

## BACKGROUND \_\_\_\_\_

### **The Kunduz airstrike: Ten years without justice**

#### **Q & A on the legal basis**

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The airstrike near Kunduz in Afghanistan on 4 September 2009 was the deadliest German military operation since World War II. German Colonel Georg Klein, who ordered the attack, undoubtedly violated human rights in doing so. Whether he is also liable to prosecution under German criminal law has not yet been sufficiently clarified. The German armed forces, the German Federal Government, and judiciary have tried to conceal information about the circumstances of the airstrike and the extent of the damage it caused, and continue to do so.

On 26 February 2020, more than ten years after the attack, the Grand Chamber of the European Court of Human Rights (ECtHR) in Strasbourg will [hear](#) the case due to its extraordinary significance. The European Center for Constitutional and Human Rights ([ECCHR](#)) is supporting Abdul Hanan, who lost [two sons](#), Nesarullah (eight) and Abdul Bayan (12), in the airstrike.

#### **The Kunduz airstrike and its consequences for the people in Afghanistan**

##### **1. What happened in Kunduz on 4 September 2009?**

In the early hours of 4 September 2009, US fighter jets dropped two 500-pound bombs near the Kunduz River in northeastern Afghanistan. The bombs were targeted at a crowd of people and two tankers that had been hijacked by the Taliban. Reportedly more than 100 people – mostly civilians, including children – were killed or injured.

Colonel Georg Klein ordered the bombing. He commanded the German armed forces' field camp in Kunduz only a few kilometers away. Klein testified that he feared the Taliban might use the vehicles as moving bombs against the German camp, even though the trucks were stuck on a sandbank in the river.

Several investigative teams tried to determine how many people died in the bombing, and how many were armed fighters. Children who died or were seriously injured in the attack were certainly not.

A few weeks after the bombing, the German armed forces inspector general said that between 17 and 142 people died. The German military now estimates that **91 people died and 11 were injured**. On the tenth anniversary of the Kunduz airstrike, at the German Left Party's parliamentary **request**, the German government said that it had not verified the exact number of victims.

## **2. How are the survivors and bereaved doing today?**

ECCHR last spoke with Abdul Hanan on 7 February 2020. His statements suggest that many people are still traumatized and dependent on support. The survivors and bereaved of the attack only received a payment from Germany of 5000 US dollars for each death.

Like Hanan, many of those affected continue to demand a comprehensive legal review of the case. Colonel Klein's promotion to general has further increased the people of northern Afghanistan's disappointment about the German authorities' behavior.

## **From Kunduz to Strasbourg**

### **3. Why is ECtHR's Grand Chamber hearing the case?**

Cases of exceptional importance can be heard directly by the ECtHR Grand Chamber. The court found that the Kunduz case fell into this category.

Abdul Hanan filed an individual complaint against Germany before the ECtHR in January 2016. Since 2010, Hanan has tried in vain to make himself heard before the German Federal Public Prosecutor's Office, the Düsseldorf Higher Regional Court and the German Federal Constitutional Court.

Hanan accuses Germany of having never had the aim of establishing the truth, and failing to check whether the use of lethal force was proportionate and absolutely necessary in terms of human rights. The entire approach to the legal processing of the airstrike was guided by the desire to relieve the German soldiers involved of their responsibility.

The allegations in the ECtHR complaint include: lack of independence of the German military police and federal public prosecutor, numerous delays in the course of the proceedings, political influence on the investigations, secrecy and lack of questioning of the information provided by the soldiers involved, and insufficient participation of those affected.

#### **4. What are the client's expectations?**

Abdul Hanan expects the ECtHR to find that Germany has violated Articles 2 and 13 of the European Convention on Human Rights (ECHR). Article 2 includes protection of life; Article 13 concerns the right to lodge an effective complaint.

Hanan argues that Germany conducted its investigations after the airstrike insufficiently. In order to uphold the right to life under the ECHR, states are obliged to conduct effective investigations.

Moreover, no independent court has been allowed to fully investigate and try the case. Those affected were denied the right to an effective appeal against the public prosecutor's decisions.

The ECtHR may order Germany to pay a fine.

#### **5. What is the goal of the complaint?**

A judgment against Germany would be significant in two ways. On the one hand, a condemnation would highlight and identify shortcomings, both concrete and structural. Germany would have to react to the court's feedback in order to be able to act in accordance with human rights in the future.

The second issue is ECHR's applicability beyond national borders. This applies in particular to military operations abroad, not only by Germany, but by all member states of the Council of Europe. France, the UK, Norway, Denmark and Sweden have joined the case. They argue that extending the ECHR's applicability would make foreign missions more difficult. The Kunduz case before ECtHR is therefore also concerned with the extent to which armed forces must comply with human rights abroad, and the extent to which ECtHR can review such compliance.

#### **6. What role does ECCHR play in the Kunduz case?**

ECCHR has represented the complainant from the beginning in all instances. ECCHR coordinates the case and contributes its legal expertise to the proceedings.

### **Germany's approach to the deadliest military operation since World War II**

#### **7. How did the German military react to the airstrike and the accusations against Colonel Klein?**

From the very beginning, the German armed forces tried to appease the German public. It never seemed to be a question of providing comprehensive, transparent and appropriate information on the air raid's circumstances and the extent of its damage. There were no direct disciplinary or criminal investigations.

Officers in the Kunduz field camp were so **hesitant to investigate** that it was no longer possible to secure the scene of the crime in the direct aftermath. The circumstances that led to the attack and the situation on the sandbank at the time were never sufficiently investigated or clarified.

Colonel Klein has not been prosecuted under military law. On the contrary: he was promoted to brigadier general in 2013, and has headed the training department in the Command and Control Base in Bonn since March 2019.

### **8. How did the German government behave immediately after the Kunduz airstrike?**

The airstrike on the Kunduz River triggered a political chain reaction in Germany, which ultimately cost the then Federal Minister of Defense Franz Josef Jung (from the Christian Social Union party) his office. Jung initially claimed that dozens of Taliban were killed, and considered the attack a success.

Jung's successor Karl-Theodor zu Guttenberg (also CSU) [described](#) the attack as "militarily appropriate" in November 2009. He later claimed that important information had not been communicated to him. Finally, in [December 2009](#), Guttenberg told the German parliament, "Although Colonel Klein undoubtedly acted to the best of his knowledge and conscience and to protect his soldiers, it was militarily inappropriate from today's objective point of view, in light of all the documents, including those withheld from me at the time."

Chancellor Angela Merkel also came under pressure: in February 2011, she had to testify before the [German parliament's investigative committee](#). Merkel distanced herself from her former Defense Minister Jung's statements, and emphasized that she repeatedly urged and asked him to account for the possibility of civilian victims in his public statements.

### **9. What is the German government's position today?**

Angela Merkel's administration has never commemorated the victims of the Kunduz bombing, and apparently does not plan to. This can be concluded from her administration's [answers](#) to a number of questions from the German Left Party's parliamentary group.

The German government does not show any understanding of responsibility in the Kunduz case: the airstrike was "permissible under international law and thus justified under criminal law." Furthermore, previous payments to survivors were – according to the government – expressly not linked to a recognition of legal obligation.

Neither the German military nor the government have publicly expressed their views on possible military or political lessons learned from the deadliest German military mission since World War II.

## **The Kunduz airstrike and the German judiciary**

### **10. What were the criminal charges against Colonel Georg Klein?**

According to the German Criminal Code (StGB), murder or negligent homicide (in accordance with paragraphs 211 and 222, respectively) are particularly relevant. Even if Klein assumed that he would only attack insurgents, which, theoretically, might have not be in violation of international law, he was at least grossly negligent. Klein should have sufficiently weighed, classified and carefully checked the paltry information he had access to – aerial photographs and information from a single informant near the sandbank. In view of the overall circumstances, the order to drop the bombs should ultimately not have been issued.

According to all publicly available information, Colonel Klein a) used only one source of information, b) did not sufficiently check whether there was a risk of civilian casualties, and c) did not warn civilians on the sandbank sufficiently or in time.

### **11. How did the legal review of the airstrike go?**

The German judiciary has not sufficiently dealt with the Kundus airstrike case.

The German Ministry of Defense actively tried to influence possible criminal proceedings by initially withholding important documents and reports. There were several talks between the ministry and the originally responsible public prosecutor in Dresden in which the latter indicated that he wished to raise important legal issues that had not yet been decided by the highest court. In the end, the Dresden public prosecutor's office took advantage of an application by the Ministry of Defense and dropped the case.

It was not until 15 March 2010, six months after the airstrike, that the German federal prosecutor's office in Karlsruhe opened investigations. Only four weeks later, on 19 April 2010, the office issued a press release announcing that the proceedings had been closed on the grounds that there was no apparent violation of international or German criminal law.

The federal public prosecutor's office essentially confined its factual inquiry to the question of Colonel Klein's subjective perceptions and assessments, without questioning their basis. Only four witnesses were heard – no victims or eye witnesses. The circumstances surrounding the attack were not taken into account, nor was the question of whether Colonel Klein took sufficient precautions during the attack adequately addressed.

The office did not conduct its own investigations on the ground, instead referring to mostly military information and lists of victims compiled by an Afghan investigative commission, which, in the view of those affected and their counsel, were insufficient and riddled with errors.

In [June 2015](#), the Federal Constitutional Court confirmed that Colonel Klein credibly stated that he considered the Kunduz base to be in danger, and had no information about civilians on the sandbank.

### **12. What role did Afghan survivors and bereaved play in the criminal proceedings?**

None of the injured parties or their family members were granted a hearing in a German court.

Their lawyers were denied access to the files on various grounds, and were ultimately granted only very limited access. They received a public version of the decision to end proceedings only six months after the decision was made. They were provided this in order to examine the decision and, if necessary, file an appeal. The complaint enforcement procedure and the constitutional complaint were not recognized.

### **13. Did those affected receive any financial or other type of support?**

The German government has neither compensated nor apologized to airstrike survivors or the bereaved. About a year after the bombing, the German Ministry of Defense paid the relatives 5000 US dollars per victim. Hanan also received this [payment](#), but only for one of his two dead sons.

However, the German Defense Ministry and military did not want the payments to be understood as compensation, and thus as an admission of guilt. The German armed forces' website stated that the payments constituted voluntary humanitarian aid and not "compensation in the legal sense."

#### **14. How did the compensation proceedings end?**

In October 2016, the Federal Court of Justice in Karlsruhe ruled that Germany was not liable for the deaths and injuries of victims of the Kunduz airstrike, and does not have to pay damages. In its judgment, the court confirmed the lower courts' decisions.

The Federal Court of Justice reasoned that the law on public liability did not apply to "military actions of the armed forces in the context of foreign missions." The court said that the law held that a civil servant or their superior must compensate for damages resulting from an "intentional or negligent" official act. However, liability only attaches to decisions made by an official in the course of "normal official business," not to those of a "soldier in combat."

Two Afghan plaintiffs then filed a complaint with the Federal Constitutional Court, which is still pending.

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