

The Return of German Militarism

Colonel Klein Goes Unpunished. The victims of militarism are truth and democracy

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The Karlsruhe federal prosecutor has closed an investigation into army colonel Georg Klein. This means that no one will face legal consequences for the deadliest bomb attack by the Bundeswehr (German Armed Forces) since its formation.

On September 4, 2009, Colonel Klein issued a command to bomb two hijacked tankers near the Afghan city of Kunduz. According to NATO sources, up to 142 people were killed as a result, including dozens of civilians. In the aftermath, senior German government and military circles tried to cover up the massacre. Only following press releases and pronouncements from the American authorities did the true extent of the massacre become known.

Defense Minister Franz Josef Jung (Christian Democratic Union, CDU) had to resign because for several days after the attack he falsely denied knowledge that there were civilian victims. His successor, Karl Theodor zu Guttenberg (Christian Social Union, CSU), initially defended Klein's conduct, but then had to reverse himself, calling the attack "not appropriate militarily." He dismissed General Inspector Wolfgang Schneiderhan and a state secretary for allegedly withholding documents from him. The Bundestag (federal parliament) even established a committee of inquiry to probe the Kunduz affair.

The federal prosecutor has now given Klein a free pass, absolving him of any criminal responsibility for the massacre in Kunduz. This will give the army a free hand to perpetrate similar massacres in future.

The reasons given by the prosecutor for this action mark a significant development of German militarism. An unelected federal agency with neither democratic legitimacy nor judicial powers has created a legal precedent that will have fatal consequences.

The federal prosecutor's office is well aware of the scope of its decision. In the official statement it says, "For the first time ever in a meticulous process of examination, the circumstances of a military attack with far-reaching deadly consequences ordered by German soldiers have been subjected, from a factual and legal standpoint, to an extensive penal investigation."

At the same time, the prosecutor refused to give the public any access to the factual material upon which the decision was based, because this was "largely classified as secret." The federal prosecutor's office has created a new legal precedent with far-reaching consequences, but in an authoritarian manner refuses to openly disclose the foundations of the decision.

It defines the Bundeswehr's Afghanistan deployment as a "non-international armed conflict as defined in international criminal law"—a legal term for civil war. It adopts the definition given by Defence Minister Guttenberg, who first used this designation after the air raid in Kunduz. Previously, for political reasons, the German government had denied that the Bundeswehr was involved in a war in Afghanistan.

Based on this definition, the federal prosecutor's office has judged Klein's order to attack on the basis of the International Criminal Code (Völkerstrafgesetzbuch; VStGB). This is a German law adopted in 2002, and not international law, as regulated by the Charter of the United Nations and other international agreements.

The Social Democratic-Green Party government responsible for the new law had justified it on the grounds that it allowed the prosecution of genocide, crimes against humanity and war crimes, even when committed by non-Germans outside of Germany. Now it turns out to largely place the military actions of German soldiers beyond any legal reproach. Under the VStGB, only serious war crimes are punishable; manslaughter and contingent intent are not. To prove a soldier has committed a crime with express intent, however, is almost impossible.

In the Klein case, the federal prosecutor has come to the conclusion that the Kunduz bombing did not constitute "prohibited methods of warfare" under the VStGB and is thus not punishable. But it does not stop there. The prosecutor attempts to define criminal liability for attacks on a civilian population as narrowly as possible, absolving in advance future attacks.

The prosecutor's office declares that the existence of an offence presupposes "subjectively a definite expectation by the perpetrator that the attack would cause the killing or injury to civilians or damage to civilian property to such an extent that was disproportionate to the total anticipated concrete and direct military advantage."

It is therefore not enough that an officer orders a bomb attack, accepting that it could result in the deaths of dozens of civilians. He must "definitively expect" that civilians would be killed. And even that is not punishable if the number of civilian dead are not out of proportion to "anticipated concrete and direct overall military advantage." The federal prosecutor has not revealed what formula will be used to balance the innocent lives lost against military advantage.

In any case, what is decisive is not the objective facts, but the subjective intention of the perpetrator, as pointed out several times: "The core of the legal assessment of the raid is formed by the relevant mental image of the accused and the subjective facts." In other words, if an officer declares he had no intention to kill civilians, he cannot be prosecuted, even if there are dozens of victims.

While the federal prosecutor claims that, at the time of the raid, Colonel Klein had not known that civilians were near the target (which, given the known facts, is not very credible), he stresses at the same time that this is irrelevant—not only under the VStGB, but also under the much more restrictive German Criminal Law: "The dropping of bombs on targets, in the immediate proximity to people, under the rules of German Criminal Law is always justified, and so accords no punishment, if the military attack is permissible under international law. That is the case here."

As far as insurgents are concerned, they are outlaws and can be shot, according to the federal prosecutor: "In so far as the people killed were with the insurgents, they may be attacked as combatants of the non-state party to the conflict." A fight against insurgents on the ground could not be expected from the commander because it was not possible "without risk to ones own troops."

The other people killed and injured were indeed "civilians protected by humanitarian international law." However, the attack order was permissible under international law because it had to be judged according to "the perspective of the assailant at the time of the incident" and "not by a retrospective course of action."

And to avoid any doubt concerning the legality of causing civilian victims, the prosecutors underlines once again: "Even if one must reckon with civilian victims of a military action, a bombing is only inadmissible in international law if it is an 'indiscriminate' attack in which the expected civilian harm is disproportionate to the anticipated concrete and direct military success. This was not the case here."

As evidence, the federal prosecutor says that Colonel Klein had, "despite the pressure of the situation in which he made the decision, decided upon a limited localised attack using the smallest available size and number of bombs." This is a level of cynicism that can scarcely be surpassed. After all, there were two 250-pound bombs deployed—an enormous explosive force. Two hand grenades would have been enough to turn the gasoline-filled tankers into a hellish inferno.

Even Klein's violations of rules of engagement of the International Security Assistance Force (ISAF) in Afghanistan are, according to the federal prosecutor, not capable of restricting actions permitted under international law. This is because such rules of engagement are purely internal, and have "no external internationally binding legal effect."

However, Klein's violation of the ISAF rules of engagement does indeed provide grounds for questioning the proportionality of the attack. He had lied to the American bomber pilots, saying there was a direct threat to German soldiers, although no army units were in the vicinity of the hijacked tankers. Without such an immediate danger, Klein was not authorised to order the attack.

And although the video images, which were transmitted to Klein's command post, clearly showed many people standing in the vicinity of the trucks, he insisted, against the advice of the US pilots, on an attack without warning. The reason for this only became known weeks later: The colonel and those whom he was consulting wanted to liquidate the regional Taliban leadership, who they believed were in the vicinity of the tankers. Thus, they were consciously seeking a high number of casualties.

The decision of the federal prosecutor and the grounds given for it strengthen all those in the military who wish to proceed ruthlessly against the Afghan insurgency and civilian population. The deputy chair of the Federal Armed Forces Association, Wolfgang Schmelzer, recognised this immediately. He welcomed the decision, saying it gave "all soldiers more security." When a soldier uses firearms in future, the prosecutor would not always be "looking over his shoulder," he exulted. This was especially important for the soldiers deployed in northern Afghanistan.

Defence Minister Guttenberg also welcomed the decision to drop the investigation, saying

soldiers now had “maximum security.” Christian Democrat parliamentary faction vice-chair Andreas Schockenhoff (CDU) demanded an end to the parliamentary committee of inquiry into Kunduz. Guttenberg was questioned before the committee on Thursday. With the decision of the federal prosecutor, the legal assessment of the case was concluded, Schockenhoff claimed.

The dropping of proceedings against Colonel Klein comes as the US and its allies are intensifying the war in Afghanistan. After seven German soldiers died in the last two weeks, the government wants to send heavy weapons into Afghanistan. It has dropped the mendacious talk about a mission to develop and stabilise Afghanistan, instead speaking openly of war.

The real character of the Afghan war is becoming ever more apparent: the occupation and subjugation of a country whose location gives it great geostrategic importance. The federal prosecutor has now given the green light for methods that have characterised every colonial war—ruthless acts against insurgents and civilians.

The victims of militarism always include truth and democracy. The high-handedness with which the federal prosecutor has gone over the heads of parliament and the people to create new legal norms is reminiscent of the authoritarian state under Kaiser Wilhelm.

At the same time, the government and the media are stirring up an atmosphere in which any criticism of the Afghanistan war is branded as a lack of respect for fallen German soldiers. This is a warning signal. It is only 12 years since the Bundestag officially lifted all judgments by Nazi military courts brought against citizens for undermining military morale. Section 109d of the Penal Code still makes “disruptive propaganda against the army” a crime.

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