High Altitude Legality: Visuality and Jurisdiction in the Adjudication of NATO Air Strikes

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Abstract

Air strikes are the signature modality of violence used by NATO militaries. When civilian victims of NATO air strikes have turned to courts in NATO countries, they have generally not been successful. What are the legal techniques and legal knowledges deployed in Western courts that render Western aerial violence legal or extralegal? The article analyzes the responses by European courts to two sets of NATO bombings: the 1999 bombing of Yugoslavia and a September 2009 air strike near Kunduz, Afghanistan. The judgments rely on two forms of "legal technicalities": the drawing of jurisdictional boundaries that exclude the airspace taken up by the bombers and the ground on which victims stood when they were killed as well as particular visual regimes that facilitate not seeing people on the ground as civilians.

Keywords: international humanitarian law, civilians, armed conflict, jurisdiction, visuality, visibility, technologies

Résumé

Les frappes aériennes constituent la modalité de violence de prédilection utilisée par les forces armées de l'OTAN. Lorsque les victimes civiles de ces frappes aériennes se sont adressées aux tribunaux des pays membres de l'OTAN, elles n'ont généralement pas obtenu gain de cause. Quelles sont les techniques et les savoirs juridiques déployés dans les tribunaux occidentaux qui ont pour effet de rendre les violences aériennes occidentales légales ou extralégales? En réponse à cette question, le présent article analyse les réponses des tribunaux européens à l'endroit de deux séries de bombardements ordonnés par l'OTAN: le bombardement de la Yougoslavie en 1999 et une frappe aérienne près de Kunduz en Afghanistan réalisée en septembre 2009. Les jugements reposent sur deux formes de « technicalités juridiques ». La première est relative à la définition de limites juridictionnelles qui

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excluent l'espace aérien repris par les bombardiers et le terrain sur lequel se trouvaient les victimes lorsqu'elles furent tuées. La seconde est, quant à elle, reliée aux régimes visuels particuliers ayant permis d'interpréter la présence de personnes sur le terrain comme n'étant pas des civils.

Mots clés : droit international humanitaire, civil, conflits armés, juridiction, visualité, visibilité, technologies

1. Introduction

Air strikes are a signature modality of violence used by NATO militaries. Yet despite claims to ever more "smart bombs" resulting in "precision" strikes and rhetorical commitments to protecting civilians, air strikes consistently kill significant numbers of persons who did not take part in hostilities.[1] A plethora of reports by human rights organizations, academic publications, and media reports seek to establish whether specific air strikes or larger patterns of targeting are in violation of the laws of armed conflict.[2] However, air strikes are rarely subject to legal scrutiny by courts and prosecutors. When civilian victims of NATO air strikes have sought redress from courts in NATO states, they have not been successful.[3] Victims of NATO bombings in Afghanistan and Iraq have occasionally been offered *ex gratia* payments in compensation, but these payments imply no admission of wrongdoing.[4]

What happens when NATO airstrikes are subjected to legal judgment by prosecutors and courts? What are the legal techniques that render Western aerial violence legal or extralegal?[5] In this article, I analyze the responses by national, regional, and international courts to two sets of NATO bombings: the 1999 bombing

1 See Maja Zehfuss, *War & the Politics of Ethics* (Oxford: Oxford University Press, 2018).

2 See Neta Crawford, *Accountability for Killing: Moral Responsibility for Collateral Damage in America's Post-9/11 Wars* (New York: Oxford University Press, 2013); Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (Cambridge: Cambridge University Press, 2015); Amnesty International, "'Collateral Damage' or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force," <https://amnesty.no/natofederal-republic-yugoslaviacollateral-damage-or-unlawful-killings> (accessed 25 February 2019); Human Rights Watch, "The Crisis in Kosovo," <https://www.hrw.org/reports/2000/nato/Natbm200-01.htm> (accessed 25 February 2019); United Nations Assistance Mission to Afghanistan Reports on the Protection of Civilians in Armed Conflict <https://unama.unmissions.org/protection-of-civilians-reports> (accessed 25 February 2019).

3 See: ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, released 6 June 2000 <http://www.icty.org/x/file/Press/nato061300.pdf> (accessed 23 May 2018); European Court of Human Rights, *Banković v. Belgium* (admissibility), Application No. 52207/99, 12 December 2001; Generalbundesanwalt am Bundesgerichtshof, *Einstellungsvermerk im Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel* W., 3 BJs 6/10-4 (offene Version), 16 April 2010; Verwaltungsgericht Köln, *Judgment*, 9 February 2012, Az. 26 K 5534/10 ≤https://openjur.de/u/453623.html> (accessed 6 July 2018) [VG Köln]; Landgericht Bonn, *Judgment*, 11 December 2013, Az. 1 O 460/11 <http://openjur.de/u/667409.html> (accessed 1 June 2018); Oberlandesgericht Köln, *Judgment,* 30 April 2015, Az. 7 U 4/14 <http://openjur.de/u/854919.html> (accessed 1 June 2018) [OLG Köln]; Bundesgerichtshof, *Judgment*, 6 October 2016, III ZR 140/15 [BGH].

4 See Elisabeth Henn, "The Development of German Jurisprudence on Individual Compensation for Victims of Armed Conflict," *Journal of International Criminal Justice* 12 (2014): 625.

5 On the many opposites of legality in international law, see Fleur Johns, *Non-Legality in International Law: Unruly law* (New York: Cambridge University Press, 2013).

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of Yugoslavia that has been brought to the attention of the European Court of Human Rights (ECtHR) and the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY), as well as a September 2009 air strike near Kunduz, Afghanistan, which was litigated in German courts. The criminal investigations did not yield any indictments. The victims' human rights complaints as well as civil compensation suits were unsuccessful. While individual decisions have been analyzed in the literature,[6] this article aims to establish patterns across different sets of litigation for airstrikes.

I argue that the decisions in these cases rely on two distinct forms of "legal technicalities"[7] which render the aerial violence either legal or beyond the purview of applicable law. First, courts draw jurisdictional boundaries that exclude the airspace taken up by the bombers and the ground on which victims stood when they were killed. Second, when jurisdiction cannot be denied, prosecutors and courts review the visual evidence in ways that confirm the claims and assumptions of the purveyors of aerial violence.

Jurisdiction "sorts the where, the who, the what, and the how of governance through a kind of chain reaction."[8] Jurisdictional rules create and order spaces by determining how and by whom they are governed.[9] The differential applicability of legal norms across spaces is not automatically suspect. Yet jurisdictional restrictions can be used to facilitate state violence without legal recourse if states exercise physical control of territories that they carefully place "outside the full jurisdiction"[10] of state law, whether in Iraq after the 2003 invasion,[11] Pakistan's FATA territories,[12] or Guantánamo Bay.[13] In these cases, the projection of state power in

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6 On the ICTY, see Andreas Laursen, "NATO, the War over Kosovo, and the ICTY Investigation," *American University International Law Review* 17 (2002): 765–814; W. J. Fenrick, "Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia," *European Journal of International* Law 12 (2001); Paolo Benvenuti, "The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia," *European Journal of International Law* 12 (2001): 503–29; on Banković, see Matthew Happold, "Banković v. Belgium and the Territorial Scope of the European Convention on Human Rights," *Human Rights Law Review* 3 (2003): 77–90; Alexandra Rüth and Mirja Trilsch, "Banković v. Belgium (Admissibility), App. No. 52207/99," *American Journal of International Law* 97 (2003): 168–72; Erik Roxstrom, Mark Gibney, and Terje Einarsen, "The NATO Bombing Case (Banković et al. v. Belgium et al.) and the Limits of Western Human Rights Protection," *Boston University International Law Journal* 23 (2005), 55–136; on Kunduz, see Andreas Fischer-Lescano and Steffen Kommer, "Entschädigung für Kollateralschäden? Rechtsfragen anlässlich des Luftangriffs bei Kunduz im September 2009," *Archiv des Völkerrechts* 50 (2010): 156–90; Martina Kolanoski, "Undoing the Legal Capacities of a Military Object: A Case Study on the (In)Visibility of Civilians," *Law & Social Inquiry* 42 (2017): 377–97.

7 Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory," *Social & Legal Studies* 18 (2009): 139–57; also see Marie-Eve Sylvestre, et al., "Spatial Tactics in Criminal Courts and the Politics of Legal Technicalities," *Antipode* 47 (2015): 1346–66; Annelise Riles, "A New Agenda for the Cultural Study of Law: Taking on the Technicalities," *Buffalo Law Review* 53 (2005): 973–1033.

8 Valverde, "Jurisdiction and Scale," 144.

9 See Valverde, "Jurisdiction and Scale."

10 Eyal Weizman, *Forensic Architecture: Violence at the Threshold of Detectability* (New York: Zone, 2018), 31.

11 European Court of Human Rights, *Al-Skeini v. United Kingdom*, application 55721/07 (7 July 2011) (affirming the jurisdiction of the European Convention on Human Rights for UK military violence committed in Iraq in 2003).

12 Weizman, *Forensic Architecture*, 31

13 See Safiyah Rochelle, "Encountering the Muslim," in this volume.

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the absence of legal jurisdiction produces "juridical thresholds"[14] that separate the "legal space[s]"[15] where rights apply from the spaces of violence beyond the purview of the courts. Jurisdiction not only orders spaces, but also shapes the public visibility of violence. The denial of jurisdiction facilitates what can be called *legal anaesthesia*, drawing on Feldman's description of "cultural anesthesia" as "the banishment of disconcerting, discordant, and anarchic sensory presences and agents that undermine the normalizing and often silent premises of everyday life."[16] If a case is inadmissible for jurisdictional reasons, courts will normally not evaluate the substance of the claims brought against the state, thereby muting the claims of the victims in the legal arena.[17]

Whereas the denial of jurisdiction pre-empts courts from reviewing the substance of the case altogether, courts and prosecutors that assess the merits of claims face choices in *re-viewing* the visual evidence. In many cases of contested aerial violence, the aerial identification of people on the ground as civilians or non-civilians is at the heart of the dispute.[18] Since violations of the laws of war typically require intent or at least knowledge of the presence of civilians, the evidence brought forward often includes video footage of the incident from the perspective of the bomber. The prosecutors and judges decide whether the officers saw, could have seen, or should have seen the people on the ground *as* civilians.[19] Seeing civilians is a complex process that requires *seeing* persons on the ground and identifying them *as* civilians; it requires visual expertise and a conceptual understanding of the civilian status and its possible markers.[20] On the basis of their training and experiences, soldiers were all too often unable to imagine, expect, or see people on the ground as non-combatants. After reviewing the aerial video footage, prosecutors and courts usually concur with the visual interpretations offered by the pilots, weapons officers, and ground control staff. These visual alignments are based on widely shared cultural preferences for the aerial view as the perspective of knowledge, power, and objectivity as well as on "racially inflected regime[s] of visuality"[21]

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14 Weizman, *Forensic Architecture*, 33.

15 ECtHR, *Banković v. Belgium*, para 80.

16 Allen Feldman, "On Cultural Anesthesia: From Desert Storm to Rodney King," *American Ethnologist* 21 (1994): 405.

17 In the litigation for civil compensation for the Kunduz airstrike (see below), the trial court and appellate court affirmed jurisdiction. Only the Supreme Court denied it. As a result, the substance of the claims has been publicly adjudicated. In the *Banković* case, in contrast, the European Court of Human Rights denied jurisdiction and therefore did not discuss any other dimensions of the claims brought forward.

18 See Lauren Wilcox, *Bodies of Violence: Theorizing Embodied Subjects in International Relations* (New York: Oxford University Press, 2015), 132.

19 On "seeing as," see Janet Vertesi, *Seeing Like a Rover: How Robots, Teams, and Images Craft Knowledge of Mars* (Chicago: University of Chicago Press, 2015); Jeff Coulter and E. D. Parsons, "The Praxeology of Perception: Visual orientations and practical actions," *Inquiry* 33 (1990): 269; Patrick G. Watson, "The Documentary Method of [Video] Interpretation: A paradoxical verdict in a police-involved shooting and its consequences for understanding crime on camera," *Human Studies* 41 (2018): 121–35.

20 On seeing and concepts, see Wes Sharrock and Jeff Coulter, "On What We Can See," *Theory & Psychology* 8 (1998): 147–64.

21 Joseph Pugliese, "Asymmetries of Terror: Visual regimes of racial profiling and the shooting of Jean Charles de Menezes in the context of the war on Iraq," *Borderlands* 5 (2006), para 7 <www.borderlands.net.au./vol5no1_2006/pugliese.htm> (accessed 21 February 2019).

in which some bodies are pre-emptively identified as violent. Although the aerial view is often understood as the "vantage point of absolute power,"[22] it is based on "a high degree of chance, luck, and confusion."[23] The prosecutors' and courts' adjudication of sight and vision treats the use of visual technologies as fulfilling requirements of due diligence irrespective of the specific visual interpretations that the officers engaged in. The visual technologies used in air strikes provide a defence mechanism for NATO soldiers accused of violating the laws of armed conflict.

Drawing on literatures about visuality, technologies, race, and jurisdiction as well as the existing analyses of litigation involving air strikes, I show that in the few cases in which NATO aerial bombardments were indeed subject to legal judgment, two separate legal techniques rendered the violence legally unobjectionable. The rulings on jurisdiction render aerial violence juridically invisible, while the guided re-viewing of the video evidence from the aerial perspective confirms the dominance of scopic regimes in which civilians are either unexpected presences or questionable in their status. The claim is not that the courts would bend the law to shield Western violence from legal scrutiny. Rather, the separation between spaces of law and spaces of violence that guides jurisdictional assessments is deeply entrenched in European law, and the jurists adjudicating aerial violence often share the visual regimes that animated the purveyors of aerial violence.

Before analyzing the legal responses to the 1999 NATO bombing of Yugoslavia (III.) and the 2009 Kunduz airstrike (IV.), I clarify theoretical assumptions and resources that guide these analyses (II.).

2. Visual Regimes

We do not see with our eyes alone. In the process of seeing, we draw on the biological capacities of our eyes as well as visual technologies such as glasses or infrared cameras; we decide to focus our attention, our eyes, or the camera; we choose a point of view;[24] we draw on our skills in attributing and distinguishing different visual phenomena;[25] and we employ the cultural and professional frames we use to name, interpret, and argue about what we see.[26] We might ask others to look at what we see, drawing them closer, pointing at details in our shared field of vision, inviting them to see with us and feeling glad that they see what we see. If seeing is "a reading, that is, a contestable construal,"[27] visibility is

[22] Wilcox, *Bodies of Violence*, 145.

[23] Peter Adey, Mark Whitehead, and Alison Williams, "Introduction: Visual Culture and Verticality," in *From Above: War, violence, verticality,* ed. Adey, Whitehead, and Williams (Oxford & New York: Oxford University Press, 2013), 1–18.

[24] See Paul K. Saint-Amour, "Photomosaics: Mapping the front, mapping the city," in *From Above: War, violence, and verticality,* ed. Adey, Whitehead, and Williams (Oxford: Oxford University Press, 2013), 121.

[25] See Janet Vertesi, "Drawing As: Distinctions and disambiguation in digital images of Mars," in *Representation in Scientific Practice Revisited*, ed. Catelijne Coopmans, Janet Vertesi, Michael Lynch, and Steve Woolgar (Cambridge: MIT Press, 2014), 15–35; Fleur Johns, "Data, Detection, and the Redistribution of the Sensible in International Law," *American Journal of International Law* 111 (2017): 57–103.

[26] See Charles Goodwin, "Professional Vision," *American Anthropologist* 96 (1994): 606–33.

[27] Judith Butler, "Endangered/Endangering: Schematic racism and white paranoia," in *The Judith Butler Reader,* ed. Sarah Salih (Malden, MA: Blackwell, 2004), 206.

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"contingent"[28] and produced by technologies and "scopic regimes."[29] A few distinct threads from the rich literature on visual perception and seeing with technologies can help identify the problems with seeing civilians and the judicial re-viewing of video footage of aerial violence.

First, psychological, philosophical, and ethnographic approaches to visual perception stress that while seeing involves biological and neurophysiological processes, "sensory neurophysiology is not in the business of explaining how it is that we can specifically see apples, oranges, sticks, and stones."[30] Seeing something "hinges upon my knowledge of what that word means, and that will involve knowing its rules of application, knowing how to use it to refer to something correctly."[31] The widely used Wittgensteinian shift from "seeing" to "seeing as" places even more stress on the concepts that are used to articulate observations.[32] *Seeing as* is a powerful concept for dealing with "ambiguity about which features are salient": "While the image does not change, in appreciating its same components in a different way you may suddenly experience a different observation."[33]

Second, social scientists have emphasized that because seeing relies on interpretation, concepts, and judgment, it is a social, professional, and embodied activity.[34] For example, as research of video evidence of violence has demonstrated, "the same footage can show, highlight or focus attention on different things; it is not typically exhausted by the uses to which it is put on any particular occasion but remains open to alternative uses."[35] In the process of collective visual interpretation, talking and gestures serve as "instructions for seeing."[36] Ethnographers have shown that in professional work contexts, a collective vision "requires a mutual entanglement of ordered vision and institutional agency."[37] The work of crafting and seeing images serves to "construct communities" of shared vision and purpose.[38] If seeing is a profoundly social, interactional, and affect-laden mode of perception that "is jointly achieved in and through the actual course of an activity,"[39] it "belongs within the public and normative order of activity, rather than taking place under an individual's skin."[40] As a consequence, inquiries into the visual practices of prosecutors and courts are important components of socio-legal studies.[41]

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28 Ryan Bishop, "Project Transparent Earth and the Autoscopy of Aerial Targeting," in *From Above: War, violence, and verticality,* ed. Adey, Whitehead, and Williams (Oxford: Oxford University Press, 2013), 191.
29 See Derek Gregory, "From a View to a Kill."
30 Sharrock and Coulter, "On What We can See," 161.
31 Sharrock and Coulter, "On What We can See," 157.
32 Coulter and Parsons, "The Praxeology of Perception," 269; also see Watson, "The Documentary Method"; Vertesi, *Seeing Like a Rover*.
33 Vertesi, *Seeing Like a Rover*, 79.
34 See Vertesi, *Seeing Like a Rover*; Goodwin, "Professional Vision"; Sharrock and Coulter, "On What We can See"; Coulter and Parsons, "The Praxeology of Perception."
35 Michael Mair, Chris Elsey, Paul V. Smith, and Patrick G. Watson, "War on Video: Combat footage, vernacular video analysis and military culture from within," *Ethnographic Studies* 15 (2018): 84.
36 Aug Nishizaka, "Seeing What One Sees: Perception, emotion, and activity," *Mind, Culture, and Activity* 7 (2000): 114.
37 Vertesi, *Seeing Like a Rover*, 16.
38 Vertesi, *Seeing Like a Rover*, 98.
39 Nishizaka, "Seeing What One Sees," 106.
40 Nishizaka, "Seeing What One Sees," 106.
41 See Mair et al., "War on Video"; Watson, "The Documentary Method."

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Third, if seeing is a contested and situated activity informed by professional vocabularies, cultural norms, fears, and expectations, how do we explain the disproportionate use of state violence against racialized people in the United States, Canada, and elsewhere? The 1991 acquittal of police officers whose beating of the Black motorist Rodney King was caught on videotape has sparked important critical analyses of professional vision, race, and fear. Charles Goodwin examines the visual practices of the defense lawyers and their police officer clients as part of his study on "professional vision," arguing that seeing is a "socially situated activity accomplished through the deployment of a range of historically constituted discursive practices."[42] Judith Butler describes these discursive practices as the "racist organization and disposition of the visible" that works to "circumscribe what qualifies as visual evidence."[43] Allen Feldman shows that the unwillingness to see the police violence on tape *as* police violence is tied to processes of "cultural anesthesia" which are based on "a graded sensory scale"[44] on which King's "capacity to sense and remember pain"[45] did not register. Goodwin, Butler, and Feldman ask us to consider how the variability of sight systematically mutes, blurs, and ignores state violence inflicted on racialized bodies. In his analysis of the police killing of Jean Charles de Menezes, Joseph Pugliese argues that "the physiology of seeing was mediated at every level by a racialized regime of visuality that proceeded to resignify virtually every aspect" of Menezes.[46] Safiyah Rochelle argues that Muslim bodies are "apprehended" in ways that are "semi-sensorial," involving anticipatory affect, perception, and practices of violence.[47] Race doesn't exclusively operate in the domain of the visible, but it structures visual perception.

How can analyses of seeing as a socially situated activity shaped by a "racially inflected regime of visuality"[48] help us make sense of how NATO officers see civilians from the air? It is important to distinguish between *seeing humans* and seeing them *as civilians*. Seeing people from the sky can be a challenge. Officers who relied on night vision technologies found that human bodies were visible as generic dots, almost at the "threshold of detectability"[49] and devoid of unique identifying characteristics. Yet seeing humans is still easier than seeing them as civilians. What does a civilian look like? Civilians don't wear uniforms; there is no distinctive sign or dress that distinguishes them. The civilian status is often gendered: women and children are more easily imagined to be civilians.[50] The civilian status is also racialized and spatialized: historically non-combatants outside of Europe and

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42 Goodwin, "Professional Vision," 606.
43 Butler, "Endangered/Endangering," 206.
44 Feldman, "On Cultural Anaesthesia," 412.
45 Feldman, "On Cultural Anaesthesia," 410.
46 Pugliese, "Asymmetries of Terror," para 7.
47 Safiyah Rochelle, "Encountering the Muslim: Guantanamo Bay detainees and the apprehension of violence," *Canadian Journal of Law and Society* 34 (2019): 209-225.
48 Pugliese, "Asymmetries of Terror," para 8.
49 Weizman, *Forensic Architecture*, 20.
50 See Helen Kinsella, *The Image Before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca: Cornell University Press, 2011); Claire Garbett, *The Concept of the Civilian: Legal recognition, adjudication and the trials of international criminal justice* (Abingdon: Routledge, 2015).

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North America have often not been recognized as civilians.[51] At its core, the recognition of the civilian is not a question of technological capabilities, but of social and legal recognition. Seeing civilians in Afghanistan from the aerial perspective is different from seeing police violence in the United States caught on video. But in both cases, we need to ask how a "racially saturated field of visibility"[52] shapes which bodies are seen as threatening, unruly, and deserving of violence. We need to inquire into the visual regimes that allowed the pilots and ground crews to not see the dots on the screen as civilians, allowed the prosecutors to affirm the classification of civilian deaths as incidental, and convinced courts to view the aerial violence as beyond the purview of the law they were empowered to apply.

3. "Unfortunately High" Civilian Casualties: The 1999 NATO Bombing of Yugoslavia in International Courts

3.1 Unruly Civilian Mobilities: The ICTY Prosecutor's Decision

From 24 March 1999 to 9 June 1999, the North Atlantic Treaty Organization (NATO) conducted a bombing campaign against the Federal Republic of Yugoslavia (FRY) that included more than 38,000 combat sorties, among them 10,484 strike sorties releasing 23,614 air munitions, killing between 400 and 600 civilians.[53] In 1993, the UN Security Council, with assent of key NATO states, had established the ICTY with "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[54] The architects of the Tribunal had envisioned that it would prosecute acts of violence by different armed forces and paramilitary groups from the states of the former Yugoslavia. Yet by bombing the same territory six years later, some of the states that drafted the treaty brought themselves under ICTY jurisdiction.

On 14 May 1999, while the NATO bombing campaign was still ongoing, the ICTY prosecutor took the unusual step of convening a committee to "assess the allegations" against NATO states in response to "numerous requests."[55] The committee's report was issued on 13 June 2000 and recommended no prosecutions.[56] The ICTY prosecutor accepted the report. The committee focused on twenty-one specific incidents with particularly high civilian casualties and reviewed the five "most problematic" incidents in detail.[57] Of these five incidents, one involved a target misidentification (the Chinese Embassy was mistaken for a Yugoslav government building), one involved a target with a disputed military status (the attack on Radio Television Serbia), and the remaining three strikes raised

[51] See Christiane Wilke, "How International Law Learned to Love the Bomb: Civilians and the regulation of aerial warfare in the 1920s," *Australian Feminist Law Journal* 44 (2018): 29–47.
[52] Butler, "Endangered/Endangering," 205.
[53] ICTY, *Final Report*, para 54. Also see Amnesty International, "NATO/Federal Republic of Yugoslavia: 'Collateral Damage' or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force," 5 June 2000, Index number: EUR 70/018/2000 <https://www.amnesty.org/download/Documents/140000/eur700182000en.pdf> (accessed 23 May 2018), 1.
[54] ICTY Statute, Art. 1 <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> (accessed 6 July 2018).
[55] ICTY, *Final Report*, para 2.
[56] ICTY, *Final Report*.
[57] ICTY, *Final Report*, para 57.

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questions about the visual identification of civilians from the air. I will focus on these cases of civilian misidentification.

First, on 12 April 1999, a NATO aircraft launched two laser guided bombs at a railway bridge over the Grdelica gorge just as a passenger train crossed the bridge.[58] The strike was aimed at the bridge, which was classified as a military target. It killed at least ten and wounded at least fifteen passengers of a civilian train that moved through and across the target area.[59] In press conferences, NATO officials stressed that the officer controlling the weapons "caught a flash of movement that came into the screen" and "suddenly the train appeared."[60] In the committee's assessment, "The crosshairs remain fixed on the bridge throughout, and it is clear from this footage that the train can be seen moving toward the bridge only as the bomb is in flight: it is only in the course of the bomb's trajectory that the image of the train becomes visible."[61] The officers later decide to drop a second bomb on the other end of the bridge, realizing too late that the impact of the first bomb had caused the train to move, resulting in a second hit on the train rather than on the bridge. While General Wesley Clark called the incident an "uncanny accident,"[62] analysts have suggested that the release of the second bomb was in violation of International Humanitarian Law because at that point the presence of civilians in the target area was obvious.[63] In addition, it became apparent that the video of the strike that NATO had shown had been artificially sped up to 3 or even 4.7 times the speed of the original incident. While NATO explained the sped-up version of the video as a result of a "'technical phenomenon' rather than human manipulation," the undisputed effect of the presentation was that the available reaction time appeared shorter than it had actually been.[64] The committee reporting to the ICTY prosecutor, taking note of these issues, decided that the first strike did not warrant an investigation. Regarding the second strike, the report notes that some committee members saw an element of recklessness, but the committee nonetheless decided by a narrow margin not to recommend an investigation.[65] In the judgment of the committee, the civilians, whose presence was unexpected and fleeting, especially when viewed in an accelerated video, were not sufficiently visible to the pilot and the weapons systems officer, rendering their deaths incidental rather than deliberate.

Second, the attack on the Djakovica Convoy occurred on 14 April 1999, when NATO aircraft dropped bombs on a convoy of about 1,000 Albanian refugees.

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58 ICTY, *Final Report*, para 58.

59 Whether the NATO practice of targeting bridges was in conformity with IHL is debated in the literature. See, for example, W. J. Fenrick, "Targeting and Proportionality," 497; Benvenuti, "ICTY Prosecutor," 520.

60 ICTY, *Final Report*, para 59.

61 ICTY, *Final Report*, para 61

62 NATO Headquarters Brussels, Press Conference with General Wesley Clark, 13 April 1999 <https://www.nato.int/kosovo/press/p990413a.htm> (accessed 5 July 2018).

63 Benvenuti, "ICTY Prosecutor," 520.

64 "NATO missile video 'no distortion,'" *BBC*, 7 January 2000 <http://news.bbc.co.uk/2/hi/europe/594800.stm> (accessed 5 July 2018). The speed with which video evidence of state violence should be replayed for viewing and interpretation in the courtroom has been the subject of dispute in a range of other cases. See Feldman, "On Cultural Anesthesia," 411.

65 ICTY, *Final Report*, para 62.

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About seventy to seventy-five civilians were killed, and one hundred were injured.[66] After initial denials of responsibility, NATO officials "confirmed that the aircraft had been flying at an altitude of 15,000 feet (approximately five kilometres) and that, in this attack, the pilots had viewed the target with the naked eye rather than aided by technology. The aim of the attack was to destroy Serb military forces, in the area of Djakovica, who had been seen by NATO aircraft setting fire to civilian houses."[67] Witnesses reported that the refugees had passed a Serb military caravan shortly before the attack. NATO deflected responsibility for the deaths of the Albanian refugees: "NATO regrets any harm to innocent civilians, and reminds that the circumstances in which this accident occurred are wholly the responsibility of (Yugoslav) President (Slobodan) Milosevic and his policies"[68] that had turned the people who were killed into refugees. The committee reporting to the ICTY prosecutor was convinced that "civilians were not deliberately targeted in this incident."[69]

Third, the attack on Koriša Village took place on 14 May 1999. NATO aircraft dropped ten bombs on the village, killing as many as eighty-seven civilians and wounding another sixty persons, most of them refugees.[70] According to the committee, "the primary target in this attack was asserted by NATO to be a Serbian military camp and Command Post located near the village of Koriša. It appears that the refugees were near the attacked object."[71] NATO officials insisted that they had hit a legitimate military target and that they "knew nothing of the presence of civilians and that none were observed immediately prior to the attack."[72] Witnesses described that the village did not have military personnel or objects aside from a few soldiers who had been billeted there.[73] NATO officials, in contrast, suggested that "displaced Kosovar civilians were forcibly concentrated within a military camp in the village of Koriša as human shields and that Yugoslav military forces may thus be at least partially responsible for the deaths there."[74] In the immediate aftermath of the attack, a NATO spokesperson said "If there are civilians at a military target, we didn't put them there."[75] The other party in the conflict was blamed for unexpected civilian presences and mobilities. The committee determined that, on the basis of the "credible information available," there was not sufficient evidence "to show that a crime within the jurisdiction of the Tribunal has been committed" in this case.[76]

How did visual regimes and visual technologies figure in the committee's assessment of the cases? Since a crime within ICTY jurisdiction would require

66 ICTY, *Final Report*, para 63.
67 ICTY, *Final Report*, para 64.
68 "NATO Confirms 'Mistakenly' Bombing Civilians in Convoy," *CNN*, 15 April 1999 <http://edition.cnn.com/WORLD/europe/9904/15/nato.attack.02/> (accessed 5 July 2018).
69 ICTY, *Final Report*, para 69.
70 ICTY, *Final Report*, para 86.
71 ICTY, *Final Report*, para 86.
72 ICTY, *Final Report*, para 88.
73 Julian Manyon and Rachel Sylvester, "Village Attack Was Justified, Says NATO," *The Independent*, 16 May 1999 <https://www.independent.co.uk/news/village-attack-was-justified-says-nato-1093802.html> (accessed 5 July 2018).
74 ICTY, *Final Report*, para 88.
75 Manyon and Sylvester, "Village Attack Was Justified."
76 ICTY, *Final Report*, para 89.

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intent, these cases hinged on the committee's review of what the pilots saw, could have seen, or should have seen before they released the bombs. The committee heavily relied on NATO's own descriptions and assessments of the strikes, quoting NATO press releases verbatim at length, and allowed its own viewing practices to be guided and instructed by the concepts and evaluations that NATO officers had used. Two specific arguments explaining civilian casualties stand out. First, the presence of civilians is consistently characterized as *unexpected*. In all three cases, civilians—many of them displaced persons or refugees—moved through or near a target area that had been neatly mapped out in advance as a military target. When civilians appear in spaces "known" through maps and aerial views of landscapes and military installations, their presences can be portrayed as surprising.

Second, the use of high-end technologies has become the military's equivalent to claims of due diligence in law regardless of how these visual technologies were used. For most of the bombing campaign, NATO planes flew at a very high altitude in order to evade the Yugoslav air defences.[77] In the committee's view, this was not a problem: "The 15,000 feet minimum altitude adopted for part of the campaign may have meant the target could not be verified with the naked eye. However, it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign."[78] Yet in at least one of the cases (Djakovica), the pilots did not rely on visual technologies for the identification of civilians. In the committee's assessment, the availability of these technologies—regardless of their specific usage—suffices for the judgment that NATO took adequate precautions.

3.2 Legal and Other Spaces: Banković

After the ICTY Prosecutor announced her decision to not pursue charges for any of the NATO air strikes, victims of the bombing of Radio Television Serbia (RTS) filed a complaint against Belgium and sixteen other signatories of the European Convention of Human Rights that had participated in the NATO mission.[79] On 23 April 1999, NATO had bombed the central studios of RTS, a state-owned broadcaster, killing between ten and seventeen people.[80] Two legal questions about the legality of the strike were central: First, was this a legitimate target? NATO considered the TV and radio channels appropriate targets since they broadcast war propaganda,[81] but this was disputed.[82] Second, were the civilian casualties disproportionate? The committee reporting to the ICTY Prosecutor found the number of deaths to be "unfortunately high" but stated that they "do not appear to be clearly disproportionate."[83]

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77 See Fenrick, "Targeting and Proportionality," 501.
78 ICTY, *Final Report*, para 56.
79 *Banković and others v. Belgium and 16 other Contracting States* (Admissibility), Application no. 52207/99, 12 December 2001.
80 ICTY, *Final Report*, para 71.
81 ICTY, *Final Report*, para 76.
82 See Fenrick, "Targeting and Proportionality," 495–96; Benvenuti, "ICTY Prosecutor," 523.
83 ICTY, *Final Report*, para 77.

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On 12 December 2001, the ECtHR ruled that the application was inadmissible because the acts had not occurred within the jurisdiction of the European Convention of Human Rights (ECHR).[84] Article 1 of the ECHR declares: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention." Does "within their jurisdiction" refer to state territory or to the reach of state action? The Court had previously held that contracting states are required to secure the Convention rights for persons under their control even when acting extraterritorially as long as they exercise "effective overall control."[85] But does dropping bombs constitute effective control?

The applicants submitted that they "were brought within the jurisdiction of the respondent States by the RTS strike."[86] They argued that extraterritorial obligations to secure Convention rights should be "proportionate to the level of control in fact exercised."[87] The effect should be that aerial bombardment would not imply an obligation to "secure the full range of Convention rights," but that it would require the states carrying out the attack to observe the right to life and physical integrity.[88] The applicants also argued that the respondent states in fact exercised control: not of the territory on the ground, but of the territorial airspace.[89]

The respondent states argued that jurisdiction "generally entails some form of structured relationship normally existing over a period of time."[90] Jurisdiction is configured as based on temporally stable control of ground-level territory. The states also cautioned that a reading of jurisdiction departing from the territorial model would "risk undermining significantly the States' participation" in "military missions all over the world,"[91] hinting at the connections between extraterritorial use of force and restrictions on extraterritorial jurisdiction. Insofar as they had control of the air space, the governments argue, such control could not be "equated with … territorial control."[92]

The Court largely sided with the respondents, declaring, "the jurisdictional competence of a State is primarily territorial."[93] Acts "performed, or producing effects" outside the territories of the Contracting States have been found to "constitute an exercise of jurisdiction" only "in exceptional cases."[94] While the occupation of a territory with ground troops would constitute "effective control of the relevant territory and its inhabitants,"[95] the NATO presence in the former Yugoslav airspace did not meet this standard. The judgment expresses unease at extending the reach of the ECHR: "The Court considers that the applicants' submission is

[84] ECtHR, *Banković v. Belgium*.
[85] ECtHR, *Loizidou v. Turkey*, Judgment (18 December 1996), Application no. 15318/8, para 56.
[86] ECtHR, *Banković v. Belgium*, para 46.
[87] ECtHR, *Banković v. Belgium*, para 46.
[88] ECtHR, *Banković v. Belgium*, para 47.
[89] ECtHR, *Banković v. Belgium*, para 52.
[90] ECtHR, *Banković v. Belgium*, para 36.
[91] ECtHR, *Banković v. Belgium*, para 43.
[92] ECtHR, *Banković v. Belgium*, para 44.
[93] ECtHR, *Banković v. Belgium*, para 59.
[94] ECtHR, *Banković v. Belgium*, para 67.
[95] ECtHR, *Banković v. Belgium*, para 71.

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tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world the act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention."[96] In short: ECHR signatories would have to respect the human rights of everyone with whom they interact—a result that appears compatible with the theory that human rights are universal and inalienable. Yet this regional human rights court expressed unease about the universalism of human rights and instead drew sharp boundaries: "the Convention is a multi-lateral treaty operating … in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."[97] The ruling has been criticized for drawing territorial borders around putatively universal human rights, thereby confirming the European tendency to grant right to those within, but not those outside, Europe.[98]

The work of jurisdiction, as Mariana Valverde argues, is to sort "governance processes, knowledges, and powers into their proper slots as if by magic," enabling different modalities and rationalities of governance to co-exist without "overtly clashing."[99] The distinction between metropolitan and other spaces has long been a feature of European law. Indeed, Art. 56 ECHR, on which *Banković* court relied when it rejected jurisdiction for extraterritorial aerial violence, has been described as a "colonial relic" originating in "British imperial constitutional arrangements."[100] The clause might well be a relic, but it functions smoothly in the ECtHR "chronotope"[101] or spatio-temporal ordering of jurisdiction that separates the legal space of European human rights from the space in which NATO commits airborne violence. While "the entire purpose for NATO's involvement in Yugoslavia was to defend the human rights of people in this foreign land,"[102] the human rights mode of governance is not extended to FRY while it is under bombardment. Air strikes have a specific spatio-temporal order: the plane enters the airspace but does not touch the ground of the state in which its targets are located. The only point of contact between the state sending the plane and the victim is the violent encounter between the bomb and the victim. The ECtHR's chronotope of jurisdiction is not simply spatially exclusionary, but, in an act of *legal anaesthesia,* it specifically excludes Western airborne violence from juridical consideration.

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96 ECtHR, *Banković v. Belgium*, para 74.
97 ECtHR, *Banković v. Belgium*, para 80.
98 Roxstrom, Gibney, and Einarsen, "The NATO Bombing Case"; Happold, "Banković v. Belgium." On this logic, also see Itamar Mann, *Humanity at Sea* (Cambridge: Cambridge University Press, 2016).
99 Valverde, "Jurisdiction and Scale," 145.
100 Happold, "Banković v. Belgium," 88.
101 See Mariana Valverde, *Chronotopes of Law: Jurisdiction, scale, and governance* (Abingdon: Routledge, 2015); Desmond Manderson, "Chronotopes in the scopic regime of sovereignty," *Visual Studies* 32 (2017): 167.
102 Roxstrom, Gibney, and Einarsen, "The NATO Bombing Case," 62.

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4. Un-Seeing Civilians in Kunduz

On 3 September 2009, in the vicinity of Kunduz, Afghanistan, a group of Taliban fighters abducted two fuel trucks and their drivers bound for a NATO base and killed one of the drivers. When the abductors tried to drive the trucks across the Kunduz River, they got stuck at a sandbank. The Taliban, who had taken control of the trucks, asked or forced local villagers to help move the trucks, offering them fuel in return. The nearby NATO Provincial Reconstruction Team (PRT), staffed with German forces, was commanded by Colonel Georg Klein. The PRT was informed about the attack and relied on aerial surveillance to locate the trucks. A local informant insisted that the people on the sandbank were all "Taliban." After Klein requested aerial support because his troops were allegedly in danger (a claim that turned out to be baseless), he told the air crews that the people on the ground were all "insurgents" or "hostile." Klein ignored an offer to do a "show of force" (a low altitude flyover to notify the people of an impending attack) and ordered the air crews to drop a 500 pound bomb on each of the trucks. Up to 142 people were killed in the explosion, which was exacerbated by the fuel that had remained in the trucks. Many bodies were burnt beyond recognition, so it was impossible to establish precise numbers of casualties and their civilian or military status on the basis of forensic evidence alone.[103]

The three major branches of the German judicial system were all involved in litigation surrounding the air strike. First, in April 2010, the Federal Attorney General announced that his office decided to not criminally indict Commander Klein or Joint Terminal Attack Controller Wilhelm after having pursued initial investigations for a month.[104] Second, on 9 February 2012, the Cologne Administrative Court refused a declaration that the airstrike was illegal.[105] Finally, family members of victims sued the German state for compensation. They lost at the Bonn Civil Court on 11 December 2013, appealed to the Cologne Appellate Court, which rejected their claims on 30 April 2015, and found this judgment confirmed by the Federal Supreme Court in Civil Matters (Bundesgerichtshof, BGH) on 6 October 2016.[106] Here, I focus on the content of the Attorney General's public *Notice* of the decision not to indict Klein[107] as well as the three judgments in the compensation litigation brought by relatives of some of the victims. Rather than summarizing each decision separately, I will focus on the key issues of jurisdiction and seeing civilians.

4.1 Jurisdiction: War and the Limits of German Law

Can individual victims of German military action abroad sue the state for compensation? In the *Kunduz* case, all three courts ruled that international law does

[103] See Deutscher Bundestag, 17, Wahlperiode, 2011, *Bericht des Verteidigungsausschusses,* 25 October 2011. Document #17/7400. Accessed April 20, 2017 <http://dip21.bundestag.de/dip21/btd/17/074/1707400.pdf> (accessed 5 July 2018). For a fuller analysis of the case, see Fischer-Lescano and Kommer, "Entschädigung."
[104] Generalbundesanwalt, *Einstellungsvermerk*.
[105] VG Köln, *Judgment*.
[106] Landgericht Bonn, Judgment, 11 December 2013, Az. 1 O 460/11 [LG Bonn]; OLG Köln; BGH.
[107] Generalbundesanwalt, *Einstellungsvermerk*.

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not establish an individual right to redress for violations of the law of armed conflict. The trial court and the appellate court found that the clause in the German Civil Code that allows individual compensation for wrongdoing by state officials would apply to the Kunduz air strike, but both courts established that there was no relevant wrongdoing. In 2016, the BGH ruled that the civil compensation clause would not apply to military action abroad. The Supreme Court referred to its 2003 decision that had denied compensation to Greek victims of 1944 Nazi atrocities. In the *Distomo* judgment, the court had established that at the time of the atrocities, "war was considered a state of exception in international law" that allowed for "the collective use of force," thereby "suspending the legal order that is in force in times of peace."[108] This was a debatable assessment of international law in 1944. The Supreme Court had the option of recognizing changes in the international legal conception of war since the 1940s or referring to new obligations arising from the 1949 Constitution. Nonetheless, in *Kunduz*, the Court relied on the *Distomo* case in its judgment that the civil compensation clause was not applicable to war since the drafters of the 1900 Civil Code had not contemplated this possibility.[109] In addition, it found that military action is different from "normal administrative action," for which the law was designed.[110] The Supreme Court places the Kunduz air strike beyond the territorial and functional jurisdiction of German courts. Here, the "machinery of jurisdiction"[111] works to keep the normal administrative functioning of the state legally separate from the extraordinary military action abroad, thereby insulating the state from compensation claims arising from the actions of the Armed Forces and maintaining a strict separation between spaces of rights at home and spaces of military violence abroad.

4.2 Reading Dots

The German courts that asserted jurisdiction over the case had to decide whether German soldiers had violated International Humanitarian Law (IHL). Did they expect civilians near the trucks? Should a reasonable military commander have known or expected the presence of civilians? The Attorney General as well as the civil courts found that Colonel Klein did not know and could not have been expected to know that civilians were present in the target area. The Federal Supreme Court summarizes the prevalent approach to sight, knowledge, and care: "Whatever a decision maker 'doesn't see' despite careful and conscientious examination of the available sources of information, they 'don't need to see' and take into consideration."[112] How was this work of carefully not seeing civilians accomplished?[113]

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[108] BGH, III ZR 140/15, para 30.
[109] BGH, III ZR 140/15, para 36.
[110] BGH, III ZR 140/15, para 42.
[111] Valverde, "Jurisdiction and Scale," 145.
[112] BGH, III ZR 140/15, para 59.
[113] For a more detailed analysis of the case and investigations into the facts, see Christiane Wilke, "Seeing and Unmaking Civilians in Afghanistan: Visual technologies and contested professional visions," *Science, Technology, & Human Values* 2017, Vol. 42(6): 1031–60.

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In a first step, the decisions provide a specific narrative of the events leading up to the air strike. The *Notice* emphasizes that the German Forces in Kunduz had been attacked almost daily since May 2009.[114] In this narrative frame of constant danger, specific places are coded as hostile. The sandbank on which the trucks were stuck is presented as a location "frequently used by Taliban."[115] Against the backdrop of a string of Taliban attacks using vehicles, the fuel trucks are understood to be bombs in the making. The trucks, the sandbank, and the landscape are primed as hostile and dangerous. These qualities will transfer onto persons seen in these spaces.

Moreover, the decisions adopt NATO's expansive vocabulary for non-civilians, including "Taliban" and "hostile persons."[116] The informant's assessment that all the persons near the river were Taliban is based on this expansive and imprecise category that includes political supporters of the Taliban who don't participate in armed conflict and who would not be legitimate targets under IHL.[117] Seeing civilians requires not only taking notice of persons, but also making judgments about their status. The shifts in the vocabularies towards more expansive concepts of non-civilians directly impact the ability of soldiers to see people *as civilians*. For example, the local informant was never asked about the definition of "Taliban;" his (translated) unquestioned vernacular vocabulary became the basis for the air strike.[118]

In a next step, the *Notice* and the courts validate Commander Klein's stated assumption that the persons on the ground were "insurgents" and therefore legitimate targets. The source of this assumption of hostility is not clear, but the record shows that Klein and his colleagues imagined that the people close to the trucks would be "involved" in the insurgency. Klein is quoted with a number of reasons why he did not expect civilians, particularly children, at the site: it would be unusual for civilians to leave their houses in the night during Ramadan, and the Taliban would claim the space around the sandbank as theirs, making it unsafe for civilians to be in this area.[119] Once this assumption of hostility is established, any additional information can be interpreted to confirm rather than challenge it.

Martina Kolanoski's incisive ethnography of the trial court hearing offers insights into the legal politics of interpreting the video images in court.[120] Instead of asking survivors or soldiers to testify in order to reconstruct the events unfolding throughout the night, the court relied on a review of the video footage taken from the F-15 plane as the main piece of evidence. The video, portions of which have become public in subsequent years, shows a rendering of the landscape through night vision technology that picks up sources of heat instead of depicting

114 Generalbundesanwalt, *Einstellungsvermerk*, 14.
115 Generalbundesanwalt, *Einstellungsvermerk*, 20.
116 Wilke, "Seeing and Unmaking Civilians"; also Henn, "German Jurisprudence"; Parsa, "Knowing and Seeing the Combatant. War, Counterinsurgency and Targeting in International Law" (PhD Thesis, Lund University, 2017). <http://lup.lub.lu.se/record/37176180-94d0-4df0-9c05-64615d17d6c5>
117 See Henn, "Development"; Fischer-Lescano and Kommer, "Entschädigung."
118 See Fischer-Lescano and Kommer, "Entschädigung," 159.
119 Generalbundesanwalt, *Einstellungsvermerk*, 29.
120 Kolanoski, "Undoing the Legal Capacities."

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the shape of persons and objects on the ground. The sandbank and the shore appear in light grey; the river is dark. Crowds of people, recognizable only as small dark dots, are near two larger objects (the trucks). Some of the dark dots move, others stay in place. The center of the video is marked with crosshairs; we are watching from the perspective of the bomber. The crosshairs flicker, a large drawn elliptical shape appears on the video, and suddenly we see the impact of the bombs: a rapidly expanding dark cloud morphing into a mushroom cloud and a fireball that blocks the view of the people and the trucks on the ground.[121]

During the hearing, Kolanoski reports, "defendants and plaintiffs agreed on one central point: the people who were targeted had been visible only as 'infrared dots.'"[122] The visual technology itself was operating at the limits of sight, representation, and resolution. The humans on the ground were at the "threshold of detectability" because their size and heat map "approximates the recording ability" of the chosen visual technologies.[123] As a result, they could only be identified as generic humans moving in the vicinity of the trucks, not as people with distinct physical attributes, carrying specific kinds of military or civilian objects, or appearing to be of a certain age or gender. As the trial court stated: "since the infrared images show sources of heat, individual persons would only appear as dots. As the examination of the video has demonstrated, it is impossible to see if one of the persons shown as a dot was carrying a weapon."[124]

How would the courts read the dots? While the complainants "displayed a preference for seeing civilians in the dots,"[125] the defendants marshalled expert witnesses who insisted that the infrared dots could represent either civilians or combatants: "I cannot recognize military conduct in the classical sense, but also no typical civilian conduct."[126] In the view of the trial court as well as the appellate court, the uncoordinated movements of the people near the sandbank did not necessarily indicate civilian presences because such patterns are also compatible with combatant behaviour: "Taliban fighters do not normally have formal military training," which is why the lack of "coordinated conduct" resembling that of military forces is not surprising.[127] The indeterminacy of the images is used to argue that the dots could represent civilians or non-civilians. On the basis of the previously established assumption of hostility and a "racially inflected regime of visuality," the courts superimpose "stereotypical images" of Afghans as likely militants on the video footage.[128]

In the legal reconstruction of the sights and decisions of that night, the courts allow Klein to not only *suspect* but *assume* that the persons near the trucks were combatants. In the legal proceedings, the epistemic authority of the video was

[121] The video is available on YouTube: https://youtu.be/DfrErSvy7U8 (accessed 22 February 2019).
[122] Kolanoski, "Undoing the Legal Capacities," 378.
[123] Eyal Weizman, "Violence at the Threshold of Detectability," e-flux Journal #64 (2015): 1–14, 5. <http://worker01.e-flux.com/pdf/article_8998134.pdf>
[124] LG, Bonn, Az. 1 O 460/11, para 71.
[125] Kolanoski, "Undoing the Legal Capacities," 392.
[126] Kolanoski, "Undoing the Legal Capacities," 387.
[127] OLG Köln, Az. 7 U 4/14, para 78.
[128] Pugliese, "Asymmetries of Terror," para 8.

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limited: instead of creating doubt about the combatant status of the people on the ground, it was viewed as compatible with what was already imagined or "known": that the persons near the trucks were Taliban. The paranoid imaginary of the local population as hostile "interpret[s] in advance"[129] the visual evidence of the video feed and erases any doubt that might give rise to additional legal obligations. Here, the bodies of Afghans appearing as black dots on a video screen are understood to be hostile even when such hostility cannot be confirmed or denied using the video alone. Superimposing the indeterminacy of the video upon the assumption of hostility, the Supreme Court attested that "the presence of civilians in the target area was objectively not recognizable" to the commander.[130] All legal decisions echo the *Notice* in its finding that "there is no evidence that Commander Klein expected civilian casualties when he ordered the strike."[131] It is worth recalling that Article 50 of the Additional Protocol I to the Geneva Conventions requires that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian." Yet the Attorney General established that Klein did not actually have any "doubt" about the status of the persons: he presumed that they were legitimate targets.

Once the courts established that Klein did not see the people on the ground as civilians, they had to adjudicate whether a "reasonable military commander" should have foreseen the presence of civilians in this case.[132] In the court proceedings, participants therefore produced the abstract "category of the military viewer."[133] The law's insistence on the figure of the "reasonable person" or, more specifically here, the "reasonable military commander" can mask engrained gendered and raced assumptions about who embodies reasonableness and which assessments are to be accepted as reasonable. Yet instead of using the legal technique of the "reasonable person" as a foil to assess Klein's actions, the courts collapse the actual Commander Klein with the abstract "reasonable military commander." As if inhabiting a caricature of law's identification of rationality with the fears of white men feeling threatened by brown men, the decisions do not distinguish between what Klein saw and thought he knew and what a "reasonable military commander" should have seen and known. As a result, Klein's assumptions, fears, and actions appear reasonable, and he walks away as the innocent legal embodiment of reasonableness.

5. Conclusions: Jurisdiction and Visibilities

Air strikes by Western militaries are rarely subjected to legal judgment. These two sets of cases following the NATO bombings of Yugoslavia and of Kunduz allow a glimpse into the operation of national, regional, and international courts dealing with aerial violence. The results are sobering: two prosecutors decline to issue indictments, the European Court of Human Rights draws jurisdictional

[129] Butler, "Endangered/Endangering," 205.
[130] BGH III ZR 140/15, para 52.
[131] Generalbundesanwalt, *Einstellungsvermerk*, 33.
[132] Fischer-Lescano and Kommer, "Entschädigung," 166.
[133] Kolanoski, "Undoing the Legal Capacity," 382.

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boundaries around air strikes, and decisions by German courts including the Federal Supreme Court that not only find no wrongdoing, but also find the claims beyond the jurisdiction of the applicable laws. Do Western air strikes come with built-in assurances of impunity? What do these judgments tell us about law, violence, and visual regimes?

In two of the cases, jurisdiction was uncontested: the ICTY had jurisdiction over military violence committed on the territory of former Yugoslavia, and the German Attorney General could draw upon German statutory law allowing for the prosecution of German citizens who committed war crimes abroad. In these cases, the prosecutors, the advisory committee, and the courts reviewed the video evidence and followed visual regimes by which they saw the civilians who were killed as either unexpected (in the case of former Yugoslavia) or disputed (in Afghanistan). The legal review of the NATO bombing of former Yugoslavia centers on visual capabilities, recklessness, and unexpected civilian mobilities. In the case of the Kunduz bombing, racialized assumptions about hostility are central to the visual regimes by which people on the ground were seen as non-civilians.

Where jurisdiction over the air strikes was asserted but contested, courts denied it. The ECtHR interpreted jurisdiction to require a form of presence and control that would be achieved by ground troops but not by air strikes. The German Supreme Court based its denial of jurisdiction on an understanding of war as an exception from legality. As a consequence, airborne violence "can be perceived as the delivery of destruction that seemingly escapes the constraints of territorial jurisdiction."[134] In noting the systemic impunity for aerial violence, I do not aim to imply that criminal trials of pilots, ground crew, or commanders would end or reduce Western violence. Rather, I want to draw attention to the fact that a key modality of military violence that is mainly accessible to Western militaries seems immune to legal reprimand and sanction, while the International Criminal Court (ICC) is preoccupying itself with low-technology violence in African conflicts.[135]

Is the airspace outside of NATO countries a "legal black hole," a situation in which the death of civilians "is the direct result of human decisions, but is not, legally, a violation of their rights"?[136] Analyzing the situation of refugees left to die in the Mediterranean, Itamar Mann argues, "these people are rendered rightless by the way international law distributes responsibility among its subjects."[137] Rightlessness is easily conceptualized as the result of an absence of law—like a blanket that doesn't stretch far enough to cover everyone. Yet the absence of actionable rights is frequently not a result of the absence of law but of the

[134] Martin Coward, "Networks, Nodes, and De-Territorialised Battlespace: The scopic regime of rapid dominance," in *From Above: War, Violence, and Verticality,* ed. Adey, Whitehead, and Williams (Oxford: Oxford University Press, 2013), 117.

[135] See Kamari Clarke, *Affective Justice* (Duke University Press, forthcoming).

[136] Itamar Mann, "Maritime Legal Black Holes: Migration and rightlessness in international law," *European Journal of International Law* 29 (2018): 348. Mann excludes the context of war, but it could be argued that only deaths of combatants, but not non-combatants should be exceptions from the problem of rightlessness.

[137] Mann, "Maritime Black Holes," 2.

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assiduous workings of legal mechanisms.[138] Even if we thought of territorial jurisdiction in terms of a blanket under which law and rights apply, we see here that courts actively withdrew this cover, leaving the victims of airstrikes on the outside. The apparent absence of "law" is produced through law. The legal forms of human rights as well as the technologies of aerial violence originate in Europe. European courts and prosecutors have reconciled these two innovations by using the legal technology of jurisdiction, which "differentiates and organizes" how and by whom different people and spaces are to be governed,[139] and by adopting visual regimes that confirm the military's ways of seeing people on the ground as non-civilians. Rights and bombs are allotted to different legal spaces.

In former Yugoslavia as in Afghanistan, visual technologies have not only enabled the air strikes, but have also become important legal defence mechanisms for Western militaries against the claims of invisibilized civilians. Seeing civilians would require *imagining* the people on the ground *as civilians* and imagining that their deaths and lives matter—politically, morally, and legally. The dominant legal responses to air strikes facilitate a particular form of legal anaesthesia: by adopting the military's visual regimes and maintaining sharp jurisdictional boundaries, courts normalize the violence of extraterritorial aerial violence.

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[138] See Johns, *Non-Legality in International Law*.
[139] Valverde, "Jurisdiction and Scale," 144.

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