

# German court rejects compensation claim from victims of Kunduz massacre

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4 January 2014

Four years after the worst massacre by German troops since World War II—in the Afghan village of Kunduz where over 140 people died, including women and children—a Bonn state court has rejected an application for compensation from two of the victims' families.

The court ruled on December 11 that there was no “culpable breach of official responsibility” by the German commanding officer at the time, Colonel Klein. It also found that he did not breach international humanitarian law, which calls for the protection of civilians and which had led the claimants to pursue compensation. As a result, the German government could not be held retrospectively liable, the court stated.

To the surprise of the victims' lawyers, the collection of evidence was thereby halted, and witness statements, including from Klein, were not even recorded, although the court had approved the application in March.

Abdul Hannan, an agricultural worker, had claimed compensation for his two sons, aged 8 and 12, who were killed during the bombing. Another claimant was the widow Qureisha Rauf, whose husband died, leaving her with six children. Together they demanded €90,000 of compensation and damages. A further 77 families had lodged compensation claims. Their legal representatives in Bremen, Karim Popal and Dr. Peter Derlider, are now appealing to the upper state court in Cologne.

On the evening of September 4, 2009, Colonel Klein ordered NATO fighter jets to bomb two tankers that had been captured by the Taliban. After the lorries became stuck in a river bed, however, dozens of villagers gathered round the tankers to siphon off petrol. The bombing produced a horrific bloodbath, costing the lives of 140 people, mainly civilians, and severely wounding many more according to NATO figures.

Unlike NATO, which transferred their pilots after opening disciplinary procedures, the German government and defence ministry initially sought to deny the massacre, before going on the offensive to declare Klein innocent.

There was a parliamentary investigatory commission, as well as an investigation by the federal prosecutor, which was abandoned before criminal proceedings were launched. The German army did not even introduce disciplinary measures. In all these investigations, the official version of events was that Klein could not have known that civilians were in the area.

The final report of the federal prosecutor after the halting of the investigation in April 2010, which was kept secret, went a step

further, making clear how much control the military leadership has over the decisions of the government and judiciary. The federal prosecutor's office reportedly denied any breach of international law due to Klein's “excesses.” It says, even the “killing of several dozen civilians protected [by international law]” had to be justified “out of tactical military considerations in anticipation of military advantages.”

To make clear that the military leadership would take no notice of the horrified response of the population, former Defence Minister Thomas de Maizière (Christian Democratic Union) demonstratively promoted Klein early in 2013 to the rank of brigadier general.

The ruling of the Bonn court must be evaluated against this background. Presiding Judge Heinz Sonnenberger declared at the announcement of the ruling that he had not reached his decision easily. The course of the proceedings indicated that the army exerted extreme pressure behind the scenes.

First, the chamber for matters of state liability stated at the opening of the proceedings on March 20 that the claim was “not obviously without foundation.” It opposed the call of government representative Dr. Mark Zimmer to immediately throw out the charges and announced a review of whether official responsibilities or the Geneva Convention had been breached. This would have provided the basis for individual compensation claims against the federal republic.

Zimmer, the government's lawyer and a former major in the German army, opposed the judge sharply from the outset. Zimmer challenged the authority of the court, claiming Klein had not exercised “national sovereign power” and had been involved in the structures of the NATO ISAF mission. He also claimed that Germany could not be liable in the exceptional situation of a war—an argument which Berlin had not publicly used at the time of the massacre.

If Germany had to be concerned about liability claims for its role in every NATO mission, Zimmer said, this would be “a very burdensome situation for the soldiers.”

The defence ministry strictly rejected a settlement until the end. When judge Sonnenberger attempted in the first court hearing to reach a settlement and estimated that €3 million for 79 families was not a huge sum, an undersecretary of the defence ministry present heavily shook his head no. In fact, particularly given the estimated €26 to €47 billion spent on the German army's mission in Afghanistan, such a settlement figure is ridiculously low.

Instead, Zimmer provocatively demanded that the claimants first prove that their relatives had died in the bombing. At the same time, Berlin recognised in the winter of 2009-10 that there had been 90 families of victims; each were paid \$5,000 (€3,800) in a bid to bury the matter. According to the Bremen-based lawyers, this money only partly reached the victims' families, because the German government used Afghan channels which distributed the money exclusively to men. Women who had lost their husbands got nothing, including claimant Qureisha Rauf.

On April 17, the court decided upon gathering of evidence. It called on the German government to provide videos from the US fighter pilots at the scene and the radio recording of communications between the pilots and the German commanding officer. In addition, the court planned to take witness statements in August.

Why the proceedings only commenced with the video and radio recordings on October 31 is not clear. Apparently, a months-long tug of war over the release of the evidence took place. In fact, the requested videos and radio recordings reached the court in unedited form, without translations and partially in the wrong order, the office of Karim Popal reported.

Finally, the December 11 ruling, which rejected the claim, unmistakably reflected the views of the defence ministry and the army leadership. It claimed that Klein had correctly identified the two bombarded tankers as military objects; that the trucks could have been useful for Taliban logistics and could be used in a possible attack; and that Klein had confirmed on a total of seven occasions with a military informant that there were only combatants and no civilians around the tankers.

It also claimed that infrared footage from the American fighter jets had only shown indistinct points; that one could neither determine the size or age of the people from these points nor identify if weapons were being carried; and that a "show of force" flight, suggested by NATO pilots in order to warn potential civilians, was not necessary, as Klein did not have to assume that civilians were in the area.

These are clearly the arguments of the army leadership. Even the commander of the ISAF operation at the time, US General Stanley McChrystal, criticised Klein for abandoning the regular "show of force" flight and demanded his dismissal. However this failed due to the opposition of the German defence ministry.

The fact that Klein explicitly rejected the low flyover to warn civilians was used by the claimants as evidence of a gross breach of international law.

Finally, the court fell into line with the defence ministry over whether individuals could sue on the basis of international law. While the court had in March called into question the defence ministry's position, now judge Sonnenberger declared that international law could only be the basis of claims between states. This had been established by a unanimous ruling of the German Constitutional Court on August 13, on a complaint brought by victims of the NATO bombardment of the "bridge of Varvarin" during the Kosovo war.

In May 1999, the German government led by the Social Democrat-Green Party coalition ordered for the first time the direct participation of the German army in a NATO intervention.

German reconnaissance planes helped provide lists of targets in Serbia, including the bridge near the town of Varvarin, and allegedly provided cover for the bombing on the day of the attack. Ten civilians were killed in the bombardment, and many more injured. Relatives later also lodged claims for compensation against the German government, which they lost at all levels, including first at the same chamber of the Bonn state court as the Kunduz victims.

The Bonn court ruling provoked controversy within legal circles. On Legal Tribune Online, an expert on crimes under international law, Denis Basak, stated that it was problematic that the court "had adopted the questionable view of the federal prosecutor in its decision to halt criminal prosecutions and only partially reviewed international humanitarian law."

The real question, he said, was "whether General Klein should have been allowed to rely on an informant as a source, who was not even in the area at the time of the attack but only passed on messages he had heard, without any further review."

The state court had to apply a higher standard than the federal prosecutor, "since public liability does not depend upon a paragraph; an objective breach of duty is sufficient."

Basak also asked why the court did not deal with General Klein's "deliberately false reports" to the US pilots. Klein had called for the fighter jets on the grounds that there were "troops in contact," which according to the rules of engagement was the precondition for an air attack.

Basak continues: "The ruling fits to a situation of drone attacks and targeted killings which shows that international humanitarian law is applied to the so called 'good' nations in the 'war against terror' only in a very limited way."

If the Bonn ruling is confirmed at the upper state court in Cologne, this will be a further step in the emergence of German militarism. It gives the army leadership a free hand to inflict civilian casualties in the course of a military mission with complete disregard for international law. It also makes clear how the military now sets the tone for the judiciary and is trying to turn the courts into instruments to assist them in their operations.



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