# Hanan v Germany and the extraterritorial application of the ECHR to the conduct of Contracting States' armed forces deployed abroad

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In its judgment of 16 February 2021 in *Hanan v Germany*, [1] the Grand Chamber of the European Court of Human Rights ('the ECtHR') confirmed that the European Convention on Human Rights ('the ECHR') applies extraterritorially to the conduct of armed forces deployed abroad by Contracting States. The case thus presents important findings on the question of jurisdiction of the ECHR. [2]

**The facts of the case**

On 3 September 2009, Afghan insurgents hijacked two fuel tankers. Later that day, the fuel tankers became immobilized on a sand bank in the Kunduz River. [3] After a tip-off about the hijacking, and believing that only insurgents were present at the scene, the German Government ordered an air-strike on the immobilized fuel tankers. [4] The airstrike destroyed the two tankers and killed, among others, Mr Hanan's two sons: Abdul Bayan and Nesarullah. They were twelve and eight years old, respectively. The total number of victims of the airstrike has never been established. [5]

Mr Hanan lodged an application against Germany. It alleged that Germany had not conducted an effective investigation, as required by the procedural limb of Article 2 of the ECHR ('the right to life'), into the air strike that had killed his two sons. [6]

In its submissions, Germany raised the lack of jurisdiction *ratione personae* and *ratione loci*. [7]

**Jurisdiction**

The Grand Chamber of the ECtHR dismisses Germany's jurisdictional objection. In its judgment, the ECtHR holds that, when combined, the following 'special features' triggered the existence of a 'jurisdictional link', for the purposes of Article 1 of the ECHR, in relation to the procedural obligation to investigate violations of the right to life under Article 2 of that convention: [8]

First, Germany was obliged, pursuant to customary international humanitarian law, to investigate the airstrike at issue since it concerned the individual criminal responsibility of members of the German

armed forces for a potential war crime. [9]

Second, by virtue of the International Security Assistance Force ('ISAF') Status of Forces Agreement, the troop-contributing States, such as Germany, had retained exclusive jurisdiction over the personnel they contributed to ISAF in respect of any criminal or disciplinary offences which their troops may commit on the territory of Afghanistan. That exclusive jurisdiction thus shields ISAF personnel of troop-contributing States from prosecution by the Afghan authorities. Thus, if Germany had not had the obligation to investigate the airstrike, it could lead to situations of impunity, in particular in respect of offences entailing individual criminal responsibility under international law. [10]

Third, German prosecution authorities were also obliged under domestic law to institute a criminal investigation. Those authorities could only have dispensed with such an investigation if there had been an investigation before an international tribunal or by the Afghan authorities, given that it was within the territory of Afghanistan that the alleged offence occurred and whose nationals were victims. However, both of those options were not possible because of Germany's retention of exclusive jurisdiction over its troops pursuant to the SIAF Status of Forces Agreement. [11]

In establishing that link, the ECtHR distinguishes its judgment in *Güzelyurtlu and Others v. Cyprus and Turkey*. [12] In that judgment, the ECtHR established that the institution of a domestic criminal investigation concerning deaths which had occurred outside the jurisdiction *ratione loci* of the Contracting State concerned would create a jurisdictional link between that State and the victim's relatives who had brought proceedings before the ECtHR. [13] However, that precedent would not apply in the context of an investigation into deaths which occurred in the context of an extraterritorial military operation conducted outside the territory of the Contracting States to the Convention within the framework of a mandate given by a resolution of the United Nations Security Council. Indeed, to hold otherwise would have a chilling effect on instituting investigations at the domestic level and 'excessively broaden the scope of application of' the ECHR. [14]

**Discussion**

In a separate and partly dissenting opinion, Judges Grozev, Ranzoni and Eicke questioned the 'jurisdictional link' approach on the basis of 'special features'. In their view, the criterion of 'special features' had initially been developed in a different context to depart from the requirement that the procedural obligation under Article 2 of the ECHR would in principle only be triggered for the Contracting State under whose jurisdiction the deceased was to be found at the time of death. [15] Thus, in *Güzelyurtlu and Others v. Cyprus and Turkey*, the establishment of a jurisdictional link on the basis of 'special features' was related to the aim of avoiding a vacuum in the system of human rights protection in the territory of Cyprus (including those parts controlled by Turkey). [16] However, the risk of such a vacuum would not be present in the circumstances of *Hanan v. Germany* as the entire conduct occurred outside the jurisdictional control of Germany (particularly because neither 'State agent authority and control' nor 'effective control over an area' were present). [17] On that basis, the jointly and partly dissenting judges find that neither the initiation of domestic criminal investigations into the deaths of Mr Hanan's sons nor the application of the 'special features' approach is capable of establishing a 'jurisdictional link' in relation to the procedural obligation under Article 2 of the ECHR. [18]

That said, should jurisdiction and the approach to 'control' of a Contracting State be so limited?

Granted, the principle of territoriality limits the application of the ECHR. However, the ECtHR has recognised exceptions to that principle outside the Contracting State's own borders, be that on the basis of 'power' (or 'control') *over the applicant*, or by reason of control *over the territory* in question. [19] When approaching the invocation of exceptional circumstances to territoriality, it is

submitted that, above all, jurisdiction should be *functional* in relation to the circumstances of the case at hand. That is precisely the approach Judge Bonello raised in his separate and concurring opinion in *Al-Skeini and Others v. the United Kingdom*. [20] To the judge, that test would be employed as follows:

> '10. States ensure the observance of human rights in five primordial ways: firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights. These constitute the basic minimum *functions* assumed by every State by virtue of its having contracted into the Convention.
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> 11. A "functional" test would see a State effectively exercising "jurisdiction" whenever it falls within its power to perform, or not to perform, any of these five functions. Very simply put, *aState has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control.*' [21]

Should the 'special features' approach be abandoned going forward, it is difficult to see how Judge Bonello's suggested approach would not be reasonable. Indeed, in view of the specific scenario of the use of force, it is inevitable that 'power' or 'control' over the right to life may take many forms. The specific type will depend on the (military) involvement concerned: consider the more 'traditional' involvement, such as air and drone strikes and on-the-ground operations, or the more 'modern' involvement, such as cyber-attacks on critical infrastructure. The ECHR should be sufficiently flexible to reflect that panoply of types of force of Contracting States and their actors if they lead to a breach of the right to life.

The opposite, one may add, would bring about precisely the type of vacuum decried in *Güzelyurtlu and Others v. Cyprus and Turkey*: be at your best behaviour 'at home' (within the jurisdictional confines of the ECHR), but kill at you own will when those 'shackles' are off. Surely, a respectable (or reasonably interpreted) system of human rights control cannot allow for that.

Indeed, to quote Mr Justice Leggatt, (at the time) of the High Court, in *Al-Saadoon and ors v Secretary of State for Defence*, [22] on the targeted use of force as an assertion of 'control', and thereby 'jurisdiction' for the purposes of the ECHR:

> 'I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is indeed the ultimate exercise of physical control over another human being. Nor as it seems to me can a principled system of human rights law draw a distinction between killing an individual after arresting him and simply shooting him without arresting him first, such that in the first case there is an obligation to respect the person's right to life yet in the second case there is not.' [23]

*The opinions expressed herein are exclusive to the author and do not reflect those of the Court of Justice of the European Union.*

[1] ECtHR, judgment of 16 February 2021, *Hanan v. Germany* (ECLI:CE:ECHR:2021:0216JUD000487116).

[2] This blogpost will not discuss the merits of the case. In its assessment, the ECtHR found that, on the basis of the evidence available, it could not doubt the assessment of the German Federal Prosecutor General that all precautionary measures which had been feasible in the circumstances had been undertaken. The colonel in charge of giving the order to strike the air tankers had not had reason to suspect the presence of civilians near the fuel tankers, and that no advance warning had been required. Ibid, ¶¶216 and 217.

[3] Ibid, ¶21.

[4] Ibid, ¶¶22 and 23.

[5] Ibid, ¶25.

[6] Ibid, ¶3.

[7] Ibid, ¶102.

[8] Ibid, ¶142.

[9] Ibid, ¶137.

[10] Ibid, ¶138.

[11] Ibid, ¶139.

[12] ECtHR, judgment of 29 January 2019, *Güzelyurtlu and Others v. Cyprus and Turkey* (ECLI:CE:ECHR:2019:0129JUD003692507).

[13] Ibid, ¶188.

[14] ECtHR, judgment of 16 February 2021, *Hanan v. Germany* (ECLI:CE:ECHR:2021:0216JUD000487116, ¶135).

[15] Joint Partly Dissenting Opinion, ¶11.

[16] Ibid.

[17] Ibid, ¶¶25 to 31.

[18] Ibid, ¶32.

[19] ECtHR, judgment of 7 July 2011 in *Al-Skeini and Others v. the United Kingdom* (ECLI:CE:ECHR:2011:0707JUD005572107, ¶133)

[20] Ibid, ¶3.

[21] Emphasis in the original.

[22] High Court, judgment of 17 March 2015 in *Al-Saadoon and ors v Secretary of State for Defence* [2015] EWHC 715 (Admin).

[23] Ibid, [95].