

# Two Calls from Kunduz: National Security Implications of Divergent Domestic Legal and Policy Frameworks

*NEW VOICES IN NATIONAL SECURITY LAW: WORKS-IN-PROGRESS*

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BRIAN L. COX

ADJUNCT PROFESSOR OF LAW, CORNELL LAW

VISITING SCHOLAR, QUEEN'S LAW

JUDGE ADVOCATE, U.S. ARMY (RETIRED)

# Initial matters

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Two incidents in Kunduz, Afghanistan

- German armed forces; September 4, 2009
- U.S. armed forces; October 3, 2015

Three lines of inquiry

- 1. What can we learn from differences in approach? (comparative conflict law)
- 2. Were conclusions accurate and adequate? (socio-legal perspective)
- 3. Were lessons learned by US military adequate? (formalistic, doctrinal perspective)

# German armed forces Omar Kheil, 7 km SW of Kunduz City Kunduz Province, Afghanistan September 4, 2009



## Luftangriff in Afghanistan

4. September 2009





# U.S. armed forces City of Kunduz Kunduz Province, Afghanistan October 3, 2015



**MSF TRAUMA HOSPITAL  
KUNDUZ, AFGHANISTAN**

**#INDEPENDENTINVESTIGATION  
CHANGE.ORG/EVENWARHASRULES**

Satellite image taken 8 October 2015

— Destroyed main hospital building — MSF compound



MSF TRAUMA CENTRE  
36°43'4.91"N 68°51'43.96"E

MSF OFFICE  
36°43'3.29"N 68°51'42.62"E



# Comparison of approaches – *overview*

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## German approach

- International law: Rome Statute and Additional Protocol I to 1949 Geneva Conventions
- Domestic accountability system: Federal Prosecutor-General

## US approach

- International law: *not* state party to Rome Statute *or* API
- Domestic accountability system: Military commander(s)

# Conclusions and accountability procedures – *overview*

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## German Prosecutor-General

- Not “war crime”: no violation of Code of Crimes against International Law (CCAIL) (Völkerstrafgesetzbuch, or VStGB)
- Not murder: no violation of § 211 (murder), German Criminal Code (Strafgesetzbuch, or StGB)

## US military commanders

- Not “war crime”: not “intentional” (investigation)
- No criminal prosecution (pursuant to UCMJ)
- Administrative measures imposed

# Approach and conclusions *in focus* – German Prosecutor-General

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Not “war crime” – not violation of CCAIL (VStGB)

- Analysis
  - Circumstances known at the time
  - Perspective at the time of attack
- Conclusions
  - Objective element: ✓
  - Subjective element: X

Not “murder” – not violation of GCC (StGB)

- Conclusions
  - Objective element: ✓
  - Subjective element: ✓
  - Justified by IHL: ✓

Violation of IHL?

- Distinction: X
- Proportionality: X
- Reasonable precautions: X



# Approach and conclusions *in focus* – US investigation (1)

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## Not “war crime”

- Analysis
  - “The label ‘war crimes’ is typically reserved for *intentional* acts – *intentionally* targeting civilians or *intentionally* targeting protected objects.”
- Conclusion
  - Not “intentional”, so not a war crime

## Violation of UCMJ?

- Analysis: \_\_\_\_\_ (?)
- Conclusions: \_\_\_\_\_ (?)



# Approach and conclusions *in focus* – US investigation (2)

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## Violation of IHL?

- Distinction: ✓ - *but*, is conclusion accurate?
  - “Neither [the air or ground] commander distinguished between combatants and civilians nor a military objective and protected property.” “Even though the Navigator, [redacted] didn't fully describe the actions of the nine people [that were observed in the compound prior to the attack], this mistake doesn't exonerate the [ground force commander] from authorizing an engagement of the compound that resulted in 211 rounds fired, the destruction of the main building and deaths of 30 people.”
- Proportionality: ✓ - *but*, is conclusion accurate?
  - “Proportionality assumes that the target to be engaged is a lawful military objective. Therefore, any engagement of a target that is not a lawful military objective is facially disproportional.”
- Reasonable precautions: ? (distinction again?)
  - “The aircrew failed to take feasible precautions to reduce the risk of harm to individuals they could not positively identify as combatants. The aircrew consistently engaged individuals that it did not positively identify as a threat for 30 minutes.”



# Line of inquiry 1: What can we learn from differences in approach? (comparative conflict law)

Military justice system: military commander or referral to independent prosecutor

- German method: referral to independent prosecutor
- US method: military commander advised by military attorney(s)

Plenary observation of juridical processes

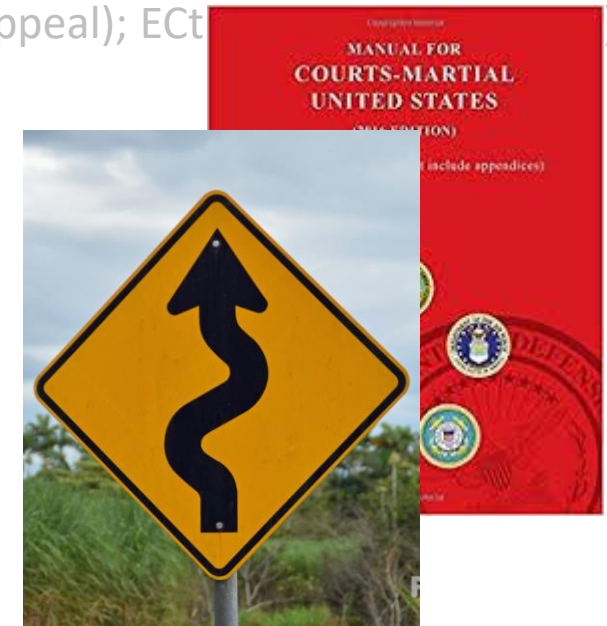
- German method: Criminal – Prosecutor-General; Civil – Federal Court of Justice (appeal); ECtHR
- US method: Command decision

Public perceptions

- Pattern of criticism and response
- Public awareness and support of operations

Legitimacy imperative in coalition context

- Effect of 2009 incident in public consciousness: German, U.S.
- Effect of 2015 incident on public consciousness: US



# Line of inquiry 2: Were conclusions accurate and adequate?

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## German Prosecutor-General

- Conclusions
  - Not war crime: objective test satisfied, but not subjective (*ex ante* perspective)
  - Not violation of IHL
    - Distinction, proportionality, reasonable precautions
  - Not violation of criminal code: objective and subjective tests satisfied, but justified by IHL

## US military investigation and disposition authorities (commanders)

- Conclusions
  - Not war crime: not “intentional” – Purpose? Knowledge? *Dolus eventualis*?
  - Violation of LOAC
    - Distinction, proportionality, reasonable precautions (?)
  - Administrative measures imposed: not “no crime”, just “no prosecution”

# Line of inquiry 3: Were lessons learned by US military adequate?

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## LOAC violations cited

- Official conclusion: distinction, proportionality (*ex post* perspective)
- My conclusion: reasonable precautions in attack (*ex ante* perspective)

## Deficit of training

- Official conclusion: retrain personnel
- My conclusion: overhaul training model

## Use of force policy

- Official conclusion: simplify theater guidance
- My conclusion: comprehensive review/revision of doctrine and policy
  - LOAC principles, standardize terminology, roles and responsibilities

## Effects?

- Prevention, public support (domestic and abroad), coalition interoperability



# Discussion & questions

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