Kunduz Airstrike Before European Court of Human Rights: Future of Jurisdiction and Duty to Investigate

by Chantal Meloni
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On 16 February, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered its judgment in the case *Hanan* v. *Germany*. The case concerned the infamous NATO air strike in Kunduz, Afghanistan, on September 4, 2009, which killed and injured around a hundred civilians. The strike had been ordered by German Colonel K. The case principally concerned whether the claim that the State failed to conduct an adequate investigation following the military operation falls within the jurisdiction of the European Convention on Human Rights, and, if so, what factors determine whether an investigation is legally sufficient.

After many years of unsuccessfully seeking justice in Germany, the case was brought to Strasbourg in January 2016 by a nongovernmental organization, the European Center for Constitutional and Human Rights, on behalf of Abdul Hanan, whose two twelve- and eight-year-old sons, Abdul Bayan and Nesarullah, had been killed in the strike. The applicant claimed that Germany violated the procedural obligation under Article 2 (right to life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR); namely, that the investigation conducted into the deaths of the applicant's sons was ineffective because: (1) it was not sufficiently independent; (2) the evidence gathered was one-sided; (3) the investigation was not prompt and had not been conducted with reasonable expedition; and (4) the applicant had not been sufficiently involved. The Court concluded that the initial investigation, which was performed by the German authorities, complied with the requirements of an effective investigation under Article 2 of the ECHR. Accordingly, no violation of the procedural component of the right to life protection under the Convention was found (*Hanan*, §236).

The judgment was disappointing to many, as it failed to bring justice to the victims of the airstrike, who were also previously denied any reparation by Germany (apart from a U.S. $5,000 *ex gratia* payment). However, the judgment is also significant for its

assessment of jurisdiction under Article 1 of the ECHR, a precondition of admissibility of any case.

In this article, I focus primarily on how the judgment's findings on jurisdiction may impact future case law of the ECtHR. Specifically, I focus on States' procedural obligations following alleged violations of the right to life committed during military operations. This article does not cover broader issues regarding the extraterritorial application of the ECHR, during or after a conflict, which remained outside the scope of *Hanan* but was discussed in another very recent judgment of the Grand Chamber in *Georgia v. Russia* (II) and has already been subject to critical commentaries by Helen Duffy and Marko Milanovic.

Jurisdiction: Yes, But…

It has been a long time since the procedural obligation to carry out an effective investigation into an alleged right to life violation under Article 2 has evolved into a separate obligation in the ECtHR's case law (for a comprehensive analysis of this evolution, see Stuart Wallace). The duty to investigate is now seen as a "detachable obligation" arising out of Article 2, which is capable of binding the State even when the death occurred outside its jurisdiction.

The judgment in *Hanan* goes a step further and confirms a relatively recent trend in the Grand Chamber's case law, namely that the jurisdictional link can trigger the application of the ECHR with respect to the State's procedural obligations under Article 2 (the investigation into the alleged violation of the right to life), regardless of whether a jurisdictional link has been established for the purposes of substantive liability under the ECHR.

This conclusion built on the 2019 findings by the Grand Chamber in *Güzelyurtlu v. Cyprus and Turkey.* There, the Court found that the criminal investigation carried out by the State into deaths that occurred outside the territorial jurisdiction of that State was sufficient to establish a jurisdictional link, between that State and the victim's relatives who brought proceedings before the Court, for the purpose of Article 1 jurisdiction. The Court also found that there were "special features" related to (1) the situation of Cyprus under effective control of Turkey and (2) the fact that the murder suspects were in the territory controlled by Turkey, which engaged Turkey's

procedural obligation under Article 2 (Güzelyurtlu § 192, summarised in Hanan §132-133).

In *Hanan,* the Court was careful to note the differences between the factual scenario at hand and Güzelyurtlu and concluded that:

> "[T]he principle that the institution of a domestic criminal investigation or proceedings concerning deaths which had occurred outside the jurisdiction *ratione loci* of that State, not within the exercise of its extraterritorial jurisdiction, is *in itself* sufficient to establish a jurisdictional link between that State and the victim's relatives who bring proceedings before the Court, does not apply to the factual scenario at issue in the present case." (Hanan §135).

Nevertheless, in *Hanan*, the Court found that jurisdiction was established in light of such special features, not defined *in abstracto*. The door had been left wide open in *Güzelyurtlu*, noting that such features "may vary considerably from one case to the other" (*Güzelyurtlu* §190). In *Hanan,* the Court identified the following three special features:

1) That Germany was obliged, under customary international humanitarian law (IHL), to investigate the airstrike at issue, as it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime (*Hanan* §137).

2) That the Afghan authorities were, for legal reasons, prevented from instituting themselves a criminal investigation against Colonel K. and Staff Sergeant W. in respect of the alleged offence (*Hanan* §138).

3) That Germany was also obliged, under its own domestic law, both the Code of Crimes under International Law (*VStGB*) and the criminal law, to institute a criminal investigation (*Hanan* §139).

The three judges in the dissenting minority were unconvinced by the approach taken by the majority, reasoning instead that such an interpretation of jurisdiction would create "a chilling effect" on States in the opening of investigations, duplicate obligations already existing or emerging under the Statute of the International

Criminal Court and/or customary international humanitarian law, and "excessively broaden the scope of application of the Convention" (*Hanan* Dissent §7). This line of analysis echoed the arguments made by various States that intervened as third parties in the proceedings on the side of Germany, namely, Denmark, France, Norway, Sweden, and the UK." Moreover, referring to *Al Skeini v. United Kingdom* and *Jaloud v. Netherlands* – two cases in which the Court first assessed whether an incident was under the jurisdiction of the State and attributable to it – the dissenters reasoned that it would have been necessary to assess whether the incident to be investigated itself fell under Germany's jurisdiction within the meaning of Article 1 of the Convention and was attributable to the State. The dissenters' concern was that the detachable nature of the procedural obligation to investigate would be stretched "beyond [the] breaking point," by abandoning any connection with "an underlying substantive Convention obligation under Article 2" (*Hanan* Dissent §12).

However, the dissent seemed to overlook that Germany did not open the investigation into the Kunduz airstrike arbitrarily or out of their own good will. As the applicant submitted and the Court confirmed, German authorities had the legal duty to conduct the criminal investigation into the strike that killed the applicant's sons, pursuant to the State's duty to investigate allegations of crimes committed abroad by German nationals under their own domestic criminal law, in accordance with the Military Agreement between NATO and the Interim Administration of Afghanistan, and under international law – the Rome Statute in particular – as implemented in Germany.

What the judgment does not discuss: Alternate paths to jurisdiction

The path followed by the Grand Chamber was not the only possible route to establish jurisdiction under Article 1. As the applicant claimed, in addition to the duty to conduct an investigation, there were a number of other factors, which were themselves sufficient to establish Germany's jurisdiction on the underlying right to life violation (*Hanan* §120-122).

Indeed, the applicant, as well as other third-party intervenors (namely, the *Human Rights Centre* of the University of Essex, the *Institute of International Studies* of the Università Cattolica of Milan and the *Open Society Justice Initiative and Rights Watch* UK), argued that Germany's jurisdiction under Article 1 of the Convention was established both pursuant to the "state agent authority and control," and the

"effective control over an area". Similar to the Dutch officers in *Jaloud* and the British soldiers in *Al-Skeini*, Colonel K. of Germany was deployed as part of a UN Security Council-mandated mission in which individuals were killed in the course of a security operation carried out pursuant to the UNSC mandate. The German colonel acted within the limits of the public powers delegated to him for the purpose of asserting control over security-relevant activities and ensuring security in the area.

In *Al-Skeini*, Judge Bonello's opinion developed the "functional test", which held that the ability to affect someone's enjoyment of the right to life through the actions of the State's organs abroad establishes jurisdiction between the State and the individuals whose right to life has been violated. In *Hanan*, Germany's jurisdiction should have been established, because, through its State agents deployed in Afghanistan, it had the ability to directly affect the life of the applicant's sons killed by the Kunduz airstrike.

In terms of attribution, the applicant elaborated on the fact that the airstrike was attributable to Germany and that even if the acts in the case at hand were hypothetically attributed to the UN, double attribution to the UN and to the State would still be possible, as already confirmed in *Al Jedda v. United Kingdom*.

The majority in *Hanan*, however, decided not to pursue these paths. In this sense, they adopted an easier, but also less clear, solution that leaves unanswered questions as to the interaction between international humanitarian law and human rights law, as well as a more clearly defined scope of the "special features" doctrine (see also, Kalika Metha).

No violation of the duty to investigate

While noting that there is no substantive conflict with respect to the requirements of an effective investigation under international humanitarian law (*Hanan* §82 and 84-85) and those under the ECHR, in the absence of a formal derogation under Article 15 of the ECHR (derogation in time of emergency), the Court reiterated that the procedural duty under Article 2 must be applied "realistically." Recalling *Al-Skeini* and *Jaloud,* the Court considered the challenges and constraints of an investigation stemming from the fact that the deaths occurred during active hostilities in an (extraterritorial) armed conflict pertained to the investigation as a whole and

continued to influence the feasibility of an investigation, including one by the civilian prosecution authorities in Germany (*Hanan* §163-168, 186, 234).

The Court seemed to fully accept ("The Court has no reason to doubt,", *Hanan* §217) the conclusions of the German Federal Prosecutor General that Colonel K. had not incurred criminal liability under the *VStGB*, because he acted without the intent to cause excessive civilian casualties. The Court further ruled out his liability under general criminal law due to the lawfulness of the airstrike under international humanitarian law. The order to strike was deemed lawful, even considering that it had killed civilians, because Colonel K.'s expectation of civilian damage at the time that he ordered the attack, was not disproportionate ("excessive") to the expected, actual, and direct military advantage.

The Court conceded that the previous investigations had several shortcomings, among which was the fact that the precise number and status of the victims was not established (*Hanan* § 218), but in the end, the "Court is prepared to acknowledge that a more accurate assessment would not appear to have been possible in the circumstances" (*Hanan* §218). Also, the Court considered that, under the given circumstances, the German military contingent could "realistically" not have been expected to perform on-site reconnaissance more promptly than they did. The Court also concurred with the applicant that "it would have been preferable," in terms of independence of the investigation, if the initial on-site assessment had not been conducted exclusively by forces under Colonel K.'s command, but noted that the German military police investigation team had not yet arrived at the time the on-site reconnaissance was conducted (*Hanan* §223).

Finally, the Court found that the fact that the investigation remained at the preliminary stage for approximately six months until the opening of the formal criminal investigation on 12 March 2010, "while regrettable," did not affect the effectiveness of the investigation (*Hanan* § 229).

A bittersweet conclusion

The positive legacy of *Hanan* is that States' obligations to investigate under international law (including international humanitarian law) and domestic law brings the ensuing investigations, or lack thereof, within the jurisdiction of the State and

triggers the application of the ECHR. In other words, States' obligations under international humanitarian law to investigate war crimes allegations means that their obligation to investigate effectively under the ECHR is also triggered.

The Court, however, takes away with one hand what it has given with the other when assessing a State's compliance with its Article 2 (procedural) obligations. The standards adopted in *Hanan* are seemingly quite low and highly subjective.

It is not clear yet what the interaction between the judgments in *Hanan* and *Georgia v. Russia* (II) will produce. However, it is legitimate to ask what remains, in light of these two judgments, of the duty to investigate alleged violations of the right to life committed during military operations abroad in times of active hostilities. What is clear is that the specific challenges related to the scope and content of the duty incumbent on States to conduct investigations in compliance with Article 2 of the ECHR, into alleged right to life violations committed during military operations abroad, have not yet been satisfactorily resolved by the Court.

Photo credit: Picture taken on September 4, 2009 shows members of the security forces walking at the site of a NATO airstrike in northern Kunduz, Afghanistan. (STR/AFP via Getty Images)

About the Author(s)

Chantal Meloni

Chantal Meloni (@chamelons) is a professor of international law at Università degli Studi of Milan and a Senior Legal Advisor at ECCHR, Berlin; in this capacity, she was a part of the legal team that brought Hanan v. Germany to the ECtHR.