Protecting Human Rights While Conducting Military Operations Abroad: a Critical Analysis of The European Court of Human Rights' Recent Judgement in *Hanan v. Germany*

La protección de los derechos humanos durante la realización de operaciones militares en el extranjero: un análisis crítico de la reciente sentencia del Tribunal Europeo de Derechos Humanos en el caso Hanan contra Alemania

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Resumen: El 16 de febrero de 2021, la Gran Sala del Tribunal Europeo de Derechos Humanos dictó sentencia en *Hanan v. Alemania* (2021). El caso se refería a la presunta violación de los artículos 2 y 13 del Convenio Europeo de Derechos Humanos por parte de Alemania en relación con un ataque aéreo ordenado por el coronel alemán Klein en Afganistán. El caso planteó varias preguntas cuyas respuestas podrían tener un impacto en todos los Estados partes del Convenio que realizan operaciones militares en el extranjero. Este artículo explora de forma crítica la jurisprudencia pasada de la Corte y las respuestas dadas por la Corte en *Hanan* con respecto a dos de estas preguntas. Primero, la cuestión sobre la aplicabilidad extraterritorial del Convenio a los ataques aéreos. Este asunto ya había sido abordado por la Corte en el caso sumamente criticado de *Banković y otros c. Bélgica y otros* (2001). Dado que los hechos en *Hanan* muestran varias similitudes con *Banković*, el Tribunal tuvo la oportunidad de cambiar su posición sobre este asunto y aclarar cuáles serían las responsabilidades del Estado al utilizar la fuerza militar en el extranjero. En segundo lugar, la cuestión de la atribución, es decir, si las Partes Contratantes que operan como parte de una organización internacional pueden ser consideradas responsables de los actos impugnados en virtud del Convenio.

Palabras clave: Convenio Europeo de Derechos Humanos, aplicación extraterritorial, jurisdicción, atribución, conflicto armado, operaciones militares.

Abstract: On February 16, 2021, the Grand Chamber of the European Court of Human Rights released its judgement in *Hanan v. Germany* (2021). The case concerned the alleged violation of Articles 2 and 13 of the European Convention of Human Rights by Germany regarding an airstrike ordered by German Colonel Klein in Afghanistan. The case raised several questions the answers of which could be impactful for all Contracting Parties to the Convention conducting military operations abroad. This paper critically explores the past-case law by the Court and the answers given by the Court in *Hanan* concerning two of these questions. First, the question concerning the extraterritorial applicability of the Convention to airstrikes. This matter had previously been addressed by the Court in the highly criticised case of *Banković and Others v. Belgium and Others* (2001); since the facts of Hanan show various similarities to *Banković*, the Court in *Hanan* had a chance to change its position on this matter and clarify what would be the state's responsibilities when using military force abroad. Second, the question of attribution, i.e., whether Contracting Parties operating as part of an international organisation can be held responsible for impugned acts under the Convention.

Keywords: European Convention on Human Rights, extraterritorial application, jurisdiction, attribution, armed conflict, military operations.

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I. INTRODUCTION

I.1. Hanan v. Germany: *What Convention obligations continue to bind Contracting Parties while conducting military operations abroad?*

The European Convention on Human Rights («the Convention»/ «ECHR») guarantees the protection of individual human rights. Pursuant to Article 1 ECHR, Contracting Parties are obligated to «*secure to everyone within their jurisdiction the rights and freedoms defined in Section 1*» of the Convention. The notion of jurisdiction, thereby, acts as a threshold criterion for the applicability of the Convention to alleged human rights violations. Meaning that jurisdiction is a key element to the protection of human rights within the European human rights protection system. Throughout the Convention's history, however, the exact meaning of «jurisdiction» in Article 1 ECHR has been widely disputed.

While it is unequivocal that the Convention applies within the national territory of a Contracting Party, the questions of whether, and to what extent, states would be responsible for extraterritorial acts – i.e., acts committed outside their national territory – has caused great uncertainty. In the decades following the first case concerning the extraterritorial application of the Convention in 1965,[1] the Strasbourg Organs increasingly expanded the notion of jurisdiction.[2] This changed in 2001, when the European Court of Human Rights («the Court» / «ECtHR») released its admissibility decision in *Bank-*

[1] *X v. Federal Republic of Germany*, app. no. 1611/62, ECommHR, 25 September 1965.

[2] E.g. *Soering v. the United Kingdom*, app. no. 14038/88, ECHR 1989; *Cyprus v. Turkey* (1982) 4 E.H.R.R 482, §586; *Stocké v. Germany*, app. no. 11755/85, ECommHR, 12 October 1989, §166; *Loizidou v. Turkey* (preliminary objections) [GC], app. No. 15318/89, ECHR 1995.

ović and Others v. Belgium and Others,[3] bringing the progressive stance taken earlier by Strasbourg Organs to an abrupt halt. The Court's highly criticised decision rejected the applicability of the Convention to an airstrike, setting a precedent that would cast a long-lasting shadow over the Court's future jurisprudence.[4] Since then, the Court has created an extraordinarily complex, and, at times, paradoxical jurisprudence concerning states' obligations under the Convention while conducting military operations abroad.

Almost twenty years after its infamous *Banković* decision the Court was once again tasked with answering the question of whether the Convention applied extraterritorially to an airstrike in the case of *Hanan v. Germany*.[5] In 2016, Mr Abdul Hanan had lodged an application with the Court against Germany in relation to the deaths of his two sons that had become the casualties of an airstrike ordered by German Colonel Klein in Kunduz, Afghanistan, in 2009. German troops had been operating in Afghanistan as part of the NATO-led International Security Assistance Force («ISAF») and were in charge of the Kunduz region. The airstrike targeted two fuel tankers that had been hijacked by insurgents which had become immobilized on a sandbank in the Kunduz River, approximately seven kilometres from the German military base. The insurgents had previously enlisted nearby villagers to siphon fuel from the tankers. Unfortunately, some of the civilians, including the two sons of Mr Hanan, were caught in the attack. Mr Hanan alleged that Germany had conducted and inefficient investigation into the deaths of his sons contrary to the procedural limb of Article 2 of the Convention, and, that he had not been awarded an effective domestic remedy contrary to Article 13 in conjunction with Article 2 of the Convention.

The case of *Hanan v. Germany* was finally heard by the Grand Chamber on February 26, 2020, and almost one year later the Court released its judgment. This decision had been long awaited by the international community due to its potential repercussions for all Contracting Parties to the Convention conducting military operations abroad – 13 at this time.[6] The case presented a unique opportunity for the Court to clarify the difficult and highly controversial questions of whether, when, and to what extent the Convention

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3 *Banković and Others v. Belgium and Others* [GC], app. no. 52207/99, ECHR 2001.

4 MALLORY, C., *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (Oxford, England: Hart Publishing, 2020), 113.

5 *Hanan v. Germany* [GC], app. no. 4671/16, ECHR 2021.

6 see *Hanan v. Germany*, §90.

continues to impose obligations on its Contracting Parties while conducting military operations outside their own territory, as well as outside the legal space[7] of the Convention. In particular, since the facts of the case were similar to those of *Banković* the Court was once again asked to apply the Convention to an extraterritorial aerial attack.

Another factor that could impact states conducting military operations abroad is the matter of attribution, posing the question whether Contracting Parties can be held responsible for impugned acts while operating as part of an international organisation. Since Germany was operating as part of ISAF, the airstrike could potentially be attributed to ISAF instead of Germany, exculpating Germany from any responsibility. Only a handful of cases have so far discussed the matter,[8] leaving many gaps in the understanding of how attribution works under the Convention. The question of attribution is, however, another fundamental aspect of the human rights protection mechanism that is the ECHR; if an act cannot be attributed to a Contracting Party, then the human rights protections afforded by the ECHR will not come into effect, as any complaints will not even be considered admissible. Consequently, there is an urgent necessity for this issue to be clarified by the Court to allow for a coherent approach in the Court's jurisprudence and give legal certainty to Contracting Parties and individuals alike.

The case of *Hanan* raised all these highly relevant questions in relation to the protections granted by the Convention in the context of foreign military operations. Considering the importance of the matter, a certain degree of legal certainty allowing Contracting Parties to understand their obligations is critical. This paper, therefore, aims to explore any gaps and controversies in the Court's jurisprudence in relation to these matters and evaluate whether and, to what extent, *Hanan* provided an opportunity for the Court to resolve the matters. Finally, this paper will also analyse the Court's approach in the *Hanan* judgement and whether and, to what extent, it addressed these issues.

The ideas presented in this paper are organized in six chapters. The first one serves as an introduction to the subject matter; Chapter 2 aims to explore

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7 The legal space (or «*espace juridique*») of the Convention refers to the collective territory of all Contracting Parties of the Convention. Hence, an act that occurs outside the legal space occurs on the territory of a state, which is not a Contracting Party.

8 See *Behrami and Behrami v. France and Saramti v. France, Germany and Norway* [GC], app. nos. 71412/01 and 78166/01, ECHR 2007; *Al-Jedda v. the United Kingdom* [GC], app. no. 27021/08, ECHR 2011.

the Court's jurisprudence in cases concerning the extraterritorial application of the Convention to airstrikes and comparable cases to examine what gaps and possibilities exist in the Court's jurisprudence; Chapter 3 critically analyses the judgement given by the Court in *Hanan*; Chapter 4 considers two potential approaches the Court could have taken in *Hanan* and could still take in future similar cases; Chapter 5 will address the question of attribution, exploring what the opportunities presented by *Hanan* were concerning the issue; and, finally, Chapter 6 presents some concluding remarks.

II. The Court's Evolving Approach to the Extraterritorial Application of the Convention to Airstrikes

The most crucial issue raised by *Hanan* is the applicability of the Convention to the airstrike in Afghanistan. While the Court has dealt with numerous cases on the extraterritorial application of the Convention, only a handful concern aerial attacks, the most important of which is *Banković and Others v. Belgium and Others*. The first section of this chapter will analyse the obstacles that were created by *Banković* for the application of the Convention to the airstrike in *Hanan*. The second section will consider the Court's previous case law dealing with victims of shootings by state agents and the cause-and-effect notion of jurisdiction. Finally, the third section will discuss the Court's judgment in *Georgia v. Russia (II)*, which was released only a month prior to the *Hanan* judgment. Overall, this chapter serves to analyse the Court's past jurisprudence concerning comparable cases to discern whether the Convention could have been applicable and, if so, how the Court could have applied the Convention to the airstrike in Afghanistan, as well as the opportunities the case of *Hanan* presented for the Court to overrule and/or clarify the extraterritorial application of the Convention to cases like *Hanan*.

II.1. *The obstacles created by Banković concerning the extraterritorial application of the Convention to airstrikes*

On 23 April 1999, a Serbian radio station in the Federal Republic of Yugoslavia («FRY»), was hit by a missile launched from a NATO forces' aircraft, killing, and injuring in total 32 people, including the applicants and their

relatives.[9] Essentially, the Court in *Banković* was tasked with answering the question of whether the applicants and their relatives would, because of the extraterritorial airstrike, fall within the jurisdiction of the respondent states. Before *Banković* the starting point for every decision on the extraterritorial application of the Convention was that there was, in principle, nothing preventing the extraterritorial application of the Convention.[10] *Banković* turned this premise upside down so that, from now on, the starting point was that the ordinary meaning of «jurisdiction» was primarily territorial and that the extraterritorial application of the Convention was exceptional, requiring special justification.[11] The airstrike in the FRY was not considered an exception.[12] Thus, the precedent was set that the extraterritorial targeted killings, such as those undertaken with bombs or unmanned drones, would not establish jurisdiction, meaning that anyone affected by the attack was prevented from making a claim before the ECtHR – including the applicants. This position, and the *Banković* decision at large, have been subject to a wave of academic critique, being described as «ludicrous», «unpersuasive», and one of «the most egregious decisions in the history of the European Court of Human Rights».[13] While there are numerous aspects about the decision that have been criticised, two particular points are relevant for *Hanan*: 1) the Court's interpretation of jurisdiction, and 2) the Court's rejection of a cause-and-effect notion of jurisdiction.

Beginning with the Court's interpretation of jurisdiction, the decision has been denounced for placing too much weight on a public international law understanding of jurisdiction, and for determining the meaning of jurisdiction without considering the object and purpose of the Convention.[14]

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9 *Banković and Others v. Belgium and Others*, §§9-11.

10 See *Ilse Hess v the United Kingdom*.

11 *Banković v. Belgium and Others*, §§55-61.

12 *Ibid.*, §61.

13 MALLORY, *Human Rights Imperialists*, 90; Cedric Ryngaert, «Clarifying the Extraterritorial Application of the European Convention on Human Rights (Al-Skeini v the United Kingdom)», *Utrecht Journal of International and European Law 28*, no. 74 (2012): 60, https://doi.org/10.5334/ujiel.ba.

14 ALTIPARMAK, K., «'Bankovic': An Obstacle to the Application of the European Convention on Human Rights in Iraq?» *Journal of Conflict & Security Law* 9, no. 2 (2004): 223-230, accessed January 16, 2021; KING, H., «The Extraterritorial Human Rights Obligations of States», *Human Rights Law Review*, vol. 9, issue 4 (2009): 536, accessed March 08, 2021, https://academic.oup.com/hrlr/article/9/4/521/683701?login=true; http://www.jstor.org/stable/26294306; Michal Gondek, «Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?» *Netherlands International Law Review 52*, no. 3 (2005): 364, accessed January 17, 2021, https://www.cambridge.org/core/journals/netherlands-interna-

In its assessment the Court applied the rules of interpretation as laid out in the Vienna Convention on the Law of Treaties of 1969 («VCLT»), and made its conclusion by referring to the Convention's preparatory works as well as public international law. However, according to Article 31(1) VCLT, and the Court's own case law,[15] the object and purpose of the Convention should also have been taken into account when interpreting the Convention.[16] Afterall, the Convention is a «living instrument which must be interpreted in the light of present-day conditions»[17] and the object and purpose of the Convention, as a whole, is the «protection of individual human beings», which requires the Convention to «be interpreted and applied so as to make its safeguards practical and effective» (principle of effective protection).[18] The restrictive approach applied by the Court in *Banković*, however, seems to be contrary to the object and purpose of the Convention and Article 1. Because of newly emerging technologies, the evolution of autonomous weapons, and increases in artificial intelligence, that enable war to be fought from increasingly further distances, attacks today can be easily executed without having any military personnel on the ground. Within this context such a restrictive approach seems impetuous at best, and downright reckless at worst. It would, thus, only seem reasonable for the Court to apply an approach that would continue to protect individual human beings from acts perpetrated by states outside their national territory. Afterall, a Contracting Party should not be allowed «to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory».[19] Otherwise, this would lead to an «á la carte respect for human rights» and it would not be compatible with the principle of universality of human rights,[20] as envisioned in the preamble to the Convention. Therefore, as argued by the applicants in *Banković* the

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tional-law-review/article/abs/extraterritorial-application-of-the-european-convention-on-human-rights-territorial-focus-in-the-age-of-globalization/A6B6B9A768F1A2777B4B34DCE621E397.

15 *Loizidou v. Turkey* (Preliminary Objections), §71.

16 GONDEK, M., *Extraterritorial Application of the European Convention on Human Rights*, 362; ALTIPARMAK, K., *«Bankovic»: An Obstacle to the Application of the European Convention on Human Rights in Iraq?* 226.

17 *Loizidou v. Turkey* (Preliminary Objections), §71.

18 *Soering v. the United Kingdom*, app. no. 14038/88, ECHR 1989, §87.

19 *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, UN Doc CCPR/C/OP/1, §88; *Issa and Others v. Turkey*, app. no. 31821/96, ECHR 2004, §71.

20 *Al-Skeini and Others v. the United Kingdom* [GC], app. no. 55721/07, ECHR 2011, Concurring Opinion by Judge Bonello, §§17-18.

concepts of «effective control» and «jurisdiction» should be «flexible enough to take account of the availability and use of modern precision weapons which allow extra-territorial action of great precision and impact without the need for ground troops».[21]

Regarding the second, above-mentioned issue, the applicants in *Banković* proposed that the state should be responsible for impugned acts «in a manner proportionate to the level of control exercised in any given extra-territorial situation».[22] This argument encompasses two significant ideas: 1) that jurisdiction would be established simply by adversely affecting the rights of an individual – a principle referred to as the «cause-and-effect notion of jurisdiction» – and 2) that Convention rights can be «divided and tailored» so that Convention rights would apply relative to the level of control exercised by the state. The Court in *Banković* rejected both these ideas, as they would lead to a too extensive application of the Convention, which according to the Court, was not envisioned by the text of Article 1.[23] Since then, the Court has repeatedly rejected a cause-and-effect notion of jurisdiction.[24] However, the notion that the Convention can be divided and tailored was later accepted,[25] leading to the conclusion that aspects of *Banković* could, theoretically, be overturned by the Court in later judgments.[26]

II.2. *Gunfire cases and the «cause-and-effect» notion of jurisdiction*

So far, there are hardly any cases that consider the extraterritorial application of the Convention to long-range artillery, such as drones or bombs. However, there is a group of cases applying the Convention extraterritorially to situations where individuals were shot by state agents. This section serves to examine these cases to determine what principles could be applied to *Hanan*.

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21 *Banković v. Belgium and Others*, §52.
22 *Ibid.*, §75.
23 *Banković v. Belgium and Others*, §75.
24 *Medvedyev and Others v. France* [GC], app. no. 3394/03, ECHR 2010, §64; *Georgia v. Russia (II)*, §134.
25 *Al-Skeini and Others v. the United Kingdom*, §§137, 142.
26 *Georgia v. Russia (II)*, Partly Dissenting Opinion of Judge Lemmens, §2; Joint Partly Dissenting Opinion of Judges Yudkivska, Wojityczek and Chanturia, §11.

In both *Solomou and Others v. Turkey*[27] and *Andreou v. Turkey*[28] the Court found that Turkey had jurisdiction in cases where its forces had shot individuals in the territory of Cyprus, as the opening of fire constituted the «*direct and immediate cause*» of the injuries sustained by the victims.[29] The victims were shot during the same protest that took place within the UN buffer zone between Northern and Southern Cyprus. In general, the Court uses two concepts to establish extraterritorial jurisdiction: 1) state agent authority and control («personal control»[30]), and 2) effective control over an area («spatial control»).[31] In *Solomou* the victim was within the territory effectively controlled by Turkey, meaning that the Court could have simply established jurisdiction applying the spatial control model. However, the Court found jurisdiction by applying personal control instead. This suggests that the Court consciously attempted to expand the personal control model to include shootings by state agents so that any further cases coming out of the same protest, such as *Andreou*, would also fall within the jurisdiction of Turkey. If this is the case, then why should not also in the future the mere act of shooting civilians bring the individual within the state's jurisdiction? It is also important to highlight that if the Court had found jurisdiction in *Solomou* but not in *Andreou* and not expanded the personal control concept, this would have highlighted an arbitrariness in the Court's understanding of jurisdiction. Afterall, can a principled system of human rights protection really condemn a state for shooting one individual but not another who was merely a few metres away from the first one?

Another case that opened more questions than it resolved as to how jurisdiction could apply to cases involving state agent shootings was *Pad and Others v. Turkey*.[32] In *Pad* the applicants' relatives had been killed by fire discharged from Turkish soldiers in helicopters. Even though it was factually unclear whether the incident occurred within or outside of Turkish national territory, the Court found jurisdiction because the Turkish Government had accepted jurisdiction over the matter.[33] It has been suggested that this means that the

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27 *Solomou and Others v. Turkey*, app. no. 36832/97, ECHR 2008.
28 *Andreou v. Turkey*, app. no. 45653/99, ECHR 2009.
29 *Ibid.*, §25.
30 Personal control means that an individual can be brought within the state's jurisdiction through the extraterritorial acts of its state agents.
31 See *Al-Skeini and Others v. the United Kingdom*, §§138-139.
32 *Pad and Others v. Turkey*, no. 60167/00, ECHR 2006.
33 *Ibid.*, §49.

relevant criteria was whether the state had intentionally killed the person.[34] This approach could also be interpreted to mean that it should actually be inconsequential whether state agents kill innocent individuals on one side of the border or another, as the mere fact of killing them, or at the very least, shooting them could bring the victims within the jurisdiction of the state. However, the Court never gave an unequivocal explanation as to how exactly it had established jurisdiction in this case.

One of the most important cases concerning the extraterritorial jurisdiction was the case of *Al-Skeini and Others v. the United Kingdom*,[35] which concerned the deaths of six Iraqi civilians killed by United Kingdom («UK») forces in Iraq. All victims were killed in different situations ranging from being killed on the street or in their home, to being killed in a UK detention centre. Within the personal control model, the Court highlighted three categories of cases which could bring matters within the scope of the Convention: 1) acts of diplomatic and consular agents, 2) exercise of public powers through the consent, invitation or acquiescence of the Government of that territory, and 3) use of force by state agents.[36] Gunfire cases would, thus, fall within the use of force by state agents category. However, usually, in these cases the Court only finds jurisdiction if the state agents have detained the individual before killing them.[37] This is why the UK national court in *Al-Skeini* had only found jurisdiction in regard to the victim who was killed in detention.[38] In relation to this Hannum commented that «simply shooting suspects is apparently immune from scrutiny, so long as you are careful not to arrest them first».[39] Judge Bonello similarly criticised the Court's «absurdities» in its finding of jurisdiction, highlighting that if two civilians got shot, whereby one had been arrested beforehand, only the one arrested will fall within jurisdiction of the UK even though all the essential facts were the same, including the UK soldier, the gun,

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[34] JANKOWSKA-GILBERg, M., «Das Al-Skeini-Urteil Des Europäischen Gerichtshofs Für Menschenrechte – Eine Abkehr Von Banković?» *Archiv Des Völkerrechts 50*, no. 1 (2012): 69, accessed January 26, 2021. doi:10.2307/41503413.

[35] *Al-Skeini and Others v. the United Kingdom* [GC], app. no. 55721/07, ECHR 2011

[36] *Ibid*., §§134-135.

[37] E.g. *Öcalan v. Turkey* [GC], app. no. 46221/99, ECHR 2005, §91; *Issa and Others v. Turkey; Al-Saadoon and Mufdhi v. the United Kingdom*, app. no. 61498/08, §§86-89, ECHR 2009.

[38] *Al-Skeini and Others v. the United Kingdom*, §76.

[39] HANNUM, H., «Bombing for Peace: Collateral Damage and Human Rights», in *Proceedings of the Annual Meeting (American Society of International Law) 96* (Cambridge University Press, 2002), 99, https://www.jstor.org/stable/25659757.

the ammunition, and the street.[40] This case, thereby, showcased the problematic nature of the Court's reasoning in these cases, which his possibly why the Court decided to take a different in approach so that jurisdiction was found in regard to all six Iraqi that were killed.

The Court found jurisdiction entirely based on the UK exercising public powers in the area due to assuming «authority and responsibility for the maintenance of security in south-east Iraq».[41] Applying the same reasoning, the applicants in *Hanan* argued that since the German troops operated with the consent of the Afghan government and were responsible for the maintenance of security in Afghanistan due to the UNSC mandate, that Germany should have had jurisdiction over the area in question.[42] Unfortunately, the Court did not address this argument, leaving it ambiguous what the Court had meant with public powers in *Al-Skeini* and how the public powers exception to jurisdiction could be practically applied again to cases in the future. Thus, it is unclear whether Germany's role in Afghanistan would have sufficed to establish jurisdiction over the casualties of the airstrike. Nevertheless, *Al-Skeini* was undoubtedly one of the most progressive cases post-*Banković*. Seemingly the Court was eager to expand the notion of jurisdiction for the Contracting Parties to be held accountable for these types of cases. Unfortunately, the Court failed to specify a general principle in relation to its judgement in *Al-Skeini*, leaving uncertainties to the application.

In 2014 the Court once again broadened the personal control model in the case of *Jaloud v. the Netherlands*, which concerned an individual who was fatally shot by Dutch troops at a checkpoint in Iraq. The Court found jurisdiction because it considered that checkpoints were set up for «the purpose of asserting authority and control over persons passing through» it,[43] essentially expanding the notion of jurisdiction to apply to checkpoints. Checkpoints are flexible and can be easily moved from one place to another, leaving one to wonder what the difference really is between someone being shot at a checkpoint compared to any other circumstance?[44] What if the individual in

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40 *Al-Skeini and Others v. the United Kingdom*, Concurring Opinion by Judge Bonello, §15.

41 *Al-Skeini and Others v. the United Kingdom*, §149.

42 *Hanan v. Germany*, §120.

43 *Jaloud v. the Netherlands* [GC], app no. 47708/08, ECHR 2014, §152.

44 Aurel Sari, «Jaloud v Netherlands: New Direction in Extra-Territorial Military Operations», *EJIL: TALK! Blog of the European Journal of International Law:* (2014), accessed January 25, 2021, https://www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/.

Jaloud had been shot just after he left the checkpoint rather than while passing through it? Moreover, one could argue that the very act of shooting someone or fighting in someone's territory is similarly aimed at asserting authority and control. This judgement shows that the Court seems to try to broaden the extraterritorial application but limits itself to expanding jurisdiction to only highly specific circumstances without pronouncing a universal principle that could be applied to all these cases. Since in *Hanan* the German troops were responsible for the maintenance of security in the region, the airstrike was arguable aimed at «asserting» control. This leaves the question whether the principles established in *Jaloud* could be expanded to apply in Hanan.

The aforementioned cases demonstrate that the Court has been willing to expand the notion of jurisdiction and, in particular, the personal control model to include cases where individuals were shot by state agents. However, the reasoning for doing so and the tests to be applied are ambiguous. The Court has failed to establish a general principle in such a way that one could understand how exactly jurisdiction was created, causing judgements to interpret jurisdiction in an arbitrary manner. Consequently, it remains uncertain, whether these types of cases will generally be accepted to create a jurisdictional link simply because an individual was shot by the state agent. Overall, the Court's jurisprudence seems sporadic and is lacking any legal certainty that would allow individuals to understand their rights and Contracting Parties to know their obligations. Judge Bonello has called the Court's jurisprudence a «need-to-decide basis, patchwork case-law», which is «cluttering the case-law with doctrines which are, at best, barely compatible and at worst blatantly contradictory».[45] With numerous Contracting Parties conducting military operations abroad it is clear that it is urgent for the Court to clarify whether and, if so, how, the Convention applies to such situations and establish a principle that can be universally applied in order to guarantee legal certainty.

One way of clarifying the situation would be for the Court to accept a cause-and-effect notion of jurisdiction. In fact, cases like *Solomou*, *Andreou*, and *Pad have* been used to advance the idea that the Court has actually been employing at least something akin to a cause-and-effect notion of jurisdiction. For instance, in *Andreou* the Court established jurisdiction, because the government *caused* the applicant's injuries.[46] In fact, a cause-and-effect notion

[45] *Al-Skeini and Others v. the United Kingdom*, Concurring Opinion by Judge Bonello, §§19-20.
[46] *Andreou v. Turkey*, §25.

of jurisdiction would help explain why the government found jurisdiction in these cases and solve any problems of arbitrariness or uncertainty created by these judgements. If the Court were to accept the notion, the European system of human rights protection would have a more universal approach to jurisdiction providing much needed legal certainty.[47] In fact, ever since *Banković* academics, as well as judges, have proposed the adoption thereof.

In addition to the argument that the Court employed the notion in its post-*Banković* case law, arguments in favour of the notion include that such a notion has arguably been adopted by the Human Rights Committee in their General Comment 36,[48] that the Court's pre-*Banković* case law had actually employed such a notion,[49] which was unjustly ignored in the *Banković* decision,[50] and the importance of taking the object and purpose of the Convention into account when interpreting Article 1. Afterall, the cause-and-effect notion of jurisdiction could succeed at holding states accountable for any sort of attack on people, anywhere in the world – including anything from simply shooting someone to drones, nuclear bombs, or cyber-attacks. It would, therefore, ensure a universal protection of the rights of the individual in modern times and comply with the object and purpose of the Convention.

What is the importance of these cases for *Hanan*? For one, if the Court were to accept the cause-and-effect notion, this concept could easily be applied to *Hanan*, as Mr Hanan's sons' rights were indisputably affected by the airstrike. If, on the other hand, the Court would simply interpret these cases to have created a new subcategory of personal jurisdiction, there would still be the question of whether this could be expanded to also include cases, like *Hanan* and *Banković*. The similarity between the gunfire cases and *Hanan* lies in the fact that the victims died or were injured as a result of having been shot by state agents. This is essentially also what happened in *Hanan* and *Banković*. The only differences were the type of weapon used and the distance between the state agents and their victims. This is to say that the underlying action

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47 *Al-Skeini and Others v. the United Kingdom*, Concurring Opinion by Judge Bonello, §§19-20.

48 UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35, available at: https://www.refworld.org/docid/5e5e75e04.html [accessed 25 March 2021].

49 *Cyprus v. Turkey* (1982), §§586; *Drozd and Janousek v. France and Spain*, § 91; *WM v. Denmark*, *§41; Stocké v. Germany*, §166.

50 MILANOVIC, M., *Extraterritorial Application of Human Rights Treaties: Law, Principles, Policy* (Oxford, United Kingdom: Oxford University Press, 2011), 182; Mallory, *Human Rights Imperialists*, 96.

of the state when affecting the rights of individuals was the same: the use of modern technology that, by its nature, is capable of adversely affecting the livelihood of individuals within their area of effectiveness. To that end, Hannum has pointed out that there should not be a difference between killing people with automatic weapons[51] or killing them with bombs just because they were unleashed from further away.[52] Nevertheless, in *Andreou* the Court did reference the proximity between the attackers and the victims,[53] suggesting that in the Court's eyes it could make such a substantial difference. The Court discusses precisely this issue in its 2021 judgment of *Georgia v Russia (II)*,[54] which will be discussed in the next sub-chapter.

II.3. *Recent developments in* Georgia v. Russia (II)

Georgia v Russia (II) was released approximately one month before the judgment in *Hanan* and concerned the armed conflict between Georgia and the Russian Federation that occurred in August 2008. To analyse whether Russia had jurisdiction the Court identified two separate phases of the conflict: First, the active phase of hostilities during the five-day war; Second, the occupation phase after the cessation of hostilities. Concerning the active hostilities, the Court noted that the «very reality of armed confrontation and fighting» aimed at establishing control means that Russia neither had spatial *nor personal control* in the area.[55]

The Court arguably admitted a cause-and-effect notion of jurisdiction, stating that the acts of Contracting Parties «performed, or *producing effects*, outside their territory can only in exceptional circumstances amount to the exercise» of jurisdiction.[56] Specifically referencing some of the aforementioned cases (*Solomou*, *Andreou*, *Pad*, *Issa*) the Court admits that in some «cases concerning fire aimed by armed forces/police» the Court has applied state agent authority and control.[57] However, the Court then differentiated these cases

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51 E.g. *Issa and Others v. Turkey*.
52 Hannum, Bombing for Peace: Collateral Damage and Human Rights, 99.
53 *Andreou v. Turkey*, §25.
54 *Georgia v. Russia (II)* [GC], app. no. 38263/08, ECHR 2021.
55 *Ibid.*, §§126-137.
56 *Ibid.*, §128.
57 *Georgia v. Russia (II)*, §131.

from *Georgia v. Russia (II)*, saying that while these cases concern the «isolated and specific acts involving an element of proximity», *Georgia v. Russia (II)* is a case involving bombing and artillery shelling by the Russian armed forces seeking to establish control over the area.[58] Thus, the Court seems to accept that gunfire cases would generally bring an individual within the state's jurisdiction, but then makes sure to differentiate these acts from long-range weaponry, like the ones employed in *Hanan*, by establishing two criteria: proximity and being an isolated and specific act.

This differentiation creates new uncertainties and further deepens the arbitrariness in the European system of human rights protection. Not only is it unclear whether both criteria would be required, but the consequences of the practical application of these principles is perplexing. Concerning the proximity element, the guarantee and protection of individual human rights should not depend on a frivolous number such that someone shot from five meters away will be afforded protection but not if they are shot from five kilometres away. In *Pad* the individuals were shot out of an airplane so that the distance between the individuals and the state agents was certainly larger that in it was, for instance, in *Andreou*. Thus, how many meters are needed in order for a state agent to be considered too far away from their victim so as not to bring the individual within the jurisdiction of the state? Effectively, the enumerated principles set out a situation where questions like «how many meters would be needed in order to establish jurisdiction?» would become relevant in the discussion of human rights protection. And just as the question «how many people must be killed to fall within the scope of the Convention?» is markedly inappropriate, so too is predicting a jurisdictional link on a variable that is being made increasingly irrelevant by modern weapons technology. The second criterion suggests that if a state executed a single attack that state could be held responsible but if it executed an extensive military campaign it would not have to abide by the Convention. Markovic formulated the arbitrariness of the judgement rather plainly: «if killing one person is a violation of the right to life, how could killing a hundred or a thousand not be?».[59] These ideas are

[58] *Ibid.*, §§132-133.

[59] MILANOVIC, M., «Extraterritorial Investigations in Hanan v. Germany; Extraterritorial Assassinations in New Interstate Claim Filed by Ukraine against Russia», *EJIL: TALK! Blog of the European Journal of International Law* (2021), accessed on 27 March 2021, https://www.ejiltalk.org/extraterritorial-investigations-in-hanan-v-germany-extraterritorial-assassinations-in-new-interstate-claim-filed-by-ukraine-against-russia/.

further supported by some of the judges, who staunchly criticized the majority opinion for being inconsistent with previous case-law and reviving the legacy of *Banković*.[60] Not only do the judges agree with the proposition that the gunfire cases demonstrate that the very act of a state agent shooting someone will bring that person within the state's jurisdiction,[61] but they disagree with the differentiation made between the gunfire cases and *Georgia v. Russia (II)*, which is, in essence, an artificial distinction drawn between «targeted action and larger-scale military operations»,[62] the latter of which are normally even more serious.[63]

With reference to *Banković* and *Medyedeyev and Others v. France*, the Court also stated that a «State's responsibility could not be engaged in respect of 'an instantaneous extraterritorial act, as Article 1 did not admit of a «cause-and-effect» notion of «jurisdiction»'.[64] Judges Yudkivska, Wojtyczek and Chanturia highlighted the absurdity with this idea, insisting that there are two possible interpretations of what «instantaneous» means. It could be interpreted according to international law on state responsibility and, thus, as the opposite of continuous. Such an interpretation would be nonsensical, as the Convention has repeatedly acknowledged the extraterritorial application to «instantaneous acts», such as an arrest carried out on foreign territory. The alternative would be to interpret it according to its ordinary meaning. Military operations, however, can never be considered «instantaneous» considering the complicated process of decision-making and execution that lies behind every action taken by the military abroad.[65] One is left to wonder how the Court can combine the two ideas that the extraterritorial act must be «isolated and specific» but cannot be «instantaneous» to establish jurisdiction, when those two terms are essentially entangled with one another. While the Court has so far not provided any further explanation of the precise meanings

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60 E.g *Georgia v. Russia (II)*, Partly Dissenting Opinion of Judge Pinto De Albuquerque, §§29-30; Joint Partly Dissenting Opinion of Judges Yudkivska, Wojityczek and Chanturia, §14.

61 *Georgia v. Russia (II)*, Partly Dissenting Opinion of Judge Lemmens, §2; Joint Partly Dissenting Opinion of Judges Yudkivska, Wojityczek and Chanturia, §4; Partly Dissenting Opinion of Judge Pinto De Albuquerque, §§8-9; Partly Dissenting Opinion of Judge Chanturia, §11.

62 *Georgia v. Russia (II)*, Partly Dissenting Opinion of Judge Chanturia, §16.

63 *Georgia v. Russia (II)*, Partly Dissenting Opinion of Judge Lemmens, §2.

64 *Medvedyev and Others v. France* [GC], app. no. 3394/03, ECHR 2010, §64; *Georgia v. Russia (II)*, §124.

65 *Georgia v. Russia (II)*, Joint Partly Dissenting Opinion of Judges Yudkivska, Wojityczek and Chanturia, §11.

of these terms, the instantaneity of an act carries with it an implicit temporal limitation, which necessarily implies both a degree of specificity and isolation.

Overall, the dissenting judges clearly advanced the proposition that the gunfire cases should be extended to apply to long-range weaponry. Unfortunately, the majority is reluctant to do so and has, thus, forced a distinction into its jurisprudence to prevent a further expansion of the extraterritorial application of the Convention. The judgment is, therefore, marked by an inherent arbitrariness, puzzling contradictions, and ill-established principles, rendering it difficult to predict how the judgement is to be applied to other cases – like *Hanan*. For instance, if both elements of proximity and an isolated incident were required to establish jurisdiction, then Germany would likely not be considered to have jurisdiction in *Hanan* due to the long-range weaponry employed. On the other hand, if one element were enough, Germany would have jurisdiction, as *Hanan* involved an isolated and specific attack. At the same time, the attack was part of the ongoing ISAF military operation in Afghanistan and, thus, could also be interpreted to not have been such.

Finally, the Court's central argument that the very reality of fighting precludes both spatial and personal jurisdiction is flawed. It would be understandable for the Court to say that the reality of fighting aimed at establishing control precludes spatial effective control. However, the way control is established in the gunfire cases is by personal control, which has never depended on the pre-existence of spatial control. It further opens the question of what circumstances of armed confrontation would be considered severe enough as to preclude control? If the non-international armed conflict in *Hanan* were to fall within this spectrum, this would mean that even if the gunfire cases were extended to long-range weapons, no personal control could be established, thereby precluding jurisdiction.

It seems that with *Georgia v. Russia (II)* the majority Court wanted to clearly establish that the gunfire cases could not be extended to long-range artillery and/or situations of active fighting and revive *Banković*. Unfortunately, the judgement also leaves many gaps and adds further questions to the extraterritorial application of the Convention. The only thing that is certain about the judgement is that the Court will have to deal with the repercussions of *Georgia v. Russia (II)* in the future, facing the «gargantuan task to restore the damage to its credibility caused by this judgement».[66]

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[66] *Georgia v. Russia (II)*, Partly Dissenting Opinion of Judge Pinto De Albuquerque, §30.

II.4. *Conclusion*

Since *Banković* the Court has predominantly followed a progressive approach extending the extraterritorial application of the Convention – with some exceptions, such as *Georgia v. Russia (II)*. Throughout this process the Court has in fact reversed some of the aspects of its *Banković* decision – in particular, that the Convention can apply extraterritorially outside the legal space and that Convention rights can be divided and tailored,[67] which weakens the strength of *Banković* as a precedent to be followed by the Court, inviting the Court to revisit the issue as a whole.[68] However, rather than creating comprehensive principles that can be applied to the individual facts of each case, the Court has added to the system on a case-by-case approach. Mallory describes this process as judicial minimalism, a style of jurisprudence, where the court gives «deliberately shallow or narrow judgments in order to avoid addressing wider normative issues within a particular area to minimise the cost of their decisions either being incorrect or correct but unpopular»,[69] leading to numerous inconsistencies, uncertainties, and arbitrary judgements.

Further, the Court has failed to specifically address the extraterritorial application of the Convention to an aerial attack in an armed conflict. The gunfire cases and the cause-and-effect notion of jurisdiction could have allowed for the extraterritorial application of the Convention to cases like *Hanan*. Unfortunately, the Court in *Georgia v. Russia (II)* rejected this idea and, in doing so, it created even more confusion, providing an unsatisfactory distinction from a human rights protection perspective.

With *Hanan* the Court could have addressed many of the issues outlined throughout this chapter and provided much needed legal certainty. Civilians in Afghanistan were lethally wounded by bombs falling out of airplanes – an attack ordered by Germany. The situation being so similar to *Banković* the Court could have finally overruled this decision, which can only be seen as an extreme outlier in the Court's jurisprudence. Moreover, the Court could have used the opportunity to extend the principles established in the gunfire cases to long-range weaponry, accept a cause-and-effect notion of jurisdiction, or clarify the

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67 see *Al-Skeini and Others v. the United Kingdom*, §§137, 142.

68 *Georgia v. Russia (II)*, Partly Dissenting Opinion of Judge Lemmens, §2; Joint Partly Dissenting Opinion of Judges Yudkivska, Wojityczek and Chanturia, §11.

69 Mallory, *Human Rights Imperialists*, 65-66.

principles established in *Jaloud* and *Al-Skeini*. The Court's judgement, however, did not assess any of the issues outlined in this chapter. The essential problem was that the applicants did not allege a violation of the substantive limb of Article 2 of the Convention, but only the procedural one. As will be outlined in the following chapter, the Court established a jurisdictional link based exclusively on the procedural aspects and decided not to address whether the airstrike itself brought the applicants within the Court's jurisdiction. The Court even expressly states that the jurisdictional link established in relation to Germany's procedural obligations does not mean that jurisdiction can also be found concerning the substantive limb of Article 2 of the Convention.[70] The Court, thus, did not overrule *Banković* or use the opportunity to establish a universal principle that can be applied to airstrikes, once again leaving the landscape of human rights protection in cases of extraterritorial airstrikes covered in a dense and disorienting fog.

III. The Court's Replies in *Hanan v. Germany* Concerning States' Extraterritorial Obligations under the Convention

Despite failing to bring clarity to the Court's approach to the extraterritorial application of the Convention to airstrikes, *Hanan* was nevertheless deemed admissible through the establishment of a jurisdictional link created in relation to the procedural obligations by Germany – The judgement was predominantly based on the 2019 decision in *Güzelyurtlu and Others v. Cyprus and Turkey*,[71] as well as some earlier cases. This chapter will first discuss the *Güzelyurtlu* judgment and the earlier case-law on which *Güzelyurtlu* and *Hanan* are built. Then it will examine the application of said case law to *Hanan*, as well as the significance and repercussions of the *Hanan* judgment itself.

III.1. *The need for a jurisdictional link:* Güzelyurtlu *judgment and the «special features» exception*

Since the applicants in *Hanan* alleged a violation of the procedural limb of Article 2, the crucial question was whether there was an obligation to investigate the airstrike. The Court heavily relied on *Güzelyurtlu and Others v.*

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70 *Hanan v. Germany*, §143.

71 *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], app. no. 36925/07, ECHR 2019.

Cyprus and Turkey to establish a jurisdictional link bringing the investigation, but not necessarily the airstrike, within the jurisdiction of Germany. *Güzelyurtlu* concerned the investigation into the murder of three Turkish Cypriots. Even though the murders were committed in Southern Cyprus, the Court held that Turkey had an obligation to effectively investigate under Article 2 of the Convention based on two exceptions to the principle of territoriality: 1) the initiation of investigation by the Turkish Republic of Northern Cyprus («TRNC»), and 2) the «special features» present in the case.[72]

As it relates to the initiation of investigations, the Court referred to the cases of *Gray v. Germany*,[73] *Aliyeva and Aliyev v. Azerbaijan*,[74] and *Markovic and Others v. Italy*,[75] concluding that if the investigative or judicial authorities of a state «institute their own criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that State, by virtue of their domestic law [...] the institution of that investigation or those proceedings is sufficient to establish a jurisdictional link for the purposes of Article 1».[76] Therefore, because in *Güzelyurtlu* the TRNC initiated investigations into the murders created a jurisdictional link sufficient to compel Turkey to comply with their procedural obligations under Article 2.[77]

In regards to the second standard, the «special features» test was first introduced in *Rantsev v. Cyprus and Russia*.[78] In that case, the Court did not find jurisdiction due to lack of special features, but it, nevertheless, stated that, in principle, the existence of special features could require a departure from the Court's general approach to jurisdiction.[79] Special features refer to the factual characteristics of a case that result in the Convention being applicable extra-territorially. However, the Court has never presented a list of what exactly would classify as a special feature, leaving the precise meaning of the term unclear. In *Güzelyurtlu* the Court finds two such special features, which were 1) Northern Cyprus being under Turkish occupation and the TRNC not being recognised as a State under international law, and 2) that the murder suspects fled to the TRNC, effectively preventing Cyprus from pursuing its own crim-

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72 *Ibid*., §§191-194.
73 *Gray v. Germany*, app. no. 49278/09, ECHR 2015.
74 *Gray v. Germany*, app. no. 49278/09, ECHR 2015.
75 *Markovic and Others v. Italy* [GC], app. no. 1398/03, ECHR 2006.
76 *Güzelyurtlu and Others v. Cyprus and Turkey*, §188.
77 *Ibid*., §191.
78 *Rantsev v. Cyprus and Russia*, app. no. 25965/04, ECHR 2010.
79 *Ibid*., §§243-244.

inal investigation.[80] While the Court bases jurisdiction in this case on both elements, it also emphasized that both the initiation of investigations and the special features would suffice by themselves to establish a jurisdictional link with Turkey.[81] Notably, neither of these exceptions falls under the personal or spatial control exceptions that have so far been promulgated by the Court. Meaning that the Court essentially created an entirely new category for the extraterritorial application of the Convention.

III.2. *The importance and repercussions of the judgement in* Hanan

The Court in *Hanan* based its finding of jurisdiction entirely on the exceptions to the territorial nature of jurisdiction as outlined in *Güzelyurtlu.* However, it only found jurisdiction based on the «special features» exception and not the institution of proceedings. While the Court emphasized that it was not trying to overrule *Güzelyurtlu* in any way, it stated that the institution of a domestic criminal investigation or proceedings does not in itself suffice to establish a jurisdictional link in the present case. It justified this by stating that the deaths in *Hanan* had occurred «in the context of an extraterritorial military operation» within the framework of UNSC mandate outside the legal space of the Convention.[82]

The differentiation of *Hanan* from *Güzelyurtlu* is lacking any legal basis. From the wording «*outside the territory of the Contracting States to the Convention*» the Court seems to suggest that the institution of investigations exception only applies to situations within the legal space of the Convention. Alternatively, or additionally, the Court bases the distinction on the investigation concerning a UNSC military operation. However, the proceedings in *Markovic* concerned an airstrike by NATO forces in the Federal Republic of Yugoslavia – the same airstrike that prompted *Banković*. Yet, the institution of proceedings by itself was sufficient to establish the jurisdictional link.[83] Thus, not only did the proceedings concern events that occurred outside the legal space of the Convention, but similarly to *Hanan*, the event in question was an airstrike by an international coalition. It is, thus, inexplicable why from a

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80 *Güzelyurtlu and Others v. Cyprus and Turkey*, §§193-194.
81 *Ibid*., §§193-196.
82 *Hanan v. Germany*, §135.
83 *Markovic and Others v. Italy*, §§54-55.

legal standpoint the Court suddenly decided that in cases, such as *Hanan*, the institution of proceedings would in themselves not be sufficient to establish a jurisdictional link.

Particularly perplexing is that, when the Court then continued to discuss the «special features» exception, it announced that this exception applies in respect of extra-territorial situations outside the legal space of the Convention and referenced, *mutatis mutandis*, *Markovic* as authority.[84] However, it is clear that in *Güzelyurtlu* the Court considered *Markovic* to be authority for the institution of proceedings exception and not the «special features» exception. Moreover, in *Güzelyurtlu* the Court actually stated that having regard to the special features in the case, not finding a jurisdictional link «would result in a vacuum in the system of human-rights protection», as Cyprus falls within the legal space of the Convention, which would create a risk of Northern Cyprus becoming a safe haven for murderers.[85] This point was in fact referenced by Germany and France in their submissions to the Court as one of the reasons why *Güzelyurtlu* was not applicable to the facts in *Hanan*. Judges Grozev, Ranzoni and Eicke, in their partly dissenting opinion, also concluded that the «special features» exception in *Güzelyurtlu* «was clearly related to the aim of avoiding a vacuum in the system of human-rights protection».[86] Thus, it appears from the previous case law that if one of these exceptions applies outside the legal space and the other one does not, then it should be the other way around.

One possible explanation for the Court's approach is that the Court was heavily influenced by political pressures. Both Germany and the intervening governments emphasized that if the institution of proceedings alone could establish a jurisdictional link anywhere in the world, this would effectively deter states from instituting proceedings in the first place; the Court expressly noted that it had taken these concerns into account in its assessment.[87] However, any attempt to restrict the extraterritorial application of the Convention was effectively undone by the Court's application of the «special features» exception. The Court found the existence of three «special features» in *Hanan*: 1) Germany was obliged under customary international humanitarian law («IHL»)

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84 *Hanan v. Germany*, §136.
85 *Güzelyurtlu and Others v. Cyprus and Turkey*, §195.
86 *Hanan v. Germany*, «Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni and Eicke», §11.
87 *Hanan v. Germany*, §135.

to investigate the airstrike; 2) troop-contributing states themselves were exclusively entitled to institute criminal investigations of proceedings against their personnel; and 3) German domestic law obliged Germany to institute a criminal investigation into the matter.[88] Analysing the Court's application of the «special features» exception, it appears that rather than restricting the extraterritorial application of the Convention, it broadened it in an arbitrary and unpredictable way. Firstly, the Court asserted that there is no exhaustive list of «special features» that could trigger a jurisdictional link.[89] Meaning that the Court can effectively establish new «special features» on any given set of facts on an ad hoc basis. This could broaden the extraterritorial application of the Convention in any number of ways and effectively negates the principle of legal certainty, since Contracting Parties are completely unable to foresee under what circumstances a jurisdictional link could be triggered. Moreover, rather than establishing the jurisdictional link on the institution of proceedings, the Court simply established the link on both the domestic and international obligations to do so, along with the fact that Afghan authorities were prevented from initiating proceedings themselves. These features, however, cannot be considered uncommon in situations of armed conflict. Customary IHL applies universally to all countries; the Court itself admits that it is a common practice for troop-contributing states in UN-authorized military missions to retain exclusive jurisdiction over their personnel,[90] and the Court also observes that the majority of Contracting Parties participating in military deployments overseas are obliged under their domestic laws to investigate alleged war crimes or wrongful deaths.[91] Therefore, these «special» features are likely to occur oftentimes, effectively broadening the extraterritorial jurisdiction rather than restricting it.

Judges Grozev, Ranzoni and Eicke noted in fact that they fail to see what makes these features described sufficiently «special» to justify a further extension of jurisdiction under Article 1.[92] In particular, the judges highlighted that following the majority opinion's reasoning this would imply that any obligation under IHL might have the same effect, that is, the creation of a jurisdic-

88 *Ibid.*, §§138-139.
89 *Ibid.*, §136.
90 *Ibid.*, §138.
91 *Ibid.*, §141.
92 *Hanan v. Germany*, «Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni and Eicke», §19.

tional link.[93] They also emphasized that the third link, i.e. that Germany was under a domestic obligation to initiate proceedings, was due to Germany, like most other Contracting Parties, having ratified the Rome Statute and that, if this were the third missing link, this could discourage Contracting Parties from adopting domestic obligations that ensure human rights protection, which would be undesirable.[94] Of course, it is unclear from the wording of the Court's judgment in *Hanan*, to what extent each one of the features has contributed to the establishment of jurisdiction; The Court merely stated that it was the combination of the three «special features» mentioned that triggered the jurisdictional link,[95] but it did not expand upon this observation in any meaningful way. What also remains unclear is whether the mere obligation to institute proceedings suffices to create a jurisdictional link and whether, therefor, a Contracting Party would not even have had to institute proceedings in order for the jurisdictional link to be established. After all, the Court never mentioned as a special feature the fact that Germany did actually institute proceedings. If this was the case, then in all practicality all Contracting Parties that have ratified the Rome Statue would have an obligation to conduct an effective investigation under Article 2 of the Convention into any potential interference with the right to life abroad.[96]

The institution of proceedings is very clearly linked to only procedural obligations. However, the «special features» exception, while so far only applied in this context, has not been expressly linked to procedural obligations alone. The term «special features» could be applied to just about anything. For instance, could proximity become such a «special feature»? Did the Court in *Georgia v. Russia (II)* consider the element of proximity present in the gunfire cases to be a «special feature»? The Court might not have expressly said it was one but considering the Court's habit of reinterpreting its past case-law to find a legal basis for their current judgement, anything is possible. The idea of «special features» also leads to the question of whether the fact that Germany had 1,500 soldiers stationed only seven kilometres away from the tanks could by itself constitute a «special feature»? This is a point that distinguishes the case from *Banković*, so that the Court could have used this to establish juris-

93 *Ibid*., §21.
94 *Ibid*., §23.
95 *Hanan v. Germany*, §142.
96 A similar interpretation is suggested in the Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni and Eicke, §14.

diction in *Hanan* in regard to the substantive limb of Article 2 without having to overrule *Banković*. Having this many soldiers so close by in addition to the soldiers stationed in the entire area known as Regional Command North, means that at any time soldiers could be swiftly sent to the area in question. Germany had the very real capability to send soldiers and could have, for instance, detained the insurgents rather than bombing them. Afterall, if they had detained and killed them, then there would no doubt have been a jurisdictional link also regarding the substantive limb under Article 2. Thus, could the capacity to do so constitute a special feature?

III.3. *Conclusion*

The judgment in *Hanan* is another example of what Mallory has described as judicial minimalism. While expanding the notion of jurisdiction with the «special features» exception, the judgment itself is limited to only procedural obligations and has not explicitly solved the extraterritorial application of the Convention to airstrikes and, in particular, the substantive limb of Article 2. While trying to appease the Contracting Parties by not allowing for the institution of proceedings to, by itself, create a jurisdictional link, the Court created further confusion as to the application of this exception. Furthermore, without instantiating general principles as to how the special features exception can be applied to future cases it is leaving enough of a gap so that the Court could use special features in regard to substantive obligations. Unfortunately, it continues to be a mystery what the Court would have done had the applicant tried to argue that Germany also violated the substantive limb of Article 2. The judgement is certainly an attempt by the Court to broaden the extraterritorial application of the Convention, while at the same time trying to limit its expansion.

IV. Paths Not Taken

The extraterritorial application of the Convention to airstrikes remains an issue to be solved. The Court seems to be willing to slowly expand the notion of jurisdiction while being fearful of broadening the scope too much. This chapter will explore two paths the Court could have taken in a case like *Hanan* to make the Convention applicable not only relating to procedural

obligations but also the substantive ones. The first section considers an adaptation of the cause-and-effect notion of jurisdiction, which is often referred to as the «functional approach» and the second section will explore the public powers exception to jurisdiction.

IV.1. *The Functional Approach*

The Court is understandably reluctant to expressly accept a cause-and-effect notion of jurisdiction. As stated by the Court such an interpretation is undesirable as it could lead to a backlog of cases due to overseas conflicts involving many cases and highly complex situations.[97] Additionally, Contracting Parties could be unhappy with a notion of jurisdiction as extensive as the cause-and-effect notion, which effectively makes the Convention applicable all over the world to any acts adversely affecting individuals. This could become problematic, especially when it comes to indirect consequences of acts. Nevertheless, this could be remedied by adapting the classical cause-and-effect notion and limiting its reach – creating what is referred to as the «functional approach» to jurisdiction. For instance, the Court could adopt a similar approach to the one taken in *Andreou*, where it limited the application of the Convention by stating that the effects must be the «direct and immediate cause». This test could be interpreted to entail an element of foreseeability[98] so that the Convention would only be applicable if its adverse effects can be foreseen. Similarly, in *Soering v. the United Kingdom*[99] the Court held that a state is held accountable for «all and any foreseeable consequences of extradition suffered outside their jurisdiction».[100] While the facts of the case differ significantly from *Hanan*, it shows that the Court has in the past applied such a functional approach. The same idea is used by the Human Rights Committee in their General Comment 36, according to which consequences must be «direct and foreseeable» in order to constitute jurisdiction. *Rights Watch UK*

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97 *Georgia v. Russia (II)*, §141.

98 European Human Rights Advocacy Centre and the Allard K. «Lowenstein International Human Rights Clinic. Allahverdiyev v Armenia (Application No. 25576/16) and Hakobyan v Azerbaijan (Application No. 74566/16): Written Submission on Behalf of the Third Party Interveners». (2019), §16.

99 *Soering v. the United Kingdom*, app. no. 14038/88, ECHR 1989.

100 *Ibid*., §86.

argued in *Hanan* that the determination of what can be considered reasonably foreseeable will have to take the specific circumstances of the case into account. Hence, in the context of an armed conflict determining the foreseeability would require employing the tools of IHL.[101]

A functional approach is strongly advocated for by Judge Bonello, who suggested a two-step test: 1) «Did it depend on the agents of the state whether the alleged violation would or would not be committed?», and 2) «Was it within the power of that state to punish the perpetrators and to compensate the victims?» If the answer to both questions is «yes» then the act falls within the state's jurisdiction.[102] Other versions of the functional approach have been suggested by King,[103] and Mallory. The latter suggested a version of a functional approach, employing a separation of positive and negative obligations as proposed by Milanovic. More specifically this version would imply that all negative obligations are within the jurisdiction of the state and all positive obligations are subject to a simple functional test of whether the action required was one within the state's power to take.[104] If the Court were to adopt a functional approach to jurisdiction, then individuals harmed or killed by an aerial attack – whether gunfire, drones, or bombing – could theoretically fall within the jurisdiction of the state perpetrating the attack without the need for any other requirements, such as public powers, effective control, or detention. Meaning that, that the functional approach would be based solely on the nexus that is created between the state and the individual by the acts of its state agents. However, as discussed, this does not *automatically* entail that anyone adversely affected in this way will fall within a Contracting Party's jurisdiction.

Applying the two-step test established by Bonello to *Hanan*, did it depend on the agents of Germany whether the alleged violation would or would not be committed? Yes, it was German Colonel Klein who ordered the two US Air Force airplanes to bomb the fuel tankers. Was it within the power of Germany to punish the perpetrators and to compensate the victims? Section I subsection 3 of the ISAF Status of Forces Agreement provides that states contributing troops to ISAF retained exclusive jurisdiction over their person-

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[101] «Hanan v. Germany (no. 4871/16): Grand Chamber hearing», filmed February 26, 2020, ECHR Webcasts of hearings. Council of Europe, February 2020, https://echr.coe.int/Pages/home.aspx?p=hearings&w=487116_26022020&language=en.

[102] *Al-Skeini and Others v. the United Kingdom*, Concurring Opinion by Judge Bonello, §16.

[103] KING, H., «The Extraterritorial Human Rights Obligations of States», 522-526.

[104] MALLORY, *Human Rights Imperialists*, 207.

nel in respect of any criminal or disciplinary offences, effectively preventing Afghan authorities from taking any action for any offences ISAF troops committed in Afghanistan. Thus, not only was it within the power of Germany to punish the perpetrators but Germany was the only one responsible for it. In addition, as the Court rightly noted, Germany was under an obligation to investigate the matter due to both customary IHL and domestic German law.[105] Therefore, under Bonello's two-step test Germany would be responsible for the aerial attack in Afghanistan under both the substantive and procedural limb of Article 2. Applying Mallory's positive and negative obligations concept is also relatively straightforward, as the prohibition of the deprivation of life is a negative obligation and, in this sense, would automatically fall within the jurisdiction of the state. It is important to note that while jurisdiction would arise without any limitations the actual obligation under Article 2 could have substantive limitations by the application of IHL. This would depend on the Court's decision on how IHL relates to Convention obligations, which is another underdeveloped area within the Court's jurisprudence. However, if, for instance, the Court were to apply IHL as the *lex specialis* during armed conflict, then which obligations continue to bind states is defined by the obligations under IHL.

Finally, what would happen if the «direct and foreseeable consequences» test was applied? Since the civilians, including Mr Hanan's sons, were injured and died as a result of the attack, the consequences can be considered «direct». However, were they also foreseeable? To determine this one must consider the planning of the attack. Colonel Klein received the information about the tank from an informant whom he repeatedly questioned to ascertain whether any civilians were present in the area. Additionally, he also sent a surveillance aircraft to locate the fuel tankers and investigate the situation. Due to this and additional objective circumstances it was determined that Colonel Klein had not acted in the expectation of any civilians at the sight.[106] Considering Klein's belief that no civilians had been present, it seems, therefore, likely that the consequences were not foreseeable, and that the attack would not fall within the jurisdiction of Germany. This could depend on how the rules of IHL are construed in regard to the situation, i.e. if it would also have to be determined whether he did take all necessary precautions to spare any

[105] *Hanan v. Germany*, §§137-139.
[106] *Ibid.*, §§215-217.

civilians.[107] Whatever test was to be applied, all of these different versions of the functional approach demonstrate that a functional approach could allow for a more universal approach to jurisdiction without extensively broadening the scope of the Convention.

IV.2. *Military Operations as an Expression of Public Powers*

In their partly dissenting opinion in *Georgia v Russia (II)* judges Yudkivska, Wojtyczek and Chanturia used the public powers notion of jurisdiction to advance an idea that would solve the extraterritorial application of the Convention to military operations, without having to accept a cause-and-effect notion of jurisdiction. Their argument revolves around the understanding of a state's command over its military as the ultimate expression of the state's public powers and sovereignty. Whether a state is fighting insurgents or troops of another state, this exercise of public power places civilians in a complex legal relationship with the belligerent state, thereby establishing a jurisdictional link. Not only are the actions taken by the troops an expression of public power, but so is the decision-making power by military commanders.[108]

Since this proposition assumes that the military operation abroad is an expression of public powers, anyone adversely affected will be brought within the state's jurisdiction. The limitation under this proposition would be to military operations. Thus, it would not simply bring anyone that is in any way affected by a state within the state's jurisdiction, excluding situations, such as the explosion of a nuclear power plant or any sort of pollution.

The potential problem could only be that usually public powers have to be exercised «through the consent, invitation or acquiescence of the Government of that territory».[109] For *Hanan*, this would not pose any problems due to ISAF having operated in Afghanistan with the consent of the Afghan Interim Government. However, if the Court had adopted such an approach in *Hanan*, this would nevertheless not have fully solved the issue of the extraterritorial application of the Convention to aerial attacks committed in the context of a

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[107] Article 57, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol 1), of 8 June 1977.

[108] *Georgia v. Russia (II)*, Dissenting Opinion of Judges Yudkivska, Wojityczek and Chanturia, §§6-7.

[109] *Al-Skeini v. the United Kigndom*, §§134-135.

military operation; cases like *Georgia v. Russia (II)* would effectively be excluded. However, the proposition by Judges Yudkivska, Wojtyczek and Chanturia considers that all military operations, whether lawful or not, should be considered an expression of public powers. The Court has often been criticised for the consent requirement, as it would simply be inconceivable for a state to be able to commit a violation abroad when it is permitted to be there but not when it has no permission. The latter being the more likely situation for a state to be committing human rights violations. Overall, the proposition made seems to be a potential path the Court could take in the future to clarify the situation and make the Convention applicable in the very specific context of overseas military operations, bringing much needed legal certainty.

IV.3. *Conclusion*

The functional approach and the public powers concept advanced by the judges in *Georgia v. Russia (II)* would allow for the extraterritorial application of the Convention to a case like *Hanan* and provide for a universal approach to comparable situations. The functional approach takes the state's ability to protect human rights into account, obliging states to respect and protect those human rights to the extent that it is able to uphold and protect them.[110] The public powers concept would specifically be restricted to military operations. Unfortunately, it remains to be seen whether the Court chooses to extend the extraterritorial application in such a way in the future, as this has not been addressed in *Hanan*.

V. Attribution in the Context of Multinational Military Operations

The respondent government in *Hanan* argued that the Convention was not admissible *ratione personae*, given that the airstrike was not attributable to Germany, which was operating under the NATO umbrella. The overall issue was whether the impugned act should be attributable to the Contracting Party, which is bound under Convention obligations, or the multinational or-

[110] Mallory, *Human Rights Imperialists*, 204.

ganization as part of which it is committing the act. Since multinational organisations are not subject to Convention obligations, applications in relation to acts attributable to them are inadmissible *ratione personae*. The question of attribution is, therefore, an essential one; it will determine whether Contracting Parties continue to be bound by the obligations under the Convention while operating as part of an international organization. Unfortunately, the Court's case law concerning the attribution is scarce and arguably insufficient causing ambiguity as to its practical application. This chapter will, therefore, investigate the Court's case law in relation attribution and analyse how the Court dealt with these issues in *Hanan*.

The question was first addressed by the Court in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*,[111] concerning alleged violations of Articles 2 and 5 by France within the context of UN operations in Kosovo. The Court determined that it was not competent to review the acts and omissions of Contracting Parties, which are covered by UNSC Resolutions.[112] Since the Court considered that the impugned acts were attributable to the UN in these cases,[113] they were ruled inadmissible *ratione personae*. The test applied by the Court to determine attributability was «whether the UNSC retained ultimate authority and control so that operational command only was delegated».[114]

The Court came to a completely different conclusion in the case of in *Al-Jedda v. the United Kingdom*.[115] In *Al-Jedda* the Court found that the detention of the applicant in a British-run military prison in Iraq, was attributable to the UK rather than the UN. According to the Court the applicable test was the one set out by the International Law Commission in Article 5 of its Draft Articles on the Responsibility of International Organizations and in its commentary thereon: i.e. whether the organization exercises effective control over the conduct in question.[116] The wording of this test is slightly different than the test previously employed by the Court in *Behrami*, which related to «ultimate authority and control». Throughout *Al-Jedda* the Court refers to

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[111] *Behrami and Behrami v. France and Saramti v. France, Germany and Norway* [GC], app. nos. 71412/01 and 78166/01, ECHR 2007.
[112] *Ibid*., §§149-152.
[113] *Ibid*., §§140-143.
[114] *Ibid.*, §§133.
[115] *Al-Jedda v. the United Kingdom* [GC], app. no. 27021/08, ECHR 2011.
[116] *Ibid.*, §§84-86.

both tests, but it remains unclear in what way they relate to each other, what the difference is between the tests, or which one should prevail. The factual difference between *Behrami* and *Al-Jedda* seems to have been the way in which the international presence was established by the UNSC resolutions. In *Behrami* the UNSC Resolution 124 authorized Member States to «establish the international security presence in Kosovo» and directed that there should be substantial NATO participation, which «must be deployed under unified command and control».[117] In *Al-Jedda* the UK had first occupied Iraq and then several UNSC Resolutions had gradually increased the UN's participation from providing humanitarian relief to contributing to the maintenance of security and stability in Iraq, as authorised by Resolution 1511. Nevertheless, the Court did not consider that Resolution 1511 fundamentally changed the unified command structure established by the UK, which continued to exercise public powers. Therefore, the Resolution did not render the acts of troop-contributing states attributable to the UN and the UK remained responsible.[118]

The issue was also raised in *Jaloud* by the Netherlands who argued that responsibility for the impugned act lay with the occupying powers rather than the Netherlands.[119] The Court decided that the Netherlands «retained full command over its contingents» and assumed responsibility in the area to the exclusion of other states.[120] Consequently, the Dutch troops could not be considered to have been placed «at the disposal» of any foreign power.[121] The question raised by this case is whether the Court has created a third test for attribution, i.e. that of «full command». In fact, Sari suggested that the concept of «full command» employed by the Court in *Jaloud* overruled *Behrami*;[122] it is not uncommon in the context of multinational military operations for operational control to be assigned to a foreign state, but the troop-contributing states always «retain ultimate military authority, known as full command».[123] This was also the case in *Behrami*, where the impugned acts were considered attributable to the UN despite such residual control.[124] Thus, the «full com-

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[117] *Ibid*., §83.
[118] *Ibid*., §§77-80.
[119] *Jaloud v. the Netherlands*, §140.
[120] *Ibid*., §§144-149.
[121] *Ibid*., §151.
[122] SARI, A., «Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations.
[123] *Ibidem*.
[124] *Behrami and Behrami v France and Saramati v France, Germany and Norway*, §§139-140.

mand» test established in *Jaloud* could be understood as effectively preventing the attribution of any acts by troop-contributing states to the multinational organisation instead of the state itself. From a human rights perspective, this seems satisfactory as it would ensure that Contracting Parties that are contributing troops to multinational military operations would continue to be bound by their obligations under the Convention. Additionally, it could simplify the determination of jurisdiction by not allowing states to escape their obligations by deflecting the responsibility to multinational organisations or other states. On the other side, however, this has been criticised as being overinclusive in the determination of jurisdiction.[125]

As demonstrated, the Court has employed three different tests in the past to assess attribution. It is, therefore, utterly ambiguous how the question of attribution is to be determined in future cases involving multinational military operations. *Hanan* is one such case. The German troops that were responsible for the airstrike in *Hanan* were operating as part of ISAF, which was taken under command by NATO. The facts of *Hanan* were such that there were similarities with all the aforementioned cases, meaning that it is by no means unequivocal whether the airstrike was attributable to Germany or NATO. Judges Grozev, Ranzoni and Eicke suggest in their partly dissenting opinion that the airstrike was in fact *not* attributable to Germany.[126] Professor Steiger, on the contrary, has proposed that it was attributable to Germany.[127] *Hanan*, therefore, opened the opportunity for the Court to clarify the matter.

Finally, the dissenting judges in *Hanan* criticized that the Court's approach allowed for Germany to be held responsible for an act that cannot be attributed to it, meaning the airstrike.[128] Since the investigation itself is undeniably attributable to Germany, this poses the question of whether there should be a difference between being responsible for an airstrike. Afterall, it does seem like an irrational conclusion if a state can be held responsible for a

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[125] SARI, A., «Jaloud v Netherlands».

[126] *Hanan v. Germany*, «Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni and Eicke», §14.

[127] STEIGER, D., «(Not) Investigating Kunduz and (Not) Judging in Strasbourg? Extraterritoriality, Attribution and the Duty to Investigate», *EJIL: TALK! Blog of the European Journal of International Law* (2020), accessed April 13, 2021, https://www.ejiltalk.org/not-investigating-kunduz-and-not-judging-in-strasbourg-extraterritoriality-attribution-and-the-duty-to-investigate/.

[128] *Hanan v. Germany*, «Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni and Eicke», §14.

procedural obligation when it could not be held responsible for the substantive one.

The Court could have employed *Hanan* to take a further step towards resolving the highly disputed issue of attribution. However, since the Court relied on the «special features» exception, attribution was irrelevant to the legal analysis. For the «special features» exception, the only relevant acts were the investigative acts conducted by German authorities, which were indisputably attributable to Germany. Whether the airstrike itself was attributable to Germany or NATO was, thereby, not a matter that had to be resolved. Unfortunately, the Court, thus, avoided addressing the questions relating to attribution, leaving the matter unresolved.

VI. Conclusion

«Silent enim leges inter arma» («In times of war law falls silent»)[129] This Ancient Roman expression continues to be true today. The Convention was made for times of peace, but with 13 Contracting Parties participating in military operations abroad it is urgently necessary for the Court to clearly establish in what circumstances and how states continue to be bound by Convention obligations.

The Court seems to be open to expanding the notion of jurisdiction but also conscious of the effects thereof, desperately trying to avoid a minefield that could easily explode the confidence and legitimacy of/in the human rights system that the Council of Europe has constructed. The Court's judicial minimalist approach has, however, muddied the comprehensibility of its jurisprudence on Article 1, which was described by Judge Bonello as «bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies».[130] Additionally, cases like *Banković* and *Georgia v. Russia (II)* have significantly stumbled the progress and prevented the application of the Convention to airstrikes in cases like *Hanan*. Similarly, the issue of attribution adds another layer to

[129] *Georgia v. Russia (II)*, Joint Partly Dissenting Opinion of Judges Yudkivska, Wojityczek and Chanturia, §1-Latin maxim stemming from Pro Tito Annio Milone ad iudicem oratio, written by Marcus Tullius Cicero.

[130] *Al-Skeini and Others v. the United Kingdom*, Concurring Opinion of Judge Bonello, §4.

the Court's already complex case law despite the significant impact it has on human rights protection during armed conflict. All of this has caused a serious lack of legal certainty. Already in 2010 states stressed the «importance of ensuring the clarity and consistency of the Court's case-law» and called for a «rigorous application of the criteria concerning admissibility and the Court's jurisdiction».[131]

Legal certainty is not only highly relevant in the system of human rights protection but desperately needed in the current circumstances; it is the light that ensures that even in a complex and ever shifting global environment, states are able to comply with their pre-established human rights obligations. In fact, legal certainty is fundamental for the preservation of states' confidence in the Court and could even help decrease the number of cases before it by ensuring that national courts and states alike understand their obligations under the Convention. For instance, the UK was blindsided by a wave of litigation concerning its actions in Iraq[132] because of not having been able to predict how the Court would apply the Convention.

In addition to the need for legal certainty many strongly support an interpretation of jurisdiction that allows for the Convention to be applied to an airstrike like in *Hanan*, which would uphold its object and purpose. Different suggestions, such as the cause-and-effect notion of jurisdiction, the functional approach, or the interpretation of an airstrike as an expression of public powers have been brought forth that would allow for the protection of individuals in these situations. Arguably modern technological developments make it imperative for the Convention to be applied to airstrikes. Otherwise, the Court would effectively encourage arial bombardment before invasion, which would allow states to escape responsibility under the current jurisprudence. In our modern world the accountability of states for their human rights abuses should not depend on any arbitrary factors, such as distance, the type of weapon used, passing through a checkpoint, exercising some public powers in the region, or taking them into custody first. If the state is infringing upon somebody's right to life, it should be held accountable and it should be obliged not to do so in the first place. How can we force states to uphold the sanctity of human rights at home but allow them to indiscriminately bomb people somewhere else?

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[131] Council of Europe, Interlaken Declaration, High Level Conference on the Future of the European Court of Human Rights (19 February 2010), §4.

[132] MALLORY, *Human Rights Imperialists*, 213.

The outcome of *Hanan* once again followed the Court's cautious pattern of judicial minimalism. While there are progressive elements in the judgment, namely the establishment of a jurisdictional link, the Court's reasoning used to reach this outcome only adds to the fog of confusion that is the extraterritorial application of the Convention. No answers have been given regarding the applicability of the Convention to airstrikes or the critical questions concerning attribution. Twenty years have passed since *Banković*, and while the Court's jurisprudence has been slow to clarify the interpretation of Article 1, transformational change has occurred in the means available to wage war. The creation of a clear and decisive doctrine regarding the application of the Convention to airstrikes is more pressing than ever; law cannot remain silent during war. One can only hope, for the sake of the Court's longevity, and, more importantly, the individuals whose rights have been affected, that the next time a case like *Hanan* appears on the docket the law stands up and speaks out.

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