 marginal no. 1 ff), tailored to "normal official business", i.e. to the compensation of damages which arise due to breaches of official duties within the framework of general and everyday administrative procedures. Within the scope of the "general official duty" to lawfully exercise his office, an (administrative) official must investigate the facts relevant to the decision, e.g. by hearing the parties involved, and must take a decision in accordance with the applicable rules of competence, form and other procedural rules. A decision on applications and other requests of the citizen must be made within a reasonable period of time (see only Schlick, Ad Legendum 2015, 250, 254). If the wrongly acting official is only guilty of negligence, liability is excluded according to § 839 para. 1 sentence 2 BGB if the injured person is able to obtain compensation in another way from a "private" injuring party (so-called subsidiarity clause). According to § 839 para. 3 BGB, the obligation to pay compensation does not apply if the injured party has culpably failed to avert the damage by using a legal remedy (priority of the protection of priority rights). All this shows that the general official liability does not fit for the assessment of military actions abroad. The subsidiarity of official liability for negligent breaches of duty and the primacy of primary legal protection do not normally apply in cases of military action from the outset and are not subject to structural changes.

really empty. Furthermore, the decision situation of an officer acting in an administrative capacity cannot be equated with the combat situation of a soldier in combat.

34 (3) The applicability of the German (national) official liability law in the case of combat operations of German armed forces abroad is also contradicted by systematic considerations with regard to the liability regime under international law. In particular with the two Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 on the protection of the victims of international (ZP I) and non-international (ZP II) armed conflicts, there exists a detailed set of rules which comprehensively guarantees the protection of the civilian population at the level of primary standards (in particular Art. 48 ff ZP I, Art. 13 ff ZP II) and regulates the consequences of liability under secondary law to the effect that a party to a conflict is responsible for all acts committed by persons belonging to its armed forces and, in the case of violations of international law, is obliged to pay damages to the home state of the injured persons (cf. Art. 91 ZP I and Art. 3 of the IV Hague Convention of 18 October 1907), whereby the home state grants diplomatic protection to its injured nationals. This liability was also assumed by the Federal Republic of Germany when it approved the additional protocols to the Geneva Conventions (see Denkschrift zu den Ergänz- a- tungsprotokolle zu den Genfer Abkommen, BT-Drucks. 11/6770 S. 117). If one also takes into account that the specific situation in the context of armed foreign deployments is clearly different from the purely national constellations for which the Institute of Public Liability was originally created, the better arguments speak in favour of regarding the international law liability regime as a special regulation compared with the general public liability law (MüKoBGB/Paper, 6th ed, § 839 marginal no. 187a; Jutzi ibid. p. 40; Raap, NVwZ 2013 ibid. p. 554; BWV 2016 ibid. p. 128).

35 (4) The system of values of the Basic Law, in particular the obligation of all state institutions to respect human dignity and fundamental rights as well as the constitutional decision in favour of international cooperation, does not compel the extension of the scope of application of the official liability standards to armed foreign missions of the Bundeswehr.

36 (a) As explained above, no rule of customary international law can be identified that entitles individuals to damages or compensation for violations of IHL. If no individual claims for damages can be derived from international law, there is also no obligation to grant individuals a claim for damages under national law by interpreting domestic law in the light of the international law-friendliness of the Basic Law (see Article 25 sentence 1 of the Basic Law) (see Jutzi loc. cit. p. 36 f). Moreover, no rule or presumption can be derived from the fact that international law does not exclude national provisions with regard to liability in the case of violations of international humanitarian law (see aa above) to the effect that a state that violates international law must grant the violated persons claims on the basis of its own national law (BVerfG, NJW 2004, 3257, 3258).

37 In view of the further development and codification of international human rights protection after the Second World War, there is currently no compelling necessity to ensure compliance with the rules of international humanitarian law of war by granting a national state liability claim of the individual "in parallel". In the meantime, international law contains numerous primary norms for the protection of the civilian population and "flanking" requirements

on the punishment of infringements by criminal prosecution and compensation for damages at intergovernmental level (in particular Art. 48 ff, Art. 85 to 91 ZP I, Art. 13 ff ZP II). At the national level, the criminal offence definitions of the International Criminal Code provide additional protection. Nor can any requirement be inferred from the Basic Law to create an individual claim for damages for every violation of fundamental rights.

38 (b) The decision of the Basic Law in favour of international cooperation (Articles 23-25 of the Basic Law) cannot be invoked for the applicability of the law on official liability to armed conflicts or military conduct abroad. It rather points to the opposite direction. The classification of Germany into peace-keeping systems is protected under constitutional law in Article 24.2 of the Basic Law. According to Article 32 (1) of the Basic Law, the Federal Government is responsible for the maintenance of international relations, with the executive power being the bearer of external authority within the Federation (Dutta ibid. p. 214; from Woedtke loc.cit. p. 312 f). The application of the law on official liability to armed foreign missions of the Bundeswehr could in several respects impair Germany's ability to form alliances as required by the constitution and the scope for shaping foreign policy. Since, if realistically considered, only foreign missions together with partner countries, in particular within the framework of NATO, would come into consideration for the Federal Republic of Germany, there would be the possibility of imputing tortious acts of another alliance partner that are contrary to international law under § 830 BGB in the context of official liability. This would not only give rise to the danger of a (joint and several) liability that could hardly be limited (in this sense Jutzi loc.cit. p. 44), but would also have the consequence that the German civil courts would have to conduct an incidental review of the sovereign acts of another alliance partner (of

Woedtke ibid. p. 313 f). The latter in particular could have a lasting negative impact on Germany's foreign policy relations with its allies, especially since in the official liability process, with regard to the principles of the secondary burden of proof or the reversal of the burden of proof (see BVerfG, BeckRS 2013, 55213 marginal no. 62 ff), the procedural necessity could arise to disclose tactical or strategic considerations - albeit under the corrective of what is reasonable - and to present facts which at least the other allies regard as requiring secrecy. In this context, it must also not be overlooked that the risk of a hardly assessable liability could lead to a reduction or even complete cessation of humanitarian armed foreign missions of the Bundeswehr (Jutzi ibid. p. 44). From the point of view, for example, of the NATO partners whose national legal systems do not provide for individual claims for damages due to violations of international humanitarian law by their armed forces (Raap, NVwZ 2013 loc. cit. p. 554; BWV 2016 loc. cit. p. 130), the German armed forces would only be capable of alliance and combat operations to a limited extent due to the sword of Damocles of official liability - also jointly and severally - (see von Woedtke loc. cit. p. 324).

39 (5) If, in view of the system of values of the Basic Law and the increased protection of the individual at the level of full civil law after the Second World War, the necessity were to be affirmed to extend the law of official liability, abandoning its traditional understanding, to armed foreign deployments of the armed forces, there would be fundamental constitutional objections to a further development of the law by judges in this respect. For the legislature has to make the essential decisions in fundamental normative areas itself (e.g. BVerfGE 98, 218, 251; Jutzi loc. cit. p. 41). In particular, the substantiation of claims to monetary benefits

with considerable financial consequences for the public budgets are reserved for the parliamentary legislature to decide in accordance with the principle of the separation of powers (so-called budgetary prerogatives of the parliament; e.g. BVerfGE 125, 175, 224; see also Senate, judgments of 12 March 1987 - III ZR 216/85, BGHZ 100, 136, 145 f and of 16 April 2015 - III ZR 333/13, BGHZ 205, 63 para. 34 on liability for legislative wrongs and of 10 December 1987 - III ZR 220/86, BGHZ 102, 350, 362 on state liability for forest damage; Jutzi ibid. p. 42; von Woedtke ibid. p. 314 f; in each case mwN). Since the risks of liability for damage as a result of combat operations, including those conducted with other armed forces, could not be estimated, especially in the case of longer and more extensive military conflicts, especially since military operations (e.g. air, missile or artillery attacks) can cause massive damage, there would be a risk of considerable financial burdens on the federal government's public budget. This makes it necessary to hand over to parliament the decision on the granting of compensation and claims for compensation in connection with armed foreign deployments of German armed forces (Jutzi ibid. p. 41 f).

40 b) Irrespective of the question of the applicability of German official liability law, a claim for damages by the plaintiffs based on this fails in any event in the case in dispute because no breaches of official duty by German soldiers or departments in the sense of concrete culpable breaches of rules of humanitarian (war) international law for the protection of the civilian population have been established in connection with the air attack on the two tankers hijacked by Taliban fighters. The Court of Appeal based its decision without legal error on the fact that the PRT commander, after having exhausted all available reconnaissance possibilities, had to take into account the presence of civilians in the target area of the airborne tanker.

was not objectively recognizable. Colonel K.'s action was therefore permissible under international law.

41 (aa) The appeal is unsuccessful in that the Court of Appeal infringed Paragraph 529(1)(1), second half-sentence, of the Code of Civil Procedure by failing to base its examination on the entirety of the material in the case which was in the file, by failing to allow the presentation of the 'mere possibility' of a different assessment of the results of the evidence and of the factual material to suffice to give rise to doubts as to the correctness and completeness of the findings relevant to the decision and by restricting its examination to procedural errors.

42 (1) Pursuant to § 529 (1) No. 1 of the Code of Civil Procedure, the Court of Appeal shall base its hearing and decision on the facts established by the court of first instance, unless specific indications give rise to doubts as to the correctness and completeness of the findings relevant to the decision and therefore require a new finding. Concrete indications which make the court of appeal not bound to the findings of the first instance may first of all result from procedural errors which the court of first instance made when establishing the facts of the case. Such a procedural error exists in particular if the assessment of evidence in the first instance judgment does not meet the requirements developed by the case law on § 286 para. 1 ZPO. This is the case if the assessment of evidence is incomplete or contradictory in itself, or if it violates laws of thought or principles of experience. The same applies if the court of first instance has disregarded facts presented by the parties or has assessed facts not presented by the parties (st. Rspr.; see only BGH, judgments of 12 March 2004 - V ZR 257/03,

BGHZ 158, 269, 272 f; of 19 March 2004 - V ZR 104/03, BGHZ 158, 295, 300 f and of 21 June 2016 - VI ZR 403/14, VersR 2016, 1194 marginal note 10 mwN).

43 However, for the court of appeal to be bound by the facts established by the court of first instance, it is not sufficient - in contrast to the review under appeal law (§ 559 (2) ZPO) - that the facts established by the court of first instance do not contain any procedural errors. Doubts as to the correctness and completeness of the findings relevant to the decision may also arise from the possibility of different assessments. This primarily refers to those cases in which the court of appeal assesses the results of a first-instance hearing of evidence, for example the statements of witnesses, differently from the lower instance (BGH, judgments of 9 March 2005 - VIII ZR 266/03, BGHZ 162, 313, 316 f; of 21 June 2016, ibid. of 29 June 2016 - VIII ZR 191/15, BeckRS 2016, 14159 marginal note 26; see also BVerfG, NJW 2003, 2524 and NJW 2004, 1487). Merely subjective doubts, merely abstract considerations or presumptions of incorrectness without tangible evidence do not oblige the parties to establish the facts again. Only objections of a legal or factual nature that can be objected to the findings of the first instance justify concrete evidence within the meaning of § 529.1 no. 1 half-sentence 2 ZPO (BGH, judgment of 8 June 2004 - VI ZR 230/03, BGHZ 159, 254, 258).

44 The Court of Appeal must examine of its own motion the entire case material of the first instance - including the result of the taking of evidence - for doubts as to the correctness and completeness of the establishment of facts. This must be done regardless of whether a corresponding appeal has been lodged. For with the admissible appeal, the entire process of establishing the facts of the case is in principle concluded.

substance of the first instance to the appellate instance without further ado (BGH, judgments of 12 March 2004 - V ZR 257/03, BGHZ 158, 269, 278 and of 9 March 2005
ibid. p. 318).

45 (2) In accordance with these principles, the Court of Appeal based its decision without error of law on the facts established by the Regional Court. In particular, the judgment on appeal is not based on a "narrowed standard" in the review of the first instance assessment of evidence. Contrary to the opinion of the appeal, the appellate court did not limit itself to a mere review of errors of law. Rather, as numerous passages of the judgment on appeal prove, it understood the assessment of evidence by the Regional Court on the basis of the entire case material and the appeals lodged by the plaintiffs and considered it free of legal errors as well as complete and convincing. Nor does the appeal state what the Court of Appeal allegedly ignored. To the extent that it complains that the mere presentation of the "mere possibility" of a different assessment of the results of the evidence and the factual material must suffice to give rise to doubts within the meaning of § 529.1 no. 1 half-sentence 2 of the Code of Civil Procedure, it merely attempts in an irrelevant manner to replace the court of appeal's formation of the court's conviction by its own without setting out errors of law.

46 bb) On the basis of the findings of the lower instances, which were made without legal error, there is already no violation of official duties by the PRT commander in the sense of a concrete (culpable) violation of rules of humanitarian (martial) international law for the protection of the civilian population. The tankers destroyed by the ordered air attack and the Taliban fighters killed in the process were legitimate military targets (see Article 50

(1), first sentence, ZP I in conjunction with Article 4(4)(a) A paras. 1, 2, 3 and 6 of the III Geneva Convention on the Treatment of Prisoners of War of 12 August 1949 [Federal Law Gazette II 1954 p. 838], Article 52 para. 2 sentence 2 ZP I). The PRT Commander Colonel K. has taken all reconnaissance measures that are practically possible in the concrete planning and decision-making situation. According to these, he had no (objective) reason to assume that in the immediate vicinity of the tanker trucks hijacked by the Ta- liban, civilians protected under international humanitarian law could be present in addition to (armed) fighters. There is therefore already no breach of official duty. If a soldier could not foresee or avoid a violation of international law for factual reasons, he does not commit a breach of official duty (see Dutta ibid. p. 227 footnote 182). In this respect, the same standard applies in principle as that applied by the recognising Senate with regard to the risk potential in the case of building plots with hidden contaminated sites. What a public official "does not see" at the time of his or her decision despite careful and expert examination and, according to the sources of knowledge available to him or her, also "does not need to see", cannot be taken into account by him or her and does not need to be taken into account by him or her (Senate, judgment of 13 July 1993 - III ZR 22/92, BGHZ 123, 191, 195).

47 (1) The appeal on a point of law that the Court of Appeal applied an incorrect standard when examining the means used in the light of international humanitarian law (in particular Article 13(2) ZP II) by failing to recognise that, according to the defendant's account, the destruction of the tankers was the sole aim of the bombing, but not the fight against the Taliban, is not valid.

48 The fact that the armed Taliban, who were in the immediate vicinity of the trucks they hijacked, were members of an organised armed group that was a party to the armed conflict is obvious and is not called into question by the revision. From the Defendant's order of 16 April 2010 - open version (preliminary proceedings of 3 FOJs 6/10-4 against Colonel K. and others) - on the content of the Defendant's defence, it follows that the two tankers were to be destroyed by the bombing, according to the PRT Commander's conception, and he expected that the air attack would also hit the surrounding Taliban. He especially expected that the Taliban leaders present would be hit. By eliminating them, he expected a noticeable weakening of the organization of the insurgents in Kunduz province. The radio communication between the air traffic control centre and the pilots of the fighter planes, which was reproduced extensively by the plaintiffs, does not say otherwise. Under time code 20:48:01, the air traffic control officer confirmed that the people in the tank trucks were also part of the target ("vehicles and the several individuals around are our target"). Furthermore, the defendant rightly points out in the reply to the appeal that the plaintiffs themselves have already argued in the first instance that the use of weapons applied to the insurgent Taliban and the tankers hijacked by them. The court of appeal therefore correctly assumed that the PRT commander had considered and selected both the two hijacked tankers and the Taliban present in the area of these vehicles as permissible military targets.

49 In this context, it is irrelevant whether the intelligence warning of 15 July 2009 to the PRT commander concerning a planned vehicle-based bomb attack against the PRT

Kunduz was still current on September 4, 2009. Because the rebellious Taliban were allowed to use military means to attack the tankers filled with large quantities of petrol and diesel fuel and the large numbers of Taliban fighters assembled on the ground.

50 (2) (a) International humanitarian law prohibits attacks against the civilian population as such or individual civilians (Art. 51 para. 2 sentence 1 ZP I, Art. 13 para. 2 sentence 1 ZP II). Attacks against a military target are also prohibited if the civil damage to be expected at the time of the order to attack is disproportionate to the concrete and direct military advantage expected (Art. 51 para. 5 letter b, Art. 57 para. 2 letter a [iii] ZP I). The prohibition of excesses is a specifically military proportionality clause, according to which collateral damage such as the death of civilians is not disproportionate if the military advantage (e.g. weakening of the enemy troops or their weapons) is only a short-term, non-conflict-decisive one (order for discontinuation of the Advocate General, loc. cit. p. 64). In addition to the obligation to maintain military proportionality, there is the requirement of the mildest means, i.e. explosive ordnance that can also hit civilians must be used as gently as possible - taking all possible practical precautions (Article 57 para. 2 letter a [ii] ZP I). According to Art. 57 para. 2 letter c ZP I, attacks that may affect the civilian population must be preceded by an effective warning. This obligation is subject to the proviso that "given circumstances" do not prevent it. In this way, international humanitarian law takes into account in particular the legitimacy and military necessity of surprise attacks (injunction of the Federal Public Prosecutor General, loc. cit. p. 67 mwN).

51 The general requirement to take precautionary measures (cf. Art. 57 ZP I) consists above all in a careful reconnaissance of the (military) situation and the battlefield. The units planning and commanding the operation must endeavour to exhaust all available reconnaissance and intelligence resources in order to obtain certainty about the military character of the objective (cf. Art. 57 para. 2 letter a [i] ZP I; Raap BWV 2016 p. 129).

52 These principles, which are laid down in particular in Art. 51 and Art. 57 ZP I, do not only apply to international armed conflicts. Rather, they are also part of international humanitarian law in the case of non-international armed conflicts (see also the Common Article 3.1 No. 1 letter a of the Geneva Red Cross Conventions of 12 August 1949, Federal Law Gazette 1954 II pp. 783 f, 813 f, 838 f, 917 f; see Frau, JZ 2014, 417, 420).

53 (b) In assessing whether there has been a (culpable) violation of international humanitarian law, the standard of due diligence is not the ex post view. Rather, it depends on the - fact-based - expectations at the time of the military action (Raap ibid.; Order of the Federal Public Prosecutor General ibid. p. 65 mwN). That military decisions in a combat situation are to be judged from the ex ante perspective of the commander follows from the wording of the provisions of the first Additional Protocol to the Geneva Conventions that protect the civilian population. According to these provisions, the planning and execution of an attack depends on whether losses among the civilian population are "to be expected" (cf. Art. 51 para. 5 letter b, Art. 57 para. 2 letter a [iii], b ZP I). The necessary precautions in accordance with Art. 57 ZP I (precautionary measures in case of attack)

A military commander can only make an assessment on the basis of the knowledge available to him in the planning and execution of the attack. The commander must not be reproached for circumstances which he neither knew nor had to know, but which only become apparent afterwards (Memorandum on the Additional Protocols to the Geneva Conventions, BT-Drucks. 11/6770 S. 113). The Federal Government (with the consent of the legislature) issued a corresponding declaration of interpretation in connection with the ratification of the Additional Protocols to the Geneva Conventions (Annex 3 No. 4 to the draft law on Additional Protocols I and II to the Geneva Red Cross Conventions of 1949, Bundestag printed paper. 11/6770 S. 132).

54 (c) Contrary to the opinion of the appeal, the Court of Appeal assumed without error of law that the PRT Commander Colonel K. had taken all educational measures practically possible in the concrete planning and decision-making situation. According to the findings of the lower instances, which were not disputed by the appeal, the situation on the sandbank was observed without interruption for at least 20 minutes by the two combat aircraft used, whereby the infrared images produced by the on-board cameras were transmitted in real time to the air traffic control centre and evaluated there. In addition, the PRT commander assured himself for the seventh time by telephoning a military informant who reported on the situation on the ground that the persons visible on the infrared images were insurgents and not civilians. The PRT commander had the assessment of the fighter pilots at his disposal as a further means of reconnaissance. After all, there were no indications of the presence of civilians in the target area of the air attack. There was also no evidence that the civilian drivers of the hijacked trucks could still be in the vicinity-

ten. Further precautionary measures to protect the civilian population in the sense of Art. 51, 57 ZP I were therefore not to be considered.

55 (aa) The appeal does not succeed in its complaint that the Court of Appeal failed to take into account that the pilots of the fighter aircraft had made a (fivefold) urgent recommendation for a "show of force" (low-level flight as a warning) because of serious doubts about the combatant status of the persons in the tankers. From the transcript of the radio communication between the air traffic control centre and the pilots referred to by the plaintiffs, it is already not evident that the pilots doubted the communication of the control centre based on the information of the intelligence informant that the persons in the vicinity of the tankers were Lebanese. Since, according to all available sources of information, the presence of civilians was not to be expected, Colonel K. did not need to respond to the suggestion of warning the people present at the tankers by means of a "show of force". Moreover, the specific circumstances spoke against such a warning, because this would have simultaneously thwarted the legitimate military objective of combating the Taliban present (see Article 57.2 letter c, second half-sentence, ZP I).

56 (bb) Insofar as the appeal claims that the PRT commander was not allowed to rely on the information provided by the alleged informant on site, this is irrelevant under appeal law, because the plaintiffs only make their own assessment of the unobjectionable judicial assessment. Nor does the appeal state why Colonel K. should have had doubts about the informant's ability to perceive and reliability from the relevant ex ante perspective. The competent intelligence officer had classified the informant as "usually credible". His

Reports on the hijacking and stoppage of tank trucks and the appearance of large Taliban groups had proved to be accurate. Moreover, the appeal does not show that Colonel K. would have had the opportunity to verify the exact location of the informant and his view of the events in the concrete situation of the decision (at night and in a contested area).

57 There is no infringement of the principles of the secondary burden of proof. The defendant disclosed the information received from the informant during the trial. The fact that he was "on the spot" was undisputed both in the first instance and on appeal and was first questioned by the plaintiffs after the end of the oral appeal hearing, which the court of appeal rightly considered to be in accordance with
§§ Sections 525, 296a ZPO has been treated irrelevant.

58 (cc) NATO's Rules of Engagement for the deployment of ISAF forces, which are also cited by the Review, do not lead to any assessment. The revision does not explain, nor is it otherwise apparent, that the Rules of Engagement, which primarily focused on the expediency of military action and regulated decision-making powers, went beyond the requirements of international humanitarian law and were contrary to the air attack. Rules of engagement - like the Central Service Regulation 15/2 of the Federal Ministry of Defence - only serve to ensure compliance with the rules of international humanitarian law in armed military operations.

III.

59 The plaintiffs' appeal is to be rejected on all counts, whereby it can be questioned whether the Federal Republic of Germany is at all legitimated to act as a passive in armed foreign missions of the Bundeswehr under the operational leadership of NATO pursuant to Article 34 sentence 1 of the Basic Law.

Herrmann TombrinkRemmertReiter

Pohl

Lower courts:
Bonn District Court, decision of 11 December 2013 - 1 O 460/11 - Cologne Higher Regional Court, decision of 30 April 2015 - 7 U 4/14 -