Dottorato di ricerca in Ordine internazionale e diritti umani, Sapienza, Università di Roma - Intercenter, Università di Messina

Ordine internazionale e diritti umani

International Legal Order and Human Rights
Ordenamiento Jurídico Internacional y Derechos Humanos
Ordre juridique international et Droits de l'Homme

EUGENIO CARLI*

INTERNATIONAL MILITARY OPERATIONS, DUTY TO CONDUCT EFFECTIVE INVESTIGATIONS AND EXTRATERRITORIAL APPLICATION OF THE ECHR: HAS THE COURT GONE TOO FAR IN *HANAN* V. *GERMANY*?

SUMMARY: 1. Introduction. – 2. The Circumstances of the Case. – 2.1. Facts Originating the Complaint. – 2.2. Relevant ECHR Provisions. – 3. An Overview of Strasbourg Court's Case-Law on Extraterritorial Jurisdiction. – 3.1. Main General Models of Extraterritorial Application of the ECHR. – 3.2. The Scenario of International Military Interventions. – 4. The "Special Features Model" for Establishing a Jurisdictional Link. – 4.1. The Content of the Model as Enshrined in *Hanan*. – 4.2. A Critique. – 4.3. The Relevance of the Nature of the Contested Obligation. – 5. The (Disregarded) Question of Attribution of Conduct. – 6. Concluding Remarks.

1. *Introduction*

The *Hanan* v. *Germany* case concerned the killing and injuring of about fifty persons between insurgents and civilians consequent to an airstrike against two fuel tankers which had been hijacked by Taliban insurgents in Afghanistan[1]. The airstrike was ordered by a German senior military officer, who was acting in the NATO International Security Assistance Force (ISAF) under a mandate given by the United Nations Security Council (UNSC) under Chapter VII of the UN Charter[2]. A German prosecutor began and then discontinued an investigation on the incident, based on a lack of grounds for the criminal liability of the military officer. The applicant – an Afghan national – thus complained under the procedural limb of Article 2 ("Right to life") of the European Convention on Human Rights (ECHR) about a lack of an effective investigation into the airstrike that had killed, *inter alios*, his two sons. Relying on Article 13 ECHR ("Right to an effective remedy") taken in conjunction with Article 2, he further alleged that he had had no effective domestic remedy to challenge the decision of the German Prosecutor General to discontinue the criminal investigation. After asserting their competence *ratione loci*, the Grand Chamber's judges

* Research fellow, University of Siena, Siena, Italy. PhD in International and EU Law, University of Florence, Italy.

[1] ECtHR, Application No. 4871/16, *Hanan* v. *Germany*, 16 February 2021.

[2] See Security Council Resolution 1386, 20 December 2001, S/RES/1386 (2001).

decided to examine the complaints solely under the procedural aspect of Article 2 ECHR. In this respect, they unanimously concluded that the investigation into the deaths of the applicant's two sons which was performed by the German authorities complied with the requirements of an effective investigation under Article 2[3] and found therefore no violation of its procedural limb.

Yet the analysis as to the effectiveness of the investigation on the incident carried out by the German judicial authorities and the access to the right to effective remedy for the purposes of Articles 2 and 13 pertains to the merits of the case and goes beyond the scope of this article[4]. What shall be dwelt upon hereafter is the question of "admissibility" of the complaint, upon which any consideration on the merits is legally dependent. The judgment is particularly interesting in this regard, inasmuch as it adopts a new model of extraterritorial application of the ECHR regarding international military operations and the duty to conduct effective investigations on incidents occurred in that context. This model further extends the legal effects of the Convention and may theoretically apply quite easily in other similar circumstances. Moreover, the *Hanan* judgment is significant being it the first time since *Banković* in which the Grand Chamber adjudicates on establishing its jurisdiction consequent to an airstrike[5] and also represents the first case of ECHR's extraterritorial application arising from the war in Afghanistan, with possible future broader ramifications in that respect. However, the decision is not without criticism, as we shall see further on.

After picturing the circumstances of the case and the main well-established models for extraterritorial application of the ECHR, including in the framework of international military operations, the present article shall scrutinize the novel approach adopted by the European Court of Human Rights (here "ECtHR" or "the Court") to assert jurisdiction in the case at hand. At a later stage, the issue of attribution of conduct and its possible relevance for the existence of a jurisdictional link shall be dealt with. Some concluding remarks shall ultimately follow.

2. *The Circumstances of the Case*

2.1. *Facts Originating the Complaint*

The decision at stake originates in the context of the military operation conducted by the ISAF in Afghanistan as of 2001. The establishment of ISAF was first envisaged in the Bonn Agreement of 5 December 2001[6] and then authorized by the UNSC's Resolution 1386 (2001) of 20 December 2001, with the mandate to assist the Afghan Interim Authority in maintaining security in Kabul and surrounding areas and to enable the Interim Authority and

[3] Namely promptness, reasonable expedition, independence, adequacy, and presence of the public scrutiny element.

[4] Suffice to say that the Court held that the investigation into the deaths of the applicant's two sons which was performed by the German authorities complied with the requirements of an effective investigation under Article 2 and therefore no violation of the procedural limb of that provision was found.

[5] As known, in *Banković* the ECtHR held that no jurisdiction is exercised through extraterritorial airstrikes. Yet in that case no military presence was on the ground, as instead was in *Hanan* through the deployment of ISAF's forces.

[6] Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement) 2001, S/2001/1154.

the UN to operate in a safe environment. Shortly after, the German Parliament authorised the deployment of German troops to Afghanistan and their participation in ISAF. In 2003 NATO assumed command of ISAF and subsequently the mission was expanded beyond the Kabul area. German forces were deployed in the Regional Command North, which in turn included the "Provincial Reconstruction Team" Kunduz, a small group of military and civilian personnel assigned to provide security in that particular Afghan province. By the end of 2006 ISAF was responsible for all of Afghanistan.

As previously mentioned, on 4 September 2009 a German Colonel K., who commanded the Provincial Reconstruction Team Kunduz, ordered an airstrike against two fuel tankers which had been hijacked by Taliban insurgents in Afghanistan, killing and injuring both insurgents and civilians. In March 2010 the German Federal Prosecutor General began and shortly after discontinued an investigation based on a lack of grounds for the criminal liability of Colonel K. under either the German Code of Crimes against International Law or the Criminal Code. He determined that the situation in the northern part of Afghanistan where the German armed forces were deployed amounted to a non-international armed conflict (NIAC), triggering the applicability of international humanitarian law (IHL) and of the Code of Crimes against International Law. For the Prosecutor, German soldiers forming part of ISAF were regular combatants and therefore not criminally liable for acts of war permitted under international law. He thus concluded that Colonel K.'s liability under the Code of Crimes against International Law was excluded because Colonel K. did not have the necessary intent to kill or harm civilians or damage civilian objects. Liability under the Criminal Code was also excluded because the lawfulness of the airstrike under international law served as an exculpatory defence[7].

After having exhausted all available judicial remedies in domestic courts, in January 2016 the applicant referred to the ECtHR for ascertaining that Germany had conducted no effective investigation into the airstrike that had killed his two sons and that he had not had access to an effective remedy to challenge the domestic decision to discontinue the investigation, in breach respectively of Article 2 and Articles 13 and 2 taken conjunctly of the ECHR.

2.2. *Relevant ECHR Provisions*

Under Article 2, paragraph 1 ECHR «[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law». As made clear by extensive case-law[8], the provision at hand entails two distinct groups of obligations. Under the former, corresponding to its substantive limb, some kinds of intentional deprivation of life are prohibited (so called "negative" obligations)[9]. Under the latter, some positive duties are requested on the part of Contracting States, including those of prevention, repression and reparation. Among the obligations of repression,

[7] *Hanan*, *supra* no. 1, para. 33.

[8] One of the landmark cases is *McCann and Others* v. *The United Kingdom*, 27 September 1995, Application No. 18984/91, para. 161, in which the Court set out the principle that the State's obligation to guarantee the right to life, in order to be effective, also implies a procedural obligation to investigate possible violations of that right. The content and nature of the obligation to investigate under Article 2 was clarified *inter alia* in *Kelly and Others* v. *The United Kingdom*, Application No. 30054/96, 4 May 2001, paras. 94-98.

[9] Such as the use of lethal or excessive force by police officers, security forces, prison officers or other State agents, as well as rejection, expulsion or extradition to a country where deprivation of life occurs.

corresponding to the procedural limb of Article 2, an effective investigation into any possible violation of the right to life shall be conducted, as well as a duty of cooperation between two or more Contracting States in criminal matters within the legal space of the ECHR shall be performed. Such procedural obligation in turn entails a series of criteria for its effectiveness to be assessed, namely the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation[10].

However, in *Hanan*, judges were primarily called upon to determine whether the deaths of the applicant's sons had occurred within the German jurisdiction for the purposes of Article 1 ECHR. According to that provision, Contracting States shall secure the rights and freedoms expressed therein «to everyone within their jurisdiction». It is well known that the main criterion for establishing jurisdiction under such norm is the territorial principle, according to which every Contracting State is bound to respect ECHR's provisions on its own territories[11]. However, other criteria have been elaborated by the ECtHR for extending the scope of the Convention in different scenarios. Those will be briefly illustrated in the next Section.

3. *An Overview of Strasbourg Court's Case-Law on Extraterritorial Jurisdiction*

A rapid overview of the main approaches developed by the Court, with a particular focus on situations consisting in the use of armed forces in foreign territories (e.g. military interventions), will be furnished below in order to have a general, albeit non-exhaustive, picture of the jurisprudential state of the art on the matter.

3.1. *Main General Models of Extraterritorial Application of the ECHR*

The extraterritorial application of human rights treaties[12], and of the ECHR in particular[13], is a very much debated topic. As far as the latter is concerned, the question boils

[10] See *Al-Skeini and Others* v. *the United Kingdom*, Application No. 55721/07, 7 July 2011, paras. 165-167.
[11] See *inter alia Banković and Others* v. *Belgium and Others*, Application No. 52207/99, Decision, 12 December 2001, para. 59.
[12] Literature on this argument is vast. See *inter alia* P. DE SENA, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Torino, 2002; F. COOMANS, M. T. KAMMINGA (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp, 2004; M. GONDEK, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Antwerp, Oxford, Portland, 2009; G. S. GOODWIN-GILL, *The Extraterritorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction*, in L. BOISSON DE CHAZOURNES. M. G. KOHEN (eds.), *Le droit international et la quête de sa mise en oeuvre; Liber Amicorum Vera Gowland-Debbas*, Leiden, 2010, p. 293; G. GRISEL, *Application extraterritoriale du droit international des droits de l'homme*, Zurich, 2010; M. MILANOVIC, *The Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy*, Oxford, 2011; K. DA COSTA, *The Extraterritorial Application of Selected Human Rights Treaties*, Leiden, 2013.
[13] See *inter alia* S. BESSON, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, in *Leid. Jour. Int. Law*, 2012, p. 857 ss.; M. DUTTWILER, *Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights*, in *Netherlands Quarterly of Human Rights*, 2012, p. 137 ss.; I. KARAKAŞ, H. BAKIRCI, *Extraterritorial Application of the European Convention on Human Rights. Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility*, in A. VAN AAKEN, I. MOTOC (eds.), *The European Convention on Human Rights and General International Law*, Oxford, 2018, p. 112 ss.

down to establishing under what circumstances Article 1 is triggered[14]. Indeed, as a result of some mostly recent phenomena – such as war on terrorism, economic globalisation, migratory issues and activities for the maintenance of international peace and security – state conduct has begun to increasingly affect the human rights of individuals across borders[15]. Besides the case of incidents occurring on the territory of Contracting States, in which the exercise of jurisdiction for the purposes of Article 1 is assumed, at least two main models have been developed by the Strasbourg case-law in order to extend its reach beyond ECHR borders[16].

The first one is the so-called "spatial model", according to which extraterritorial jurisdiction for the purposes of Article 1 ECHR is meant to be exercised in the area placed under the "effective control" of a Contracting State. In such a case, questions arise as to what an area is to be intended and, above all, what "effective control" amounts to. As to the former element, the area corresponds to a portion of a foreign State's territory, regardless of its extension. However, the concept is functionally linked to the latter, which is also the most problematic. The ECtHR clarified in the landmark *Loizidou* case[17] that such type of control – whether exercised through lawful or unlawful actions – has to be assessed on the basis of factual circumstances. Those include *inter alia* the number of soldiers deployed by the State in the territory in question and the extent to which the State's military, economic and political support for the local subordinate administration provides it with influence and control over the region.

The second criterion for extraterritorial application of the ECHR is the "personal model", for which a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory[18]. In this case, the Court found, for example, that a certain degree of "authority and control" exercised by State (military or civilian) agents over individual persons who are in the territory of another State[19] or the exercise of «all or some of the public powers» normally exercised by Governments on respective territories[20] are able to trigger jurisdiction under Article 1 ECHR. Typical situations in which this model has been applied are physical custody in the context of extraterritorial detentions or abductions[21] and conduct of military forces in the course of international security missions[22].

In general, and as far as State's acts occurring on territory outside of ECHR space are concerned, different scenarios may entail the application of those two models and thus implicate extraterritorial jurisdiction under Article 1 ECHR, such as the conduct of State

---

[14] In this article I will focus on the jurisdiction of State parties in territories *outside* of ECHR space. Situations have arisen as well where State's acts occurred within ECHR space, but outside Contracting State's own territory and where State's acts on its own territory, produced effects in another State.

[15] See F. COOMANS, M. T. KAMMINGA, *Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties*, in F. COOMANS, M. T. KAMMINGA, *Extraterritorial Application*, cit., p. 1 ss.

[16] Those two models are almost unanimously identified in literature. See *inter alia* M. MILANOVIC, *Jurisdiction and Responsibility. Trends in the Jurisprudence of the Strasbourg Court*, in A. VAN AAKEN, I. MOTOC (eds.), *The European Convention on Human Rights*, cit., p. 97.

[17] *Loizidou* v. *Turkey*, Application No. 15318/89, Preliminary Objections, 23 March 1995, para. 62.

[18] See for example *Drozd and Janousek* v. *France and Spain*, Application No. 12747/87, 26 June 1992, para. 91.

[19] See for example *Issa* v. *Turkey*, Application No. 31821/86, 16 November 2004, para. 71.

[20] See *Banković*, *supra* no. 11, para. 71.

[21] See for example *Öcalan* v. *Turkey*, Application No. 46221/99, 12 May 2005, para. 91.

[22] See for example *Al-Saadoon and Mufdhi* v. *the United Kingdom*, Application No. 61498/08, Decision, 30 June 2009, paras. 86-89.

security forces acting abroad, military presence and occupation, State acts in high seas and, for what most interests here, international military intervention in non-contracting States[23].

3.2. *The Scenario of International Military Interventions*

As far as military intervention in foreign territories is concerned, one of the factual situations comprised in this ambit is the use of armed force by national contingents operating in the framework of multinational missions, be that conducted jointly by several States (such as the acts of the Coalition Provisional Authority set by the UNSC in 2003 in Iraq under a unified command) or operating under the auspices of an international organization (such as the conduct of German military forces as part of ISAF in Afghanistan). In those cases, the discourse on jurisdiction for the purposes of Article 1 (competence *ratione loci*) has usually been linked in the Court's reasoning, albeit not always in a very clear fashion, to that on attribution of conduct (competence *ratione personae*) under the law of international responsibility. In a few words, one may say that those two issues, despite their legal distinctness, have generally gone hand in hand in Strasbourg's jurisprudence, meaning that whenever conduct was attributed to the respondent State, extraterritorial jurisdiction was found as well, and vice versa[24]. Such a trend, as we shall see later, seems having changed in the most recent case-law[25].

As to the first – prevalent – type of situation (extraterritorial jurisdiction by, and attribution of conduct to, the respondent State), it is possible to mention several cases brought before the ECtHR arisen from the conduct of multinational forces operating in Iraq as of 2003. One of those is *Al-Jedda*, regarding an application lodged by an Iraqi civilian who had been interned in a detention centre run by the British forces. The Court observed that since the UNSC had not exercised "effective control" or "ultimate authority and control" over the conduct of the national troops, the applicant's internment was not deemed imputable to the UN but exclusively to the United Kingdom (UK) and was thus under the latter's jurisdiction[26]. The Court confirmed the *Al-Jedda* principles in *Hassan*, concerning the capture of an Iraqi national by the British armed forces and his detention in a camp during the hostilities in 2003. The ECtHR found that the victim had been within the UK's jurisdiction rather than that of the United States, as contended by the British Government. Judges rejected the UK argument that jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the Contracting State were operating in a territory of which they were not the Occupying Power, and where the conduct of the State should instead be subject to the requirements of IHL. The Court also held that even after the area in question had been transferred from British to US authority, the UK had retained authority and control over all the aspects of the complaints raised by the applicant[27]. Shortly after *Hassan*, the Court ruled on the *Jaloud* case, concerning the

[23] For an overview of these scenarios see the factsheet *Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights*, July 2018. Clearly, situations of international military interventions in foreign territories fall both into the "spatial" and the "personal" models for the purpose of extraterritorial application of the ECHR.

[24] This introduces the question – that won't be dwelt upon here – whether attribution is a real prerequisite for jurisdiction under international human rights law. See on this point M. MILANOVIC, *The Extraterritorial Application*, cit., p. 41 ss.

[25] See *sub*, Section 5.

[26] *Al-Jedda* v. *The United Kingdom*, Application No. 27021/08, 7 July 2011, paras. 76-86.

[27] *Hassan* v. *The United Kingdom*, Application No. 29750/09, 16 September 2014, paras. 76-80.

investigation by the Netherlands authorities into the circumstances surrounding the death of an Iraqi civilian in an incident involving Netherlands Royal Army personnel, acting in the framework of the Stabilisation Force in Iraq. The applicant complained that the investigation into the shooting of his son had neither been sufficiently independent nor effective. The Court established that the complaint about the investigation into the incident – which had occurred in an area under the command of an officer of the British armed forces – fell within the jurisdiction of the Netherlands, which had retained full command over its military personnel in Iraq[28].

In fewer cases, the finding by the ECtHR that the contested conduct was not attributable to the respondent State precluded any analysis on the existence of a jurisdictional link for the purposes of Article 1 (second type of situation abovementioned). For example, in *Behrami and Saramati*, regarding deprivation of life and liberty in the framework of NATO military operations in the Yugoslav territory, the Court noted the delegation by the UNSC of its powers under Section VII of the UN Charter and concluded that the decisive question was whether the UNSC had retained "ultimate authority and control" over the armed forces. Applying that criterion, the Court ruled that the UNSC had indeed retained ultimate authority and control and hence declared the applications incompatible *ratione personae* with the Convention[29]. As known, the decision was widely criticized for resorting to a controversial criterion of attribution, which disregarded the prevalent test of "effective control"[30] and remained for this reason quite isolated in the Court's jurisprudence.

There are also cases occurring in the context of international military interventions on foreign territories where the question of attribution was not addressed at all. For example, in *Al-Skeini* the Court had to determine whether some Iraqi citizens who had been killed or fatally wounded by British troops during the invasion of Iraq had been within the jurisdiction of the UK. Judges noted that at the material time the UK (together with the United States) had assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign Government. In such exceptional circumstances, there had been a "jurisdictional link" between the UK and the persons killed[31]. As regards the UNSC, the Court merely acknowledged the role and status of the Occupying Powers in Iraq. In that case, the Court apparently viewed as obvious the attribution of the wrongful conduct to the UK, also considering its status of Occupying Power (together with United States) under relevant IHL rules and the exercise of "public powers" on that territory.

In general, one may conclude that the Court, although continuing stressing that the exercise of extraterritorial jurisdiction may take place only in exceptional circumstances, has increasingly found this to occur and a broader and more inclusive interpretation of the Convention may be envisaged as of the highly criticized *Banković* case[32]. As to extraterritorial international military operations, the Court has resorted to both the spatial and personal models in order to assert its jurisdiction, excluding the latter in the case of non imputability to the respondent Contracting State of the alleged wrongful conduct. As we shall see, the *Hanan* judgment distances itself from previous case-law under different profiles.

---

[28] *Jaloud* v. *The Netherlands*, Application No. 47708/08, 20 November 2014, paras. 139-153.
[29] *Behrami and Behrami* v. *France and Saramati* v. *France Germany and Norway*, Applications Nos 71412/01 and 78166/01, Decision, 2 May 2007, paras. 133-134.
[30] Besides having been criticized by numerous scholars, the test was clearly rejected by the International Law Commission. See G. GAJA, *Seventh Report on Responsibility of International Organizations*, UN Doc. A/CN.4/610, 27 March 200, p. 80, para. 30.
[31] *Al-Skeini*, *supra* no. 10, paras. 149-150.
[32] See K. DA COSTA, *The Extraterritorial Application*, cit., pp. 252-253.

4. *The "Special Features Model" for Establishing a Jurisdictional Link*

4.1. *The Content of the Model as Enshrined in* Hanan

In *Hanan* the Court introduced a new model of extraterritorial application of the Convention in the context of international military missions conducted under the auspices of an international organization, maintaining (by a majority) that the existence of three "special features" cumulatively triggered the application of Article 1 and made the case admissible *ratione loci*.

Judges held, firstly, that since a NIAC was deemed to exist between the ISAF military forces fighting on behalf of the Afghan authorities, on the one hand, and the Taliban insurgents and affiliated groups thereto, on the other, Germany had been obliged under customary IHL[33] to investigate the airstrike at issue, as it had concerned the individual criminal responsibility of members of the German armed forces for a potential war crime[34]. Secondly, the Afghan authorities had been, for legal reasons, prevented from instituting themselves a criminal investigation. By virtue of the ISAF Status of Forces Agreement (SOFA) concluded between the ISAF and the Interim Administration of Afghanistan on 4 January 2002[35], the troop-contributing States had indeed retained exclusive jurisdiction over the personnel they had placed at ISAF's disposal in respect of any criminal or disciplinary offences on the territory of Afghanistan[36]. Thirdly, the German prosecution authorities had also been obliged under domestic law (in particular, according to the rules contained in the Code of Crimes against International Law[37] and in the German Code of Criminal Procedure[38]), related to Germany's ratification of the Rome Statute of the International Criminal Court, to investigate any liability of German nationals for, *inter alia*, war crimes or wrongful deaths inflicted abroad by members of their armed forces, as in the majority of Contracting States participating in military deployments overseas[39].

Importantly, the ECtHR had already used the special features model two years earlier in *Güzelyurtlu*, regarding the death of three Cypriot nationals outside the territory of the respondent State (namely, the Cypriot-Government controlled part of Cyprus) and the alleged violation of the procedural obligation under Article 2 on the part of Cypriot and Turkish authorities. In that case, the Court's jurisdiction was established on two grounds, each of which, in its view, would have sufficed in itself to establish a jurisdictional link. The former was that the authorities of the Turkish Republic of Northern Cyprus (TRNC) had

---

[33] In particular, J.-M. HENCKAERTS, L. DOSWALD-BECK (eds.), *Customary International Humanitarian Law*, Geneva, Cambridge, 2005, Rule 158 ("States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects").

[34] *Hanan*, *supra* no. 1, para. 137.

[35] Military Technical Agreement between the International Security Force (ISAF) and the Interim Administration of Afghanistan 2002, Annex A at section I, subsection 3. The text is reproduced in *Hanan*, *supra* no. 1, para. 75.

[36] *Ivi*, para. 138.

[37] In particular, Article 11 ("War crimes consisting in the use of prohibited methods of warfare").

[38] In particular, Article 152 on the duty of the public prosecutor's office to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.

[39] *Hanan*, *supra* no. 1, para. 139.

instituted their own criminal investigation into the murder of the applicants' relatives, thus giving the courts criminal jurisdiction over the individuals who had committed the crimes wherever they were to be found on the whole island of Cyprus. The latter ground regarded instead the very existence of two special features, namely the fact that: a) the northern part of Cyprus was under the "effective control" of Turkey for the purposes of the Convention; and b) the presence of the murder suspects in the territory controlled by Turkey had been known to the Turkish and TRNC authorities and prevented Cyprus from fulfilling its Convention obligations[40].

The special features model was also resorted to by the Court in *Georgia* v. *Russia (II)* in order to assert jurisdiction over the alleged violation by the Russian Federation of the procedural limb of Article 2, due to war crimes committed during the active phase of the hostilities with Georgia. In that case, the Court noted first that the Russian Federation had an obligation to investigate the events in issue, in accordance with the relevant rules of IHL and domestic law. Furthermore, although the events which occurred during the active phase of the hostilities did not fall within the jurisdiction of the Russian Federation, the State had established "effective control" over the territories in question shortly afterwards. Lastly, Georgia was prevented from carrying out an adequate and effective investigation into the allegations[41].

However, despite some similarities, those two cases differ from *Hanan* under different aspects. As the Grand Chamber clarified, *Hanan* is to be distinguished from *Güzelyurtlu* to the extent that in the former case the institution of a domestic criminal investigation or proceedings concerning deaths which had occurred outside the jurisdiction *ratione loci* of that State is not in itself sufficient to establish a jurisdictional link between that State and the victim's relatives who brought proceedings before the Court. Indeed, in the Court's opinion the establishment of such a link merely on the basis of the institution of an investigation may have a chilling effect on instituting investigations at the domestic level into deaths occurring in extraterritorial military operations[42]. The logic of the differentiation between the two cases lies in the fact that the circumstances in *Hanan* were that of an extraterritorial military operation conducted under the auspices of an international organization, in which the jurisdictional link should be more solidly construed for the purposes of Article 1. Moreover, one of the two special features identified in *Güzelyurtlu* (which do not correspond in their content to those found in *Hanan*) was that one of the respondent States (Turkey) was occupying the northern part of Cyprus and exercised an "effective control" over it for the purposes of the Convention. Also, *Güzelyurtlu* involved a duty to judicially cooperate in criminal investigations, which is absent in *Hanan*. Finally, and quite relevantly, IHL – with particular regard to the customary rule according to which States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects[43] – played in *Hanan* a decisive role in order for the ECtHR to assert its jurisdiction under Article 1, while it was not taken into account in *Güzelyurtlu*.

Hanan also differs from *Georgia* v. *Russia (II)* since – while the number of special features identified (three) and the content of two of them coincide (legal obligation for the respondent State to conduct effective investigations on the events and impossibility for the

[40] *Güzelyurtlu and Others* v. *Cyprus and Turkey,* Application No. 36925/07, 29 January 2019, paras. 191-197.
[41] *Georgia* v. *Russia (II)*, Application No. 38263/08, 21 January 2021, paras. 330-337.
[42] *Hanan*, *supra* no. 1, para. 135.
[43] *Ivi*, para. 83.

victims to do so) – in the latter case the criterion of "effective control" over an area was considered to be one of such special features, as in *Güzelyurtlu*. Moreover, the complaint in *Georgia* v. *Russia (II)* regarded the alleged lack of investigation over violations of IHL and not ineffective ones[44].

In the case in comment, the assertion of jurisdiction for the purposes of Article 1 is instead made regardless of any "effective control" possibly exercised by German troops over the Afghan area where the incident took place or any "authority or control" exercised by German authorities over the people killed and injured by the airstrike. The finding thus rests on purely "external" factors, not directly related to the *de jure* or *de facto* situation existing in Afghanistan. In other words, the Court has taken its decision on admissibility solely on the basis of this brand new model of extraterritorial application.

4.2. *A Critique*

The "special features model" seems *prima facie* applicable in the vast majority of international military operations conducted under the auspices of an international organization and participated by several States[45]. Indeed, the features identified seem not particularly "special" and, in comparison to previous case-law in similar scenarios, apparently create a weaker jurisdictional link for the purposes of Article 1, extending quite generously ECtHR's jurisdiction extraterritorially.

As to the first feature (the existence of an obligation to investigate under customary IHL), it can be easily assumed that, since customary international law is binding upon all States of the international community[46], the threshold of application is in principle quite low. In fact, provided that an armed conflict is in place, this criterion shall be presumably satisfied whenever the procedural limb of Article 2 is at stake. The difficulty in this case would be that of assessing whether the killing(s) can actually be classified as a war crime and hence be considered regulated by general international law.

As long as the second feature is concerned (the impossibility for Afghan authorities to exercise criminal jurisdiction), one should note that its applicability is quite automatic in other similar scenarios. Apart from NATO-led missions such as ISAF, one shall indeed consider that the SOFAs concluded with host States by other international organizations having competences for the maintenance of international peace and security – such as the European Union acting in the framework of the Common Security and Defence Policy or the UN when conducting peace-keeping or peace-enforcing missions – usually leave exclusive criminal jurisdiction upon sending States[47].

---

[44] In *Romeo Castaño* v. *Belgium* the Second Section of the Court resorted as well to the special features model but with exclusive regard to the alleged failure by the Belgian authorities to cooperate with the Spanish authorities in order to investigate over the suspected murderer of the applicants' father. *Romeo Castaño* v. *Belgium*, Application No. 8351/17, 9 July 2019, para. 38.

[45] See M. MILANOVIC, *Extraterritorial Investigations in Hanan* v. *Germany; Extraterritorial Assassinations in New Interstate Claim Filed by Ukraine against Russia*, 26 February 2021, available at www.ejiltalk.org/extraterritorial-investigations-in-hanan-v-germany-extraterritorial-assassinations-in-new-interstate-claim-filed-by-ukraine-against-russia/ [last accessed 6 June 2021].

[46] Except for in the case of legally sound persistent objections. On the (controversial) content of the rule see the recent work by the International Law Commission, *Draft conclusions on identification of customary international law, with commentaries*, in *Report of the International Law Commission, Seventieth session (30 April-1 June and 2 July-10 August 2018)*, A/73/10, para. 66, Draft conclusion no. 15.

[47] See for example Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces

Finally, the third feature (obligation for Germany to investigate any liability of German nationals) is probably the most specific and complex to identify in other situations. However, the fact that, on the one hand, most Contracting States have such a legal obligation under respective domestic law, as recognized by the Court[48] and, on the other, the existence of such feature was directly linked to the ratification of the ICC Statute, which has been ratified by most Contracting States as well[49], lowers the threshold.

4.3. *The Relevance of the Nature of the Contested Obligation*

The resort to the special features model can be legally justified by the fact that it has been (so far) applied only with regard to the "positive obligation" to conduct effective investigations (or to cooperate with other Contracting States to this end) under the procedural limb of Article 2.

As known, positive obligations on human rights generally entail a concrete intervention on the part of States, through the implementation of certain actions or services, which in turn normally require a strong link to the territory and individuals therein. Among positive obligations, procedural obligations constitute a particular category, requiring States to take certain positive measures of a procedural or instrumental nature, of a preventive or repressive character, to protect certain human rights, in particular the right to life[50]. However, in the case at hand the existence of the procedural duty to conduct an effective investigation into the killing of the applicant's sons depends solely on the Germany's own involvement in the killing[51] and thus that duty can in principle be properly performed even without the exercise by Germany of either an "effective control" over the area where the incident occurred or of some degree of "authority and control" over the persons killed and injured. In other words, an effective investigation over the consequences of the airstrike was to be, and could be, conducted by German authorities within their national territory only, although the incident had occurred extraterritorially. Therefore, the fact that the applicant complained exclusively under the procedural limb of Article 2 ECHR made the finding of a jurisdictional link by the Court not dependent upon any of the models of extraterritorial application defined in previous case-law. The relevance of the "nature" of the obligation at stake for the extraterritorial application of the ECHR is also pointed out by the Court, which held that not necessarily the establishment of a jurisdictional link in relation to the procedural obligation under Article 2 means that the substantive act also falls within the jurisdiction of the State[52]. In other words, in *Hanan* the ECtHR explicitly "divided and tailored" the ECHR in order to assert its jurisdiction *ratione loci*. This is clearly a departure from *Banković*, where with respect to the same kind of both conduct (airstrike causing civilian casualties) and context (extraterritorial international military operation led by NATO), the Court dismissed the applicants' argument and held that it had no jurisdiction, claiming that the positive

which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA) [2003] OJ C 321/2, Article 17, para. 3.

[48] *Hanan*, *supra* no. 1, paras. 90 and 141.

[49] With some relevant exceptions, such as Russia, Turkey, Ukraine, Armenia and Azerbaijan.

[50] See *inter alia* R. PISILLO MAZZESCHI, *Responsabilité de l'État pour violation des obligations positives relatives aux droits de l'homme*, in *Collected Courses of the Hague Academy of International Law*, 2008, p. 228 ss. and p. 393 ss.

[51] See M. MILANOVIC, *The Extraterritorial Application*, cit., p. 217.

[52] *Hanan*, *supra* no. 1, para. 143.

obligation under Article 1 can't be «divided and tailored in accordance with the particular circumstances of the extra-territorial act in question»[53].

In any case, the position of the Court is objectively bold in wiping out all the control-based criteria developed in its case-law on extraterritorial jurisdiction. One could assume that such conclusion is due to the fact that the exercise of an "effective control" on the part of German forces over the area of the incident (or of the authority over the persons involved) was difficult to establish in that specific case. This position seems reasonable[54], if one considers the limited number of German soldiers deployed in the area (around 1,500) and the deterioration of the security situation in the Kunduz province as of April 2009[55]. However, it is also possible that the Court has deliberately avoided resorting to any of the main models for extraterritorial jurisdiction, in order to inaugurate a new jurisprudential trend. This solution would be in my opinion even more desirable, since it fully corresponds to the nature of the ECHR as a living instrument, especially in situations involving the commission of the most serious crimes and the consequent violation of fundamental rights.

5. *The (Disregarded) Question of Attribution of Conduct*

Another interesting point in *Hanan* is the lack of any reference to the question of attribution of conduct[56]. The Court in fact limits itself to maintain that the procedural limb of Article 2 does not automatically imply that the act would be attributable to the State and that investigative acts and omissions by German military personnel in Afghanistan as well as the acts and omissions of the prosecution and judicial authorities in Germany are capable of giving rise to the responsibility of that State under the Convention[57]. Yet it makes no assessment whatsoever to establish whether the conduct consisting in ineffective or incomplete investigations over the death of the applicant's sons on the part of German authorities and/or in the airstrike ordered by Colonel K. were attributable to that State under (general) international law. This seems to be not fully in line with previous case-law, as pointed out by judges Grozev, Ranzoni and Eicke in their separate opinion to the judgment[58]. In this regard, Germany interestingly claimed that military actions conducted under the ultimate authority and control of the UNSC, the latter acting pursuant to Chapter VII of the

---

[53] *Banković*, *supra* no. 11, para. 75.

[54] But see the comment by A. VAN BAELEN, *What is Fair in Law & War? Discussing States' conduct and compliance with human rights standards during military operations abroad in Hanan* v. *Germany*, 9 April 2021, available at https://strasbourgobservers.com/2021/04/09/what-is-fair-in-law-war-discussing-states-conduct-and-compliance-with-human-rights-standards-during-military-operations-abroad-in-hanan-v-germany/ [last accessed 6 June 2021], according to whom «the Court could very well have argued that the combination of the airstrike and Germany's permanent military presence (incl. checkpoints, daily military patrols), was sufficient to conclude that Germany had "effective [territorial] control over [the Kunduz] area"».

[55] *Hanan*, *supra* no. 1, paras. 20 and 121.

[56] See on this point the comment by D. STEIGER, *(Not) Investigating Kunduz and (Not) Judging in Strasbourg? Extraterritoriality, Attribution and the Duty to Investigate*, 25 February 2020, available at https://www.ejiltalk.org/not-investigating-kunduz-and-not-judging-in-strasbourg-extraterritoriality-attribution-and-the-duty-to-investigate/ [last accessed 6 June 2021].

[57] *Hanan*, *supra* no. 1, paras. 143-144.

[58] *Ivi, Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni and Eicke*, para. 8.

United Nations Charter, could not be attributed to the respective Contracting State[59]. The respondent Government referred to the well-known *Behrami and Saramati* decision that in its opinion was comparable to *Hanan* on a factual level[60], while other cases in which the wrongful conduct was attributed to Contracting States – such as *Jaloud*, *Al-Jedda* and *Al-Skeini* – were not, due to exceptional circumstances being absent in *Hanan*.

Although the Court reiterated that the test for establishing the existence of jurisdiction is not to be equated with that for establishing a State's international responsibility under general international law[61], there is no much clarity in its decisions as to issues of attribution and their relevance for the purposes of Article 1 ECHR[62]. Yet it should be observed that the most recent case-law tends to separate more clearly – and correctly so – the question of jurisdiction, pertaining to admissibility issues, from that of attribution of conduct, instead to be (usually) determined on an examination on the merits[63]. In this regard, no analysis on the question of attribution of conduct was either made in *Güzelyurtlu* and in *Georgia* v. *Russia (II)*. However, unlike those two cases, *Hanan* took place in the context of an international military operation, in which different subjects of international law were differently involved (UN, NATO and Germany). Therefore, the question of attribution of conduct may prove relevant and particularly complex. Moreover, and unlike *Al-Skeini*, Germany was not an Occupying Power nor did it exercise public powers on the Afghan territory, factors which could have probably supported exclusive attribution of conduct to it.

If the underlying act leading to the investigation, i.e. the airstrike, was deemed decisive (and not the investigating authorities' acts and omissions, which were probably to be attributed to Germany), the Grand Chamber would indeed have had to deal with its previous controversial case-law on the matter[64]. It can be thus presumed that it avoided addressing such issue on purpose, since that would have required a difficult legal analysis with uncertain results, which might have potentially affected the conclusion on the existence of a

---

[59] *Hanan*, *supra* no. 1, para. 103. The same view was adopted by the intervening Governments of Denmark, France, Norway, Sweden and the United Kingdom, according to which the applicant's complaints were not compatible *ratione personae* with the ECHR since the UNSC exercised ultimate authority and control over ISAF (so that the incident to be investigated was attributable to the United Nations rather than to Germany). *Ivi*, para. 123.

[60] Since: ISAF was created by a UNSC Resolution with a sufficiently precise mandate; ISAF was commanded and controlled in a manner comparable to KFOR; the security presence of ISAF and its military activities in Afghanistan had been endorsed by the Security Council and the UN bodies. Moreover, for Germany the fact that "full command" rested within German authorities did not change the incompatibility *ratione personae* of the application.

[61] See for example *Catan and Other* v. *Moldova and Russia*, Application Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012, para. 115 and *Jaloud*, *supra* no. 28, para. 154.

[62] According to Milanovic «it is the Court itself that has over the decades been the greatest culprit in conflating jurisdiction and state responsibility». M. MILANOVIC, *Jurisdiction and Responsibility*, cit., p. 103.

[63] See for example *Georgia* v. *Russia (II)*, *supra* no. 41, para. 162 and *Ukraine* v. *Russia (re Crimea)*, Applications Nos. 20958/14 and 38334/18, Decision, 16 December 2020, para. 166.
A certain lack of coherence in the Court's reasoning should be noted here too, as the question of attribution is sometimes included in the admissibility proceedings (under the heading "competence *ratione personae*"), and sometimes not. See on this point ECtHR, *Practical Guidance on Admissibility Criteria*, updated on 28 February 2021, para. 224, which in my opinion does not shed much light on the issue.

[64] For a comment of most controversial cases see *inter alia* K. M. LARSEN, *Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test* , in *Eur. Jour. Int. Law*, 2008, p. 509 ss.; D. VAN DER TOORN, *Attribution of Conduct by State Armed Forces Participating in UN-authorised Operations: The Impact of* Behrami *and* Al-Jedda, in *Australian International Law Journal*, 2008, p. 9 ss.; F. MESSINEO, *Things Could Only Get Better:* Al-Jedda *Beyond* Behrami, in *Military Law and the Law of War Review*, 2011, p. 321 ss.

jurisdictional link under Article 1[65]. Given the similarity between the cases, a solution in this regard would have been for the Court to follow the approach adopted in *Jaloud*, in which two different attribution inquiries were carried out by the judges[66]. Be that as it may, the Court should have at least tried to clarify this question, if only to exclude its relevance in the case at hand.

6. *Concluding Remarks*

Hanan can be considered "another brick in the wall" of extraterritorial application of the ECHR, whose relevance should not be underestimated. Considering that (multinational) military operations conducted on non-Contracting States' territories are more and more frequent in recent international practice, complaints regarding a lack of effective investigations over particularly grave crimes are likely to arise and consequently case-law on the procedural limb of Article 2 is probably set to increase.

In *Hanan* the Court departed from its previous "classical" models for establishing a jurisdictional link and created a new one, which has the advantage to be potentially applicable in many situations alike, especially in the context of international security missions. In this regard, the role played by customary IHL in the Court's reasoning on admissibility issues is quite significant. On the other hand, the decision can be criticized inasmuch as it excessively widens the scope of application of the ECHR by anchoring the existence of a jurisdictional link to rather weak (and not so special) features[67].

Although at least two of the three special features envisaged raise some doubts as to their specialty[68], I believe that the conclusion of the Court in determining its jurisdiction for the purposes of Article 1 is correct in substance, especially if one considers the peculiarity of the procedural limb of the right to life. Being that a positive procedural obligation requiring, in the case at hand, no particular attachment of the respondent State to the foreign territory in which the incident occurred, the resort to the special features model can be seen as a smart technique to bypass legal complexities and allow adjudication on the merits. Furthermore,

---

[65] In fact, I believe that there can be cases where a jurisdictional link for the purposes of Article 1 exists, but conduct cannot be attributed to the Contracting State exercising extraterritorial jurisdiction and therefore no international responsibility under the ECHR arises. *Hanan* could have been one of these cases.

[66] One establishing that the Netherlands troops were not placed "at the disposal" of any foreign power nor were they "under the exclusive direction or control" of any other State, the second attributing to the Netherlands the actual alleged violations. See *Jaloud*, *supra* no. 28, respectively paras. 151-152 and 155. For a comment see M. MILANOVIC, *Jurisdiction, Attribution and Responsibility in Jaloud*, 11 December 2014, available at https://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/ [last accessed 6 June 2021].

[67] In this regard, it is worth noting that Germany claimed the inadmissibility *ratione loci* of the complaint on a dual basis. First, by stressing that Article 1 ECHR does not imply a "cause and effect" notion of jurisdiction, since the airstrike causing the death of the applicant's sons was an instantaneous extraterritorial act. Second, by rejecting the "special features model". In particular, the respondent Government contested the second special feature, claiming that the provision of the ISAF Status of Forces Agreement was actually a rule on immunity, which had the sole purpose to exclude ISAF personnel from prosecution by the Afghan authorities but did not open up any possibility for the civilian law-enforcement authorities of troop-contributing States to pursue criminal investigations of their own on Afghan territory. *Hanan*, *supra* no. 1, paras. 107 and 113.

[68] See for example the comment by K. MEHTA, *Tailoring the Jurisdiction of the ECHR. The ECtHR's Grand Chamber Decision in Hanan* v. *Germany*, 18 February 2021, available at https://verfassungsblog.de/tailoring-the-jurisdiction-of-the-echr/ [last accessed 25 May 2021].

the judgment may serve as an incentive for States participating in multinational military operations to conduct the most effective investigations on possible incidents, in the awareness that even purely national inquiries may fall under the Court's jurisdiction. For the same reason, the decision may as well affect somehow the willingness of States to engage in extraterritorial military operations, especially in the framework of particularly complex scenarios such as the one existing in Afghanistan at the material time.

Finally, I think that some clarification as to the role of the question of attribution of conduct, in scenarios where the existence of a jurisdiction link is controversial and several legal actors are involved, is required. This is even more so when the ECHR is "divided and tailored" according to procedural and substantial obligations like in the case at hand. Despite some timid developments in recent case-law, the Court should probably better separate those questions and deal with them in a more coherent manner. In this regard, *Hanan* constitutes a missed opportunity.