German Air Strike near Kunduz – A Year After

Evaluation of judicial reactions and further information

Berlin, 30 August 2010
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I. Introduction

One year ago, on 4 September 2009, two American jets attacked a crowd and two fuel tankers on the riverbank of the Kunduz River in Afghanistan following an order from German Colonel Georg Klein. Approximately 102 people were killed or injured. The reactions of German authorities, the government, the army, and law enforcement agencies within the last twelve months have been disappointing and insufficient. Furthermore, the German public seems to have lost interest in this incident and popular opinion supports the termination of the German mission in Afghanistan sooner rather than later.

One year after the incident the following can be stated: Firstly, the German army and government tried to cover up the fact that the majority of casualties killed in the air strike were civilians. Secondly, German authorities failed to conduct own investigations to establish who had been killed or injured in this incident. One year after the incident no authoritative list of victims exists and the number was corrected time and again, recognizing more and more victims. Furthermore, the persons responsible for the killing and injuring of at least 102 people have not been held accountable thus far. The victims’ families were offered 5,000 USD each; far too little for those families who lost their primary breadwinners. To date, there has been no official apology by Germany to the victims.

The European Center for Constitutional and Human Rights followed the incident from the beginning. Since April 2010, attorney Wolfgang Kaleck represents one of the victims: a thirty-five year old father who lost his two young sons. Regarding the criminal investigation proceedings, a comprehensive study was presented which concluded a prima facie case that the German soldiers involved in the incident committed crimes under the German criminal code, but not under international law. According to this analysis, a continuation of the investigations by the Public Prosecutor’s Office in Dresden was requested. A decision is pending.

Concerning the issue of reparations, the law firm Geulen & Klinger stepped in. They resumed negotiation talks with the German Ministry of Defense, after initial talks with another lawyers’ team were suspended. These talks are still on-going, but there is a large discrepancy between the 33,000 USD claimed by representatives of the victims, based on previous compensations paid by the German government to victims in Afghanistan, to the offered reparation sum of 5,000 USD. The possibility for the victims to enter legal actions is still open.
II. Chronology of Events

On 4 September 2009, two F-15 jets attacked a group of people gathering around two tankers on a riverbank of the Kunduz River. The attack was ordered by German Colonel Georg Klein. He intended to kill a few high-ranking Taliban leaders of the Kunduz region. In fact, most of the victims were civilians, among them children. To date, the exact number of people killed and injured is unknown. The official German government estimate comprises at least 102 casualties (91 killed, 11 injured).

Prior to the air strike that took place shortly after midnight, around noon time of 3 September 2009 the two tankers had been hijacked by a group of known Taliban near Kunduz. The tankers were then driven towards a Taliban controlled area south of Kunduz and the German army camp. In the late afternoon, the two tankers got stuck in the Kunduz River. Attempts by the Taliban to free the tankers failed. In the course of the evening, many inhabitants of the surrounding villages showed up out of curiosity or to get fuel from the tankers.

At the same time, the German camp got information from Afghan intelligence sources that the tankers had been stolen and were now stuck. A NATO surveillance airplane discovered the location of the tankers and began to send video images to the German camp. At the camp, four German army members watched the videos and received further information. The primary source of this information was only one Afghan intelligence officer who was not present at the site. He reported via three other persons, including one translator, that only insurgents were present at the site. The German camp was in frequent contact with two American F-15 pilots which arrived around midnight at the site since Colonel Klein reported troops-in-contact. The NATO Rules of Engagement only allow for sending F-15 jets in case that German groups are endangered. However, this information turned out to be false. After a conversation with the pilots in which various requests by them regarding the imminent danger of the people on the ground as well as the possibility of warnings took place, Colonel Klein decided to attack the civilians with the goal of hitting a large number of local Taliban leaders. About seven hours after the tankers got stuck, Colonel Klein gave the order that the two American F-15 pilots drop two GBA-15 bombs on the crowd.

The bombs hit more than 100 people, most of them civilians. Among them were a considerable number of children. Following the incident, NATO issued a secret report which found a number of violations of the NATO rules of engagements. The ICRC examined breaches of international humanitarian law and came to the conclusion that the attack had been unlawful. Various Afghan bodies conducted own investigations, and Amnesty International published a short report about the number of possible victims.

In Germany, a parliamentary inquiry commission was established to examine the misleading information given by the Ministry of Defense in the aftermath of the event and the attempt by the German military to conceal the high number of civilian victims. The General Public Prosecutor and the Federal Public Prosecutor started investigations, which were terminated rather quickly. Victim representatives negotiated with the Ministry of Defense regarding reparations and 5,000 USD were thus far paid to some victims’ families, which might lead to a lawsuit, since in other cases Germany paid up to 33,000 USD to a victim of the German army forces in Afghanistan.
III. Legal Evaluation

Reparations

The Ministry of Defense meanwhile recognized 102 victims as result of the air strike of 4 September 2009, among them 91 persons killed. Without challenging this number, it can be stated that this represents a high number of affected persons, regardless of whether they are surviving members of families or injured victims. This group of affected people consists primarily of women and children who have lost their current or future breadwinner. Most of the deaths were men and boys, who went to the riverbank to get fuel from the tankers or who went just out of curiosity.

In order to give these families adequate compensation, so that they can survive by their own, negotiations took place between the lawyers Karim Popal and Bernhard Docke and the German government. The latter was generally open to pay compensation, as it has already done so in other cases in Afghanistan, of up to 33,000 USD. In the current case, however, they only offered 5,000 USD per victims’ family.

The negotiation talks proceeded until March 2010, when the Ministry suspended them and tried itself to organize reparation payments circumventing the lawyers. In July 2010, talks were resumed; this time the lawyers’ team was extended to include Reiner Geulen, Remo Klinger and Wolfgang Kaleck. These talks are still on-going, although the Ministry in the meantime had already decided about the condition of reparations and wanted to proceed itself in paying the previously announced sum of 5,000 USD per family. It is remarkable that the ministry approached the victims’ families directly, since it is prohibited under German law to directly approach clients who are represented by a lawyer in order to reach an agreement. This prohibition is based on a number of reasons, e.g. to ensure that clients are not put under undue pressure to agree to something without consulting their lawyers for legal expertise.

According to German civil law (article 839 of the German civil code in combination with article 34 of the German basic law) victims of illegal acts by German officials have the right to adequate compensation. These acts also include those by members of the German army that are in violation of German laws. To date, no court in Germany has ever ruled in last instance about the applicability of these rules during armed conflicts. Comparable rules in other countries are applicable without any doubt (e.g. U.S.A., U.K., France).

Currently, a case is pending before the German Constitutional Court about the attack on civilians during a NATO air campaign in the Serbian city Varvarin in 1999. The Court could rule on this question for the first time. A decision is expected this year. Whether the Kunduz victims will bring legal action against Germany will also depend on the outcome of this decision.
Investigations and Prosecution

The criminal investigations conducted so far have been insufficient. First, the initially competent Public Prosecutor in Potsdam referred the file to the Prosecutor in Dresden, because the suspected person, Colonel Klein, was stationed in this court district. The Public Prosecutor in Dresden then referred the case to the Federal Prosecutor in Karlsruhe, since war crimes had allegedly been committed and such a case the Federal Prosecutor has jurisdiction, not the Public Prosecutor in one of the German federal states.

The Federal Prosecutor terminated his investigations in April 2010 regarding the alleged commission of war crimes, after having received statements by the suspects and others involved in the air strike. As stated in the press release of the Federal Prosecutor, only the perspective of the suspect was considered according to the relevant provisions in the German Code of Crimes against International Law.

The lawyers in this case, who had announced their representation to the Federal Prosecutor, never received a formal notice of the termination of the investigations. Without this notice, no appeal and judicial review of the Federal Prosecutor’s decision is possible. Furthermore, the lawyers were denied access to the files and they were not allowed to file their own statement before the decision to terminate the investigations was made. They only were informed about the termination of investigations through the press release. The Federal Prosecutor never gave reasons why the investigation was terminated, although he is obliged under German law to give reasons. Generally, it is standard procedure to allow the lawyers to comment on the investigations before they are terminated. As a justification for denying access to the files during the ongoing investigations, the reason given was that the represented victims were still potential witnesses. But in the end the file was closed without hearing any statement from the victims and without allowing access to the files. At the very latest upon the decision not to have any victims testify, access to the files should have been granted – also following their own reasoning – but was again denied. Procedural rights have hence been violated continuously.

Surprisingly, the Federal Prosecutor also terminated the investigations regarding all alleged crimes under the regular German criminal code. Only the Public Prosecutors’ Offices of the federal states are permitted to make this decision, but not the Federal Prosecutor. The latter must refer a case dealing with pure German criminal law back to the competent Public Prosecutor’s Office in a federal state, if there is insufficient evidence for the commission of an international crime such as a war crime. For this reason, a request has been filed with the Public Prosecutor in Dresden to continue the previous investigations.

The investigations under national criminal law are – regarding a possible justification of the act - also based on relevant provisions of the Geneva Conventions and their Additional Protocols as well as on customary rules. These provisions are slightly different from those of
the German Code of Crimes against International Law. The subjective view of the suspect is less relevant, instead the perspective of a reasonable third person is decisive for the decision to attack.

The German army announced in August 2010, that possible disciplinary measures will not be taken and no provisions of the German military code have been violated.

Even a negative decision by the prosecutors’ offices may be subject to judicial review. A higher district court has the competence to decide whether the prosecutors’ decisions were correct. There are also complaint mechanisms available on the international level, e.g. regarding the duty to conduct genuine investigations, which is part of various human rights treaties.
IV. Announcements

Please note, both events will be held in German.

A Year After: The Kunduz incident and the prohibition to kill in armed conflict
(Zum ersten Jahrestag: Der Fall Kundus und das Tötungsverbot im Krieg)

Dienstag, 31. August 2010, 19.00 Uhr
European Center for Constitutional and Human Rights (ECCHR)
Zossener Straße 55-58 (Aufgang D), Berlin • U7 Gneisenastraße • U1 / U6 Hallesches Tor

Gerd Hankel spricht zum Tötungsverbot im Krieg,
mit einer Einleitung von Rechtsanwalt Wolfgang Kaleck zum Stand des Strafverfahrens.

Einladungstext:


Wir bitten um Anmeldung unter info@ecchr.eu und freuen uns auf Ihr Kommen!
Wir möchten ferner auf folgende Veranstaltung hinweisen:

Remembrance of the Victims of Kunduz
(Gedenken an die Opfer von Kundus)

Samstag, 4. September 2010, 19.00 Uhr
Heilig-Kreuz-Kirche
Zossener Straße 65, Berlin • U7 Gneisenaustraße • U1 / U6 Hallesches Tor

Es sprechen:
Karim Popal, Anwalt der Opfer
Dr. Modjadjdi, Vorsitzender des Vereins für Afghanistan-Förderung e.V.
Jan van Aken, MdB, DIE LINKE
Hans-Christian Ströbele, MdB, Bündnis 90/DIE GRÜNEN
Christine Buchholz, MdB, DIE LINKE
Dagmar Apel, Pastorin der Heilig-Kreuz-Kirche
Yakup Tufan, stellv. Vorsitzender des Zentralrats der Muslime
Dr. Angelika Claußen, Vorsitzende der IPPNW

Es spielt:
Das Kammermusikensemble der Berliner Symphoniker

unterstützt von: Gruppen der Berliner Friedenskoordination, Attac Berlin, Attac AG
Globalisierung und Krieg, BDS-Berlin, Bündnis 90/DIE Grünen Friedrichshain-Kreuzberg,
Deutsche Friedensgesellschaft – Vereinigte KriegsdienstgegnerInnen (DFG-VK), Deutscher
Friedensrat e.V., DIE LINKE., DKP-Berlin, Europäisches Friedensforum/Deutsche Sektion,
Internationale Liga für Menschenrechte, Friedensratschlag Kassel, Gesellschaft zum Schutz
von Bürgerrecht und Menschenwürde e.V. (GBM), IMI Tübingen, Naturfreunde
Deutschlands e. V., SDAJ

in Medienpartnerschaft mit: die tageszeitung, Neues Deutschland, junge Welt
V. Links

Expert opinion on criminal accountability by ECCHR (in German): Link

Submission to the Public Prosecutor in Dresden (in German): Link

Submission to the German Ministry of Defense (in German): Link

Book (in German):


Legal Articles:

in English


in German


D. Diehl - Zur Einstellung des Ermittlungsverfahrens gegen Oberst Klein und Hauptfeldwebel Wilhelm durch die Bundesanwaltschaft, BOFAXE Nr. 343D, 11. May 2010;


C. Safferling/ S. Kirsch - Die Strafbarkeit von Bundeswehrangehörigen bei Auslandseinsätzen: Afghanistan ist kein rechtsfreier Raum, Juristische Ausbildung 02/2010, p. 81 et seq.;


VI. Contacts and Donation Account

Contacts

European Center for Constitutional and Human Rights (ECCHR)
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Andreas Schueller, LL.M., Program Manager Universal Justice

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Donation Account

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The donations support the enforcement of reparations and are not being used for lawyers’ fees.