

Kunduz massacre goes unpunished

Justus Leicht
3 March 2021

In February, the Grand Chamber of the European Court of Human Rights (ECHR) in Strasbourg dismissed the appeal of Abdul Hanan, a farmer from Kunduz, against the Federal Republic of Germany over a 2009 massacre in Afghanistan. Hanan, who also appeared on behalf of his village, had filed the complaint alleging inadequate judicial investigation of the deaths of his two sons, who were eight and twelve years old when they were killed.

The two children, Abdul Bayan and Nesarullah, and more than a hundred other people (the exact number has not yet been firmly established), most of them civilians, were killed on 4 September 2009 when two US warplanes bombed a crowd that had gathered around two stalled tankers on a sandbank of the Kunduz River. The order for the attack had been given by Col. Georg Klein of the Bundeswehr (Armed Forces).

It was the largest massacre ordered by a German officer since the Second World War. But after eleven years, it finally remains unpunished.

From the beginning, the Attorney General's Office had refused to press charges against Klein and his air traffic control officer. Hanan had then tried to force an indictment through a so-called "proceedings to force criminal prosecution". However, he had failed in all German courts with his motions, brought by the renowned human rights lawyer Wolfgang Kaleck from Berlin. The Düsseldorf Higher Regional Court, the Federal Court of Justice and finally the Federal Constitutional Court had not even allowed them. This has now been rubber-stamped by the ECHR.

The non-profit human rights organisation European Centre for Constitutional Rights (ECCR), which supported Hanan, called the Strasbourg decision "disappointing, as the German military's policy of secrecy and the de facto denial of procedural rights to those affected were not reprimanded".

Plaintiff Abdul Hanan described the last twelve years as "an ordeal for my family and the families of the other victims". He said they had never received an official apology from the German government. "All we wanted is for those responsible for the attack to be held accountable and for us to be properly compensated."

The German government is not prepared to do that. To this day, it holds the stated view that the airstrike was "permissible under international law and thus justified under criminal law". Although it has given small sums of money to the survivors and

surviving dependents, it has expressly not linked this to the recognition of any legal obligation.

The ECHR dismissed Hanan's complaint, although the court acknowledged that there had been a whole series of glaring deficiencies in the investigation of the case. The decision is final. Further appeals are no longer possible.

This has far-reaching significance for German militarism. The Bundeswehr is assured that it has nothing to fear from the prosecuting authorities and the judiciary when it causes large-scale collateral damage among civilians.

Eleven years ago, when it closed the investigation against Colonel Klein after only four weeks, the Attorney General had already determined that it was only impermissible to kill numerous civilians when dropping bombs if "the expected civilian damage is disproportionate to the expected concrete and immediate military success".

In all the proceedings against Klein and his German comrades, it was repeatedly claimed that he had done everything possible at the time of the attack to get a picture of the situation and could not have known that it was mainly civilians who were near the tankers. This is demonstrably false.

The German military relied only on a single informant of dubious reliability who was not on the spot and even lied to allied NATO forces to push through the bombing. The subsequent investigations by the Bundeswehr, public prosecutors and the courts were aimed at giving Klein and his comrades a clean bill of health. All this has now been justified or brushed aside by the ECHR.

For example, after discussions with the Ministry of Defence, the state Attorney General's Office in Dresden, which was initially responsible for the case, handed it over to the Federal Attorney General's Office, which is under the authority of the Ministry of Justice, i.e., the federal government. The ECHR did not find this relevant, as there was no evidence that such instructions had been given, or that the Ministry of Defence had tried to influence the proceedings, it said.

The ECHR also rejected the applicants' objection that the investigators in Afghanistan had not been independent of the suspects. The Strasbourg judges did note that "it would have been better in terms of independence if the initial assessment on the ground had not been carried out exclusively by members of the Kunduz Provincial Reconstruction Team who were under the command of Colonel K.". However, it was the *mens rea*

[subjective ideas, knowledge and will] of Colonel Klein that mattered anyway. “Realistically speaking”, the investigations had therefore not been influenced.

The ECHR, like the German Attorney General and the German Federal Constitutional Court, did not consider it necessary to question witnesses other than Klein himself and his comrades in the German command post, not even the Afghans affected by the airstrike or the American pilots who carried it out.

The court also saw no need to question military experts or to re-enact the situation in the command centre. After all, the ISAF investigation team—comrades or subordinates of Colonel Klein—consisted of “military experts from various countries”.

The Strasbourg judges were also not particularly bothered by the fact that it had not been determined how many victims there had been and how many of them were civilians. After all, the liability of Colonel Klein had depended on his subjective view.

The fact that the investigations were discontinued without even once hearing the complainant of the father of two persons killed by the air raid appeared “problematic at first sight” to the ECHR, because it could not be ruled out that Hanan had relevant information, in particular about the identity of the persons present at the bombing site. After all, the plaintiff could still have produced relevant information even after the investigation had been discontinued.

Three judges placed a dissenting opinion on record. According to them, the ECHR should have dismissed the complaint as inadmissible from the outset. This was in line with the official legal opinion of Germany, Britain, France, Denmark, Norway and Sweden. Accordingly, the applicant had had no right to invoke the European Convention on Human Rights and the ECHR had no jurisdiction.

The majority of the judges took a different view: first, Germany had been obliged by international law to investigate the airstrike; second, the Afghan authorities had been legally barred from investigating (because of an agreement with the international troops in their country); and third, the German law enforcement authorities had also been called upon to investigate under national law.

Legal observers, who were otherwise critical of the ruling, praised it as a possible “milestone” in ECHR jurisprudence. It is nothing of the sort. Those politically and militarily responsible went scot-free. Colonel Georg Klein was promoted and still serves as a general in the Bundeswehr.

The plaintiff and the other victims and survivors, on the other hand, leave empty-handed; they are awarded no compensation, and no one is held accountable for the death and destruction they suffered. In the end, it took little more than the military commander’s statement that he had acted in good faith to legally wash him clean of the blood of dozens of innocent men, women, and children.

The result was no different in the civil courts. In November last year, the Federal Constitutional Court did not accept a

constitutional complaint by survivors of victims of the Kunduz massacre, who had been denied damages and compensation for pain and suffering by the lower courts. The constitutional court judges in Karlsruhe ruled coolly that “not every killing of a civilian in the context of armed conflict also constitutes a violation of international humanitarian law”. Colonel Klein had made a “valid prognosis decision” from his point of view at the time.

The lower court, the Federal Court of Justice (Bundesgerichtshof, BGH), had gone even further and had fundamentally rejected public liability claims against German soldiers on armed missions abroad because of the possible impairment of Germany’s “ability to form an alliance and its scope for shaping foreign policy”. The Federal Constitutional Court, on the other hand, had expressly left open the question of whether public liability claims were possible in the case of military missions abroad. It did not have to decide on this because Colonel Klein had not acted unlawfully in the specific case.

Taken together, these rulings send a clear message that officers and soldiers need not fear punishment when they kill civilians, nor even facing charges in a criminal court. The judgements provide a blank cheque to German militarism, which is massively rearming and preparing to wage war all over the world again. Only a week after the ECHR ruling, the German government extended the Bundeswehr’s Afghanistan mandate until January next year and published plans to intervene militarily in the Indo-Pacific and other regions of the world, in addition to existing missions, such as in Mali.

In the Nuremberg Trials that followed the defeat of the Nazis in World War Two, the head of the High Command of the Wehrmacht (Hitler’s Army), Wilhelm Keitel, was convicted and executed as a war criminal, among other things, because he had given the following order in Yugoslavia: “It is ... not only justified, but it is the duty of the troops to use all means without restriction, even against women and children, so long as it ensures success.”

Today, according to the Attorney General, it is permissible to kill civilians if it is “proportionate to the expected immediate and concrete military success”. The ECHR has now given this its legal blessing.



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