EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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The investigation by the German authorities following a lethal airstrike in the context of NATO operations in Afghanistan did not breach the Convention

In today's **Grand Chamber** judgment[1] in the case of Hanan v. Germany (application no. 4871/16) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 2 (right to life) of the European Convention on Human Rights

The case concerned the investigations carried out following the death of the applicant's two sons in an airstrike near Kunduz, Afghanistan, ordered by a colonel of the German contingent of the International Security Assistance Force (ISAF) commanded by NATO.

The Court found that the fact that Germany had retained exclusive jurisdiction over its troops deployed within the International Security Assistance Force with respect to serious crimes, which, moreover, it was obliged to investigate under international and domestic law, constituted "special features" which, taken in combination, triggered the existence of a jurisdictional link for the purposes of Article 1 of the Convention in relation to the procedural obligation to investigate under Article 2.

The Court observed that the Federal Prosecutor General had found that Colonel K. had not incurred criminal liability mainly because he had been convinced, at the time of ordering the airstrike, that no civilians had been present at the sand bank. According to the Prosecutor General, Colonel K. had thus not acted with the intent to cause excessive civilian casualties, which would have been required for him to be liable under the relevant provision of the Code of Crimes against International Law. The Prosecutor General had considered that liability under the Criminal Code was also excluded because the lawfulness of the airstrike under international law served as an exculpatory defence. Colonel K. had believed that the armed Taliban fighters who had hijacked the two fuel tankers were members of an organised armed group that was party to the armed conflict and were thus legitimate military targets. The Court noted that the German civilian prosecution authorities had not had legal powers to undertake investigative measures in Afghanistan under the ISAF Status of Forces Agreement, but would have been required to resort to international legal assistance to that end. However, the Federal Prosecutor General had been able to rely on a considerable amount of material concerning the circumstances and the impact of the airstrike.

The Federal Constitutional Court had reviewed the effectiveness of the investigation on the applicant's constitutional complaint. Noting that the Federal Constitutional Court was able to set aside a decision to discontinue a criminal investigation, the Court concluded that the applicant had had at his disposal a remedy enabling him to challenge the effectiveness of the investigation.

Lastly, the Court observed that the investigation into the airstrike by the parliamentary commission of inquiry had ensured a high level of public scrutiny of the case.

Principal facts

The applicant, Abdul Hanan, is an Afghan national who was born in 1975 and lives in Omar Khel (Afghanistan).

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Following the attacks of 11 September 2001 the United States launched military operations in Afghanistan on 7 October 2001 under the name Operation Enduring Freedom. In November 2001 the German Parliament authorised the deployment of German troops as part of that operation.

At the beginning of December 2001 a number of Afghan leaders met in Bonn under the auspices of the United Nations to decide on a plan for governing the country, and set up an Afghan Interim Authority. On 5 December 2001 they signed the "Bonn Agreement", requesting the assistance of the international community in maintaining security in Afghanistan, and providing for the establishment of an International Security Assistance Force (ISAF). The same month, the United Nations Security Council authorised the establishment of ISAF, which was to assist the Afghan Interim Authority in maintaining security in Kabul and the surrounding areas and to enable the Interim Authority and the United Nations personnel to operate in a safe environment. The mission of the forces engaged in Operation Enduring Freedom was to undertake counterterrorism and counter-insurgency operations. Also in December 2001, the German Parliament authorised the deployment of German armed forces as part of ISAF.

On 11 August 2003 the North Atlantic Treaty Organization (NATO) assumed command of ISAF. By the end of 2006 ISAF was responsible for security throughout Afghanistan. After April 2009 the security situation in the Kunduz region deteriorated sharply and it became the scene of intense conflict.

On 3 September 2009 insurgents hijacked two fuel tankers which became immobilised on a sand bank in the Kunduz River, around seven kilometres from the military base of the Kunduz Provincial Reconstruction Team (PRT). The insurgents enlisted people from the nearby villages to help them move the tankers. At around 8 p.m. PRT Kunduz was informed of the hijacking. Colonel K., the German army officer in command of PRT Kunduz, fearing an attack, gave the order to bomb the fuel tankers, which were still immobilised. The airstrike carried out that night destroyed both tankers and killed several people, both insurgents and civilians, including the applicant's two sons, Abdul Bayan and Nesarullah, aged 12 and 8 respectively.

On the morning of 4 September 2009 Brigadier-General V., who was in charge of the Regional Command (RC) to which PRT Kunduz was attached, sent an investigation team of the German military police to Kunduz to support PRT Kunduz in its investigation. On 5 November 2009 the Dresden Public Prosecutor General requested the office of the Federal Prosecutor General to review the possibility of taking over the prosecution of the case in the light of possible liability under the Code of Crimes against International Law. By this time the Federal Prosecutor General's office was already in the process of establishing whether it had competence, having initiated a preliminary investigation on 8 September 2009.

On 12 March 2010 the Federal Prosecutor General opened a criminal investigation against Colonel K. and Staff Sergeant W., who had assisted Colonel K. on the night of the airstrike. On 16 April 2010 the Federal Prosecutor General discontinued the criminal investigation owing to a lack of sufficient grounds for suspicion that the suspects had incurred criminal liability under either the Code of Crimes against International Law or the Criminal Code. He determined that the situation in the northern part of Afghanistan where the German armed forces were deployed amounted to a non-international armed conflict within the meaning of international humanitarian law. In his view, that situation triggered the applicability of international humanitarian law and of the German Code of Crimes against International Law. The Federal Prosecutor General concluded that Colonel K.'s liability under the Code of Crimes against International Law was excluded because the colonel had not had the necessary intent to kill or harm civilians or damage civilian objects. Liability under the Criminal Code was also excluded because the lawfulness of the airstrike under international law served as an exculpatory defence.

In his discontinuation decision the Federal Prosecutor General considered that two aspects, in particular, had to be clarified: Colonel K.'s subjective assessment of the situation when he had ordered the airstrike, and the exact number of persons who had suffered death or injury as a

result. According to Colonel K.'s account, he had assumed that only Taliban insurgents, and no civilians, had been located near the fuel tankers when he had ordered the airstrike. In the Federal Prosecutor General's view, this account was corroborated by a large number of objective circumstances, the statements of the persons who had been present at the time of the events and the video footage from the aircraft prior to and during the airstrike. The Prosecutor General further noted that other persons present at the command post had all credibly testified that they had operated on the assumption that only insurgents and no civilians had been present at the location.

On 12 April 2010 Mr Hanan, through his legal representative, filed a criminal complaint with the Federal Prosecutor General regarding the death of his two sons. He also requested access to the investigation file. By letter of 27 April 2010 the Federal Prosecutor General informed the applicant's representative that the criminal investigation had been discontinued.

On 15 November 2010 the applicant filed a motion with the Düsseldorf Court of Appeal seeking that public charges be brought against the suspects or, in the alternative, that the competent public prosecutor continue investigating the matter with a view to determining their liability under the Criminal Code. He submitted, in particular, that certain additional investigative measures were required.

On 13 December 2010 the Federal Prosecutor General submitted his observations, taking the view that the motion should be dismissed as inadmissible for failure to comply with the formal requirements or, in the alternative, as ill-founded. He maintained that all the necessary investigative measures had been carried out. On 16 February 2011 the Düsseldorf Court of Appeal dismissed the applicant's motion to compel public charges as inadmissible for failure to comply with the formal requirements.

On 28 March 2011 Mr Hanan filed a complaint of a breach of the right to be heard (*Gehörsrüge*) in respect of the Court of Appeal's order. The Court of Appeal dismissed the complaint as ill-founded on the grounds that the decision of 16 February 2011 had been based exclusively on the applicant's submissions as such and had related only to compliance with the formal requirements.

Mr Hanan lodged two constitutional complaints with the Federal Constitutional Court – the later complaint encompassing the earlier one – alleging that the criminal investigation had been ineffective. On 8 December 2014 the Federal Constitutional Court refused to admit the constitutional complaint for adjudication in so far as it concerned access to the investigation file. On 19 May 2015 it refused to admit the complaint for adjudication in so far as it concerned the effectiveness of the criminal investigation, finding that it was in any event ill-founded. In the Constitutional Court's view, the Federal Prosecutor General had neither misjudged the importance of the right to life and the resulting obligations of the State to protect it nor the requirement to carry out an effective investigation into deaths as defined by the case-law of the Federal Constitutional Court and of the European Court of Human Rights.

On 16 December 2009 the German Parliament established a commission of inquiry to assess, in particular, whether the airstrike had been in compliance with the mandate given by Parliament to the German armed forces, with the operative planning and with the applicable orders and rules of engagement. On 20 October 2011 the commission published its report, finding that, on the basis of the information available to it, the airstrike could not be considered proportionate and should not have been ordered, but that Colonel K. had acted at the relevant time to the best of his knowledge and to protect "his" soldiers. His decision to order the airstrike had therefore been comprehensible.

Mr Hanan and another individual lodged a civil action for compensation against the Federal Republic of Germany in connection with the killing of their relatives by the airstrike of 4 September 2009. On 6 October 2016, after the Bonn Regional Court and then the Cologne Court of Appeal had rejected the plaintiffs' claims, the Federal Court of Justice rejected their appeal on points of law as

ill-founded. The Federal Constitutional Court declined to consider a constitutional complaint lodged by the applicant in respect of those civil proceedings.

Complaints, procedure and composition of the Court

Relying on the procedural limb of Article 2 of the Convention (right to life), the applicant alleged that the respondent State had not conducted an effective investigation into the airstrike carried out on 4 September 2009 near Kunduz in which several people, including his two sons, had been killed. Under Article 13 (right to an effective remedy) taken together with Article 2, he also complained that he had not had an effective domestic remedy by which to challenge the decision of the German Federal Prosecutor General to discontinue the criminal investigation.

The application was lodged with the European Court of Human Rights on 13 January 2016. On 27 August 2019 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A hearing was held on 26 February 2020.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Jon Fridrik **Kjølbro** (Denmark), *President*,
Linos-Alexandre **Sicilianos** (Greece),
Ksenija **Turković** (Croatia),
Paul **Lemmens** (Belgium),
Yonko **Grozev** (Bulgaria),
Helen **Keller** (),
Aleš **Pejchal** (the Czech Republic),
Faris **Vehabović** (Bosnia and Herzegovina),
Carlo **Ranzoni** (Liechtenstein),
Mārtiņš **Mits** (Latvia),
Tim **Eicke** (the United Kingdom),
Latif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),
Arnfinn **Bårdsen** (Norway),
Erik **Wennerström** (Sweden),
Saadet **Yüksel** (Turkey),
Anja **Seibert-Fohr** (Germany),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

Decision of the Court

Admissibility – existence of a jurisdictional link for the purposes of Article 1 of the Convention

The applicant complained exclusively under the procedural limb of Article 2 of the Convention about the criminal investigation into the airstrike which had killed his two sons. In its judgment in *Güzelyurtlu and Others* the Court had set out the principles concerning the existence of a jurisdictional link for the purposes of Article 1 of the Convention in cases where the death had occurred outside the territory of the Contracting State in respect of which the procedural obligation under Article 2 was said to arise.

The Court observed that the German authorities, under their domestic-law provisions, had instituted a criminal investigation into the deaths of the applicant's two sons and of other civilians in connection with the airstrike near Kunduz on 4 September 2009. Nevertheless, the Court found inapplicable in the present case the principle that the institution of a domestic criminal investigation

or proceedings concerning deaths which occurred outside the territorial jurisdiction of the State – not within the exercise of its extraterritorial jurisdiction – was sufficient to establish a jurisdictional link between that State and the victim's relatives who brought proceedings before the Court.

However, the Court considered, firstly, that Germany had been obliged under customary international humanitarian law to investigate the airstrike at issue, as it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime.

Secondly, the Afghan authorities had, for legal reasons, been prevented from themselves instituting a criminal investigation against Colonel K. and Staff Sergeant W., as under section I, subsection 3, of the ISAF Status of Forces Agreement, the troop-contributing States had retained exclusive jurisdiction in respect of any criminal or disciplinary offences which their troops might commit on the territory of Afghanistan. That provision constituted a rule on immunity in so far as it shielded the ISAF personnel of troop-contributing States from prosecution by the Afghan authorities. It was also a rule regulating jurisdiction, which clarified who had jurisdiction over ISAF personnel in criminal matters and provided that only the troop-contributing States were entitled to institute a criminal investigation or proceedings against their personnel, even in cases of alleged war crimes.

Thirdly, the German prosecuting authorities had also been obliged under domestic law to institute a criminal investigation, as confirmed by the Government. That investigation had been conducted by the Federal Prosecutor General.

The Court further observed that in the majority of those Contracting States which participated in military deployments overseas, the competent domestic authorities were obliged under domestic law to investigate alleged war crimes or wrongful deaths inflicted abroad by members of their armed forces, and that the duty to investigate was considered essentially autonomous.

In the present case, the fact that Germany had retained exclusive jurisdiction over its troops with respect to serious crimes, which, moreover, it was obliged to investigate under international and domestic law, constituted "special features" which, taken in combination, triggered the existence of a jurisdictional link for the purposes of Article 1 of the Convention in relation to the procedural obligation to investigate under Article 2. As the applicant did not complain about the substantive act which had given rise to the duty to investigate, the Court did not have to examine whether, for the purposes of Article 1 of the Convention, there was also a jurisdictional link in relation to any substantive obligation under Article 2. It emphasised, however, that it did not follow from the mere establishment of a jurisdictional link in relation to the procedural obligation under Article 2 that the substantive act fell within the jurisdiction of the Contracting State or that the said act was attributable to that State.

Accordingly, the scope of the present case was limited to the investigative acts and omissions by German military personnel in Afghanistan undertaken in accordance with the retention of exclusive jurisdiction under the ISAF Status of Forces Agreement over German troops in respect of any criminal or disciplinary offences which the latter might commit on the territory of Afghanistan, as well as to acts and omissions of the prosecution and judicial authorities in Germany. These were capable of giving rise to the responsibility of Germany under the Convention.

Article 2

The Court considered it appropriate to examine the applicant's complaints solely under the procedural aspect of Article 2 of the Convention.

The Court noted that the criminal investigation had established that the applicant's two sons had been killed by the airstrike ordered by Colonel K. on 4 September 2009.

The Federal Prosecutor General had found that Colonel K. had not incurred criminal liability mainly because he had been convinced, at the time of ordering the airstrike, that no civilians had been present at the sand bank. The Prosecutor General concluded that Colonel K. had thus not acted with

the intent to cause excessive civilian casualties, which would have been required for him to be liable under the relevant provision of the Code of Crimes against International Law. He had believed that the armed Taliban fighters who had hijacked the two fuel tankers were members of an organised armed group that was party to the armed conflict and were thus legitimate military targets.

In order to answer the relevant questions of law regarding Colonel K.'s criminal liability, the Federal Prosecutor General's investigation had focused, in essence, on clarifying two questions of fact: firstly, Colonel K.'s subjective assessment of the situation when he had ordered the airstrike, which was crucial with regard to both his liability under the Code of Crimes against International Law and the lawfulness of the airstrike under international humanitarian law; and, secondly, the number of victims.

The Court noted that the German civilian prosecution authorities had not had legal powers to undertake investigative measures in Afghanistan under the ISAF Status of Forces Agreement, but would have been required to resort to international legal assistance to that end. However, the Federal Prosecutor General had been able to rely on a considerable amount of material concerning the circumstances and the impact of the airstrike. The Prosecutor General had interrogated the suspects and the other soldiers present at the command centre and found credible their testimonies that they had operated on the assumption that only insurgents and no civilians had been present. He had noted that this account was corroborated by objective circumstances and evidence such as audio recordings of the radio traffic between the command centre and the pilots of the American F-15 aircraft and the thermal images from the latter's infrared cameras. The Federal Prosecutor General had established that Colonel K. had had at least seven calls put through to the informant in order to verify that no civilians had been present at the scene and that the information given by the informant corresponded to the video feed from the aircraft.

The Court had no reason to doubt the assessment of the Federal Prosecutor General, and that of the Federal Constitutional Court, that no additional insights as to whether Colonel K. had acted in the expectation of civilian casualties when ordering the airstrike could have been gleaned by examining further witnesses.

Nor could the Court discern a need for the involvement of additional military experts or for a simulation of the situation at the command centre. The report of the ISAF investigation team had been prepared by military experts from different countries. Relying on that report, the Federal Prosecutor General had concluded that all precautionary measures had been undertaken and that Colonel K., at the time of ordering the airstrike, had had no reason to suspect the presence of civilians near the fuel tankers, and that no advance warning had been required.

As to the establishment of the precise number and status of the victims, the Federal Prosecutor General, having regard to the divergent findings of the different reports, the methods by which they had been established and the available evidence, including the video material, had concluded that about fifty persons were likely to have been killed or injured by the airstrike and that there had been significantly more Taliban fighters than civilians among the victims. The Court acknowledged that a more accurate assessment would not appear to have been possible given the situation of intense conflict in the area. It also observed that the precise number of civilian victims did not have any bearing on the legal assessment in respect of the criminal liability of Colonel K., which focused on his subjective assessment at the time of ordering the airstrike.

The Court found that the facts surrounding the airstrike which killed the applicant's two sons, including the decision-making and target verification process leading up to the ordering of the airstrike, had been established in a thorough and reliable manner in order to determine the legality of the use of lethal force.

The Court reiterated that the procedural obligation in Article 2 of the Convention did not necessarily require a judicial review of investigative decisions as such. The Government had nevertheless

indicated that the applicant had had at his disposal two judicial remedies by which to challenge the effectiveness of the investigation, and had used both, namely his motion to compel public charges before the Court of Appeal and his constitutional complaint. The Court noted that the Court of Appeal had declared the applicant's motion to compel public charges inadmissible. It observed that the application of the admissibility requirements had been consistent with the well-established case-law of the domestic courts and that the Court of Appeal had engaged in a thorough review of the evidence referred to by the applicant and of the decision by the Federal Prosecutor General, as also pointed out by the Federal Constitutional Court. The latter court had reviewed the effectiveness of the investigation on the applicant's constitutional complaint. Noting that the Federal Constitutional Court was able to set aside a decision to discontinue a criminal investigation, the Court concluded that the applicant had had at his disposal a remedy enabling him to challenge the effectiveness of the investigation.

Lastly, the Court observed that the investigation into the airstrike by the parliamentary commission of inquiry had ensured a high level of public scrutiny of the case.

Having regard to the circumstances of the present case, the Court concluded that the investigation by the German authorities into the deaths of the applicant's two sons had complied with the requirements of an effective investigation under Article 2 of the Convention. There had accordingly been no violation of the procedural limb of Article 2.

Separate opinion

Judges **Grozev**, **Ranzoni** and **Eicke** expressed a joint partly dissenting opinion which is annexed to the judgment.

The judgment is available in English and French.

Press contacts
During the current public-health crisis, journalists can continue to contact the Press Unit via echrpress@echr.coe.int.

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