The Kunduz airstrike before the European Court of Human Rights: a glimmer of hope to expand the Convention to UN military operations, or a tailored jurisdictional link?

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On 16 February 2021, the Grand Chamber of the European Court of Human Rights ruled, in Hanan v. Germany, that Germany exercised its extraterritorial jurisdiction for the purpose of its procedural obligation under Article 2 of the European Convention on human rights to investigate the airstrike it carried out in Afghanistan within the framework of a United Nations Security Council resolution. To establish an extraterritorial jurisdictional link, the Court relied on the ‘special features’ threshold that it has recently introduced in its jurisprudence, along with the threshold of the ‘institution of a criminal investigation’. This potentially extends the standards of protection under the ECHR to situations where Contracting States are carrying out massive military operations in armed conflict, such as airstrikes, even within the framework of a UN mandate. Nonetheless, the Court remains cautious not to formulate general theories of jurisdiction and retains a very strict (and caustic) control over the new jurisdictional thresholds.

Le 16 février 2021, la Grande Chambre de la Cour européenne des droits de l’homme a conclu, dans l’affaire Hanan c. Allemagne, que l’Allemagne a exercé sa juridiction extraterritoriale en invoquant son obligation procédurale, découlant de l’article 2 de la Convention européenne des droits de l’homme, d’enquêter sur la frappe aérienne menée en Afghanistan dans le cadre d’une résolution du Conseil de sécurité des Nations Unies. Pour établir un lien juridictionnel extraterritorial, la Cour s’est appuyée sur la notion de « circonstances propres » qu’elle a récemment introduite dans sa jurisprudence, ainsi que celle d’« institution d’une procédure pénale ». Cela étend potentiellement les normes de protection en vertu de la CEDH à des situations où les États signataires mènent des opérations militaires de grande envergure dans un conflit armé, telles que des frappes aériennes, même dans le cadre d’un mandat des Nations Unies. Néanmoins, la Cour ne se risque pas à formuler des théories de juridiction générales et maintient un contrôle très strict (et au cas par cas) sur les nouveaux seuils juridictionnels.

Op 16 februari 2021 oordeelde de Grote Kamer van het Europees Hof voor de Rechten van de Mens in de zaak Hanan tegen Duitsland dat Duitsland zijn extraterritoriale rechtsmacht uitoefende in toepassing van zijn procedurele verplichting krachtens artikel 2 van het Europees Verdrag voor de Rechten van de Mens om een onderzoek in te stellen naar de luchtaanval die het uitvoerde in Afghanistan in het kader van een resolutie van de Veiligheidsraad van de Verenigde Naties. Om een extraterritoriale rechtsbevoegdheidsband vast te stellen, baseerde het Hof zich op de drempel van de ‘specifieke omstandigheden’ die het onlangs in zijn rechtspraak heeft ingevoerd, net zoals de drempel van de ‘instelling van een strafrechtelijk onderzoek’. Hierdoor kunnen de beschermingsnormen krachtens het EVRM mogelijk worden

uitgebreid tot situaties waarin verdragsluitende staten grootschalige militaire operaties uitvoeren in een gewapend conflict, zoals luchtaanvallen, zelfs in het kader van een VN-mandaat. Niettemin blijft het Hof voorzichtig met het formuleren van algemene theorieën over rechtsbevoegdheid en behoudt het een zeer strikte (en casuïstische) controle over de nieuwe drempels inzake rechtsbevoegdheid.

Il 16 Febbraio 2021 la Grande Camera della Corte europea dei Diritti dell'Uomo ha stabilito che, nella causa Hanan v. Germany, la Germania ha esercitato, ai fini del suo obbligo procedurale ai sensi dell'articolo 2 della Convenzione europea dei diritti dell'uomo, la sua giurisdizione extraterritoriale per indagare sul bombardamento aereo che, nel quadro di una risoluzione del Consiglio di sicurezza delle Nazioni Unite, ha effettuato in Afghanistan. Per stabilire un legame giurisdizionale extraterritoriale, la Corte si è basata sui principi delle "caratteristiche speciali" che ha recentemente introdotto nella sua giurisprudenza, insieme a quelli della "istituzione di un'indagine penale". Questo estende potenzialmente gli standard di protezione della CEDU a situazioni in cui gli Stati contraenti stanno conducendo operazioni militari di massa in un conflitto armato, come gli attacchi aerei, anche entro il quadro di un mandato delle Nazioni Unite. Tuttavia, la Corte rimane cauta nel non formulare teorie generali di giurisdizione e mantiene un controllo molto rigoroso (e sul caso) sulle nuove soglie giurisdizionali.

El 16 de febrero de 2021, la Gran Sala del Tribunal Europeo de Derechos Humanos dictaminó, en Hanan vs. Alemania, que Alemania ejerció su jurisdicción extraterritorial, a efectos de cumplir la obligación procesal en virtud del artículo 2 del Convenio Europeo de Derechos Humanos, al investigar el ataque aéreo que se llevó a cabo en Afganistán en el marco de la ejecución de una resolución del Consejo de Seguridad de las Naciones Unidas. Para establecer un vínculo jurisdiccional extraterritorial, el Tribunal se basa en el umbral de las "características especiales" que ha introducido recientemente en su jurisprudencia, junto con el umbral de la "instrucción de una investigación penal". Esto amplía potencialmente los estándares de protección bajo el CEDH a situaciones donde los Estados Contratantes llevan a cabo operaciones militares masivas en conflictos armados, tales como ataques aéreos, incluso dentro del marco de un mandato de la ONU. No obstante, el Tribunal se mantiene cauteloso para no formular teorías generales sobre jurisdicción y mantiene un control muy estricto (y casuístico) sobre los nuevos umbrales jurisdiccionales.

Am 16. Februar 2021 hat die Große Kammer des Europäischen Gerichtshofs für Menschenrechte in der Sache Hanan vs. Deutschland entschieden, dass Deutschland seine extraterritoriale Gerichtsbarkeit zum Zwecke seiner Verfahrenspflicht nach Artikel 2 der Europäischen Menschenrechtskonvention ausgeübt hat, um den von ihm im Rahmen einer Resolution des UN-Sicherheitsrates durchgeführten Luftangriff zu untersuchen. Zur Feststellung eines extraterritorialen Gerichtsbarkeitsbands basierte sich der Gerichtshof auf die Schwelle der 'besonderen Merkmale', die er vor Kurzem in seiner Rechtsprechung eingeführt hat, ebenso wie die Schwelle der 'Einleitung eines Ermittlungsverfahrens'. Dies weitet die Standards des Schutzes gemäß der EMRK potenziell auf Situationen aus, in denen Vertragsstaaten in einem bewaffneten Konflikt groß angelegte Militäreinsätze, wie Luftangriffe, selbst im Rahmen eines UN-Mandats, durchführen. Trotzdem ist der Gerichtshof weiterhin behutsam, indem er vermeidet, allgemeine Theorien über die Gerichtsbarkeit zu formulieren, und erhält er eine sehr strikte (und kasuistische) Kontrolle über die neuen Gerichtsbarkeitsschwellen aufrecht.

Keywords: extraterritorial jurisdiction, airstrike, special features, Article 2 ECHR, procedural

On 16 February 2021, the Grand Chamber of the European Court of Human Rights (ECtHR) ruled in the case *Hanan v. Germany*.¹ The case concerned an airstrike ordered in 2009 by a member of the German air force in the Kunduz province of Afghanistan, which led to the death of numerous civilians. The military operation took place within the framework of a mandate given by a resolution of the United Nations (UN) Security Council. The applicant, Mr. Hanan, alleged that Germany had not conducted an effective, prompt and impartial investigation into the airstrike which had caused the death, *inter alios*, of his two sons aged 8 and 12. He thereby invoked a violation of the procedural limb of Article 2 of the European Convention on Human Rights (ECHR).²

The ECtHR found no violation of the procedural obligation to investigate alleged unlawful killings under Article 2, ruling that Germany did conduct an effective investigation into the Kunduz airstrike. In spite of this, the judgment presents importance in that it addresses the question of the extent to which the ECHR applies to extraterritorial military operations – and in particular to airstrikes – carried out by a Contracting State under the mandate of the UN. The concept of extraterritorial jurisdiction, which pertains to Article 1 ECHR,³ is therefore central to the *Hanan* judgment. The case reminds us of the 2001 infamous *Banković and Others v. Belgium* judgment, in which the ECtHR held that no extraterritorial jurisdiction is created through airstrikes themselves conducted by NATO forces, so that Article 2 in its substantive dimension (i.e. the duty to respect the right to life by refraining from unjustified use of force) does not apply. However, the jurisdictional analysis in *Hanan v. Germany* is confined to the extraterritorial applicability of Article 2 in its procedural dimension (i.e. the duty to investigate unlawful uses of lethal force) to aerial bombardments carried out by Contracting States in the context of a UN military operation. The majority held that there was a clear jurisdictional link triggering Germany's procedural duty under Article 2, on the basis of an alternative jurisdictional threshold of 'special features' recently introduced in its jurisprudence. The case *Hanan* therefore expands, albeit only to a limited extent, the application of the Convention to the peculiar (and geopolitically delicate) situation of armed conflicts outside of Europe, in which Contracting States are carrying out military operations under the auspice of the UN.

The present article focuses on the specific issue of extraterritorial jurisdiction and on the (potential) contribution brought by the judgment *Hanan v. Germany* in this respect.⁴ The article will in section 1 briefly introduce the facts of the case. Afterward,

1. *Hanan v. Germany* App no 4871/16 (ECHR 16 February 2021).

2. The European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 4 November 1950 ETS 5). Article 2 ECHR will further be referred to as 'Article/Art 2' in the present contribution.

3. Article 1 ECHR provides that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' This provision defines the scope of application of the ECHR. In particular, Article 1 imposes that the Convention's rights and obligations applies only when a person falls within the jurisdiction of a Contracting State, the concept of jurisdiction thereby being a threshold requirement.

4. The judgment *Hanan v. Germany* issued by the ECtHR's Grand Chamber has already received some attention by scholars, in particular through blogposts that provide interesting and critical insights on, *inter alia*, the issues of jurisdiction, attribution and the duty to investigate under Art 2 ECHR. The purpose of the present contribution is to dwell in more detail on the notion of extraterritorial jurisdiction under Art 1 ECHR in particular, and under international human rights law in general. See for instance M Milanovic, 'Extraterritorial Investigations in *Hanan v. Germany*; Extraterritorial Assassinations in New Interstate Claim Filed by Ukraine against Russia' (*EJIL: Talk!*,

the Court's decision and in particular its findings regarding the question of extraterritorial jurisdiction will be explained and replaced in the broader context and debates revolving around the concept of jurisdiction (section 2). Finally, the article ends in section 3 with a conclusion.

1 THE FACTS OF THE CASE *HANAN V. GERMANY*

In December 2001, the UN Security Council authorized the establishment of the International Security Assistance Force (ISAF) to maintain security in Kabul and to assist the Afghan Interim Authority. The same month, the German Parliament authorized the deployment of German armed forces as part of the ISAF. At the time of the airstrike, German troops were primarily in charge of the Provincial Reconstruction Team (PRT) Kunduz, and the German Colonel K. was the officer-in-command.

On 4 September 2009, Afghan insurgents hijacked two immobilized fuel tanker trucks on a sandbank on the Kunduz river. After a tip-off about the hijacking and after assessing the situation, Colonel K. believed only insurgents were present at the scene, and consequently ordered to bomb the immobilized fuel tankers. The airstrike therefore pursued two military objectives: to destroy the tankers and the fuel hijacked by the Taliban and to kill Taliban fighters, both legitimate military targets under international humanitarian law. However, it happened that the strike was ordered at a time when the immobilized trucks were surrounded by several people, including many civilians. The aerial bombardment caused the death, inter alios, of the applicant's two sons respectively aged 12 and 8 years old. The estimated number of persons killed by the

26 February 2021), available at <<https://www.ejiltalk.org/extraterritorial-investigations-in-hanan-v-germany-extraterritorial-assassinations-in-new-interstate-claim-filed-by-ukraine-against-russia/>> (accessed 27 September 2021); K Metha, 'Tailoring the Jurisdiction of the ECHR' (*Verfassungsblog*, 18 February 2021), available at <<https://verfassungsblog.de/tailoring-the-jurisdiction-of-the-echr/>> (accessed 27 September 2021); F Bouhon, 'Hanan v. Germany: Applying the ECHR to United Nations International Military Operation without Affecting States' Willingness and Ability to Engage in Such Operations?' (*EU Law Live*, 19 February 2021), available at <<https://eulawlive.com/analysis-hanan-v-germany-applying-the-echr-to-united-nations-international-military-operation-without-affecting-states-willingness-and-ability-to-engage-in-such-operations/>> (accessed 27 September 2021); N Kuplewatzky, 'Hanan v Germany and the Extraterritorial Application of the ECHR to the Conduct of Contracting States' Armed Forces Deployed Abroad' (*Regulating for Globalization*, 18 February 2021), available at <<https://regulatingforglobalization.com/2021/02/18/hanan-v-germany-and-the-extraterritorial-application-of-the-echr-to-the-conduct-of-contracting-states-armed-forces-deployed-abroad/>> (accessed 27 September 2021); C Meloni, 'Kunduz Airstrike Before European Court of Human Rights: Future of Jurisdiction and Duty to Investigate' (*Just Security*, 26 February 2021), available at <<https://www.justsecurity.org/74996/kunduz-airstrike-before-european-court-of-human-rights-future-of-jurisdiction-and-duty-to-investigate/>> (accessed 27 September 2021); D Steiger, '(Not) Investigating Kunduz and (Not) Judging in Strasbourg? Extraterritoriality, Attribution and the Duty to Investigate' (*EJIL: Talk!*, 25 February 2020), available at <<https://www.ejiltalk.org/not-investigating-kunduz-and-not-judging-in-strasbourg-extraterritoriality-attribution-and-the-duty-to-investigate/>> (accessed 27 September 2021); A Van Baelen, 'What Is Fair in Law & War? Discussing States' Conduct and Compliance with Human Rights Standards during Military Operations Abroad in Hanan v. Germany' (*Strasbourg Observers*, 9 April 2021), available at <<https://strasbourgobservers.com/2021/04/09/what-is-fair-in-law-war-discussing-states-conduct-and-compliance-with-human-rights-standards-during-military-operations-abroad-in-hanan-v-germany/>> (accessed 27 September 2021).

airstrike, and how many of these were Taliban or civilian, has never been clearly ascertained but is said to amount to more than 50 casualties.⁵

Simultaneously to an on-site investigation on the day of the airstrike, preliminary investigations were conducted by various German public prosecution authorities. Six months after the airstrike, the German Federal Public Prosecutor General opened a criminal investigation against Colonel K. and the Staff Sergeant who assisted him on the night of the airstrike. The criminal investigation was discontinued one month after its opening due to an alleged lack of sufficient grounds for suspicion regarding a prosecutable criminal offence. The Federal Public Prosecutor General held that Colonel K. did not know of any civilian presence at the scene and therefore had not acted with the intent to kill or harm civilians to a degree which was disproportionate to the military benefit of the airstrike. Mr. Hanan subsequently filed a motion with the Düsseldorf Court of Appeal to compel public charges against the suspects. His motion was declared inadmissible. He then decided to lodge constitutional complaints with the Federal Constitutional Court alleging that the criminal investigation had been ineffective and that not all necessary investigative measures had been taken in order to comprehensively establish the objective circumstances of the airstrike. The Constitutional Court refused to admit his complaints, finding that the Federal Prosecutor General had conducted effective investigations.

In January 2016, Mr. Hanan lodged an application with the ECtHR against Germany. He alleged that the German State had violated Article 2 – the right to life – in its procedural limb, arguing that the investigation into the airstrike was not effective. In addition, he invoked the violation of Article 13 – the right to an effective remedy – arguing that he had no effective domestic remedy to challenge the decision of the German Federal Prosecutor General to discontinue the criminal investigation. The Court therefore had to rule whether Article 2, in its procedural limb, applied in the specific context of the Kunduz airstrike, thereby addressing the question of extraterritorial jurisdiction as part of an airstrike carried out by Contracting States' agents under the auspice of a UN Security Council mandate.

2 THE JURISDICTIONAL TEST OF 'SPECIAL FEATURES' TO EXTRATERRITORIALLY TRIGGER THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 ECHR – LEAVING *BANKOVIĆ* INTACT

In *Hanan*, the ECtHR's Grand Chamber held that there was a clear extraterritorial jurisdictional link triggering Germany's procedural duty under Article 2 to investigate the alleged unlawful uses of lethal force during the Kunduz airstrike. The Court applied the jurisdictional test of 'special features' that it had previously introduced in its case law. This establishment of a jurisdictional link in the particular context of airstrikes contrasts with the Court's long-standing restrictive jurisprudence according to which extraterritorial jurisdiction is not created by airstrikes themselves. In particular, the Court has repeatedly decided that aerial bombardments do not involve sufficient factual territorial nor personal control capable of triggering the substantive limb of Article 2 so that airstrikes' victims' lives are not substantially protected by the Convention (see Section 2.1). In its examination of the applicability of Article 2, in its procedural limb this time, in the case *Hanan*, the Court did however not alter its restrictive jurisdictional approach according to which airstrikes alone do not involve a sufficient factual territorial or personal control

5. *Hanan* (n 1) paras 25–40.

(see Section 2.2). Rather, it applied an alternative jurisdictional threshold of ‘special features’ that it had previously formulated for the specific purpose of the procedural duty under Article 2, and ruled that Germany was exercising its extraterritorial jurisdiction and therefore had to investigate the Kunduz airstrike (see Section 2.3). The Court’s jurisdictional reasoning with respect to the procedural limb of Article 2 can be seen as a mitigating solution to its restrictive approach regarding the applicability of the substantive limb of Article 2. Yet the reasoning adopted by the ECtHR in *Hanan* in relation to this threshold of ‘special features’ leaves a significant discretionary control to the Court, which makes one doubt whether there is a new jurisdictional threshold at all (see Section 2.4).

2.1 No jurisdictional link created by airstrikes themselves: no assessment of the lawfulness of killings under Article 2 ECHR in its substantive limb

While the notion of jurisdiction is primarily territorial, its extraterritorial exercise has long been recognized by international human rights courts and treaty bodies. In particular, extraterritorial jurisdiction has first and foremost been conceived in terms of factual effective control exercised over an area (the spatial model), or over persons (the personal model). In the specific context of extraterritorial aerial bombardment or artillery shelling, the ECtHR has repeatedly decided that none of these models is applicable (see Sections 2.2.1 and 2.2.2), declaring inadmissible complaints brought under the substantive dimension of Article 2 according to which States’ agents had unlawfully killed the victims of these operations.

2.1.1 Airstrikes do not constitute sufficient territorial control

In its 2001 *Banković v. Belgium* decision, the ECtHR held that no extraterritorial jurisdiction is established through airstrikes abroad.⁶ The case concerned the bombing by NATO forces of the Serb radio premises on the territory of the Federal Republic of Yugoslavia (FRY) during the Kosovo campaign in 1999. The Court decided that the ECHR only⁷ applies where Contracting States exert effective territorial control and that airstrikes alone were not sufficient to satisfy such requirement since NATO troops were not deployed on the territory of the FRY.⁸ In addition, the Court denied

6. *Banković and Others v. Belgium and Others* App no 52207/99 (ECHR 12 December 2001).

7. In *Banković*, the Court also acknowledged extraterritorial jurisdiction in situations that did not concern territorial control, but rather the personal model of extraterritorial jurisdiction: ‘69. In addition, a further example [...] was the Drozd and Janousek case where [...] the Court accepted that the responsibility of Contracting Parties (France and Spain) could, in principle, be engaged because of acts of their authorities (judges) which produced effects or were performed outside their own territory [...]’ And ‘73. Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.’

8. Since then, indeed, it appears from the jurisprudence of the Court that jurisdiction requires a strong and full physical control over an area, qualified by boots on the ground. See for example *Al-Skeini and Others v. UK* App no 55721/07 (ECHR 07 July 2011), para 139; See further M

that the most expansive form of control over persons through acts of killings (here from an aircraft) may bring about extraterritorial jurisdiction. It stated that such a 'submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State'.⁹ The ECtHR hence also refused to apply the model of factual control over persons to the situation where a Contracting State kills a person with a missile.¹⁰

Under *Banković* thus, Article 2 in its substantive limb does not apply extraterritorially to aerial bombardments if the acting State lacks effective territorial control – and the airstrikes themselves are not sufficient to establish such control. However, the territorial model has been construed by the ECtHR as requiring a high level of control, involving situations of belligerent occupation or temporary military operations involving strong and full physical control over a large area.¹¹ What matters is that States have sufficient factual control over the area at stake, meaning that they have enough power over the territory and its inhabitants to broadly do as they please.¹² Recently even, the Strasbourg Court adopted a rather categorical position in *Georgia v. Russia II*,¹³ stating that 'in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict one cannot generally speak of "effective control" over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area.'¹⁴ Hence, not only the court ruled in *Banković* that airstrikes are not sufficient territorial control, but it also seemed to say in *Georgia v. Russia II* that the 'context of chaos'

Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011) 141; A Klug and T Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-Refoulement Principle to Extraterritorial Interception Measures' in R Bernard and M Valsamis (eds), *Extraterritorial Immigration Control: Legal Challenges* (Brill Nijhoff, 2010) 80; K da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Brill Nijhoff, 2013) 124.

9. *Bankovic* (n 6) para 75.

10. By contrast, the Inter-American Commission relied on the personal jurisdiction model to establish a jurisdictional link when a Cuban military aircraft shot down a civilian aircraft in international airspace in the case of *Alejandre v. Cuba* Rep no 86/99 (IACoHR 29 September 1999), para 25.

11. In cases of occupation, see for example, *Loizidou v. Turkey* App no 40/1993/435/514 (ECHR 28 November 1996), paras 52–56; *Cyprus v. Turkey* App no 25781/94 (ECHR 10 May 2001), para 77. In addition, in *Issa and Others v. Turkey*, the Court did not exclude the possibility that effective territorial control could also be established during a temporary military operation which do not involve situations of occupation but still required a strong military control. In *Issa* for instance, the Court ruled in the absence of jurisdiction as the degree of de facto territorial control was deemed not enough, see *Issa and Others v. Turkey* App no 31821/96 (ECHR 16 November 2004), paras 74–75, 138; See further E Kannis, 'Pulling (Apart) the Triggers of Extraterritorial Jurisdiction' (2015) 40 University of Western Australia Law Review 221, 227–29.

12. Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 8) 137; Klug and Howe (n 8) 79.

13. M Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (*EJIL: Talk!*, 25 January 2021), available at <<https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/>> (accessed 28 September 2021).

14. *Georgia v. Russia II* App no 38263/08 (ECHR 21 January 2021), para 126.

prevailing during active hostilities in international armed conflict (IAC) situations prevents any territorial control on the ground at all.¹⁵ In other terms, Contracting States carrying out airstrikes abroad during a IAC would never have their extraterritorial jurisdiction established on the basis of the territorial model, thus escaping their substantive duty to respect the right to life under Article 2 of the Convention.

2.1.2 *Instantaneous killings are not sufficient personal control*

The second traditional model of extraterritorial jurisdiction, namely the personal model of physical control over persons, has also generally been construed by the ECtHR as involving an important degree of factual power exerted over persons/victims. It has been applied for instance in situations of abduction, detention, mistreatment and interception at sea.¹⁶ Yet, the case law of the Strasbourg Court lacks clarity and consistency when it comes to the exact threshold necessary to establish jurisdiction. On the one hand, it is evident that situations of physical custody, detention and arrest, trigger jurisdiction.¹⁷ In *Hassan v. the UK*, the Court ruled that physical custody will *ipso facto* create a jurisdictional link.¹⁸ On the other hand, the Court is unclear when it comes to what it refers to as ‘instantaneous acts’ carried out by States’ agents abroad, such as acts of killing.

As was seen, in *Banković*, the Court considered that the mere killing from an aircraft as part of a large airstrike was not sufficient for establishing jurisdiction. In 2010, the Court found in *Medvedyev* that, situations ‘where – as in the *Banković* and *Others* case – what was at issue was an instantaneous extraterritorial act [...]’ are excluded from extraterritorial jurisdiction.¹⁹ The Court thus explained that what happened in *Banković* was merely an ‘instantaneous’ act of killing, insufficient for establishing jurisdiction. Things were not made clearer – rather the opposite – in the Court’s long-awaited decision *Al-Skeini*.²⁰ The case arose out of the occupation of Iraq by British troops. Some of the victims had allegedly been shot and killed by British troops on patrol, in the course of security operations on the ground, and others had been shot

15. Note, however, that the position of the Court in *Georgia v. Russia II*, according to which no effective territorial control can be established during the active phase of hostilities in an IAC, because of the ‘context of chaos’, seems contradictory to the admissibility decision issued by the Court one month earlier in the interstate case *Ukraine v. Russia (re Crimea)*. In the later, the Court ruled that Russia exercised an effective territorial control over Crimea even before its occupation, and thus during the ‘active phase of hostilities’. In particular, the Court relied on the increase of Russian military personnel, on the elite status of the forces thereby deployed, on the fact that Russia had no real reason to deploy these forces except to acquire control over the territory and on the fact that Russian troops immobilized and disarmed Ukrainian forces and did back the Crimean self-defence forces. *Ukraine v. Russia (Re Crimea)* App nos 20958/14 38334/18 (ECHR 16 December 2020), paras 321–335.

16. *Issa* (n 11) para 71; *Pad and Others v. Turkey* App no 60167/00 (ECHR 28 June 2007), paras 53–54; *Isaak and Others v. Turkey* App no 44587/98 (ECHR 28 September 2006); *Oçalan v. Turkey* App no 46221/99 (ECHR 12 May 2005), para 91; *Al-Saadoon and Mufidhi v. United Kingdom* App no 61498/08 (ECHR 2 March 2010), paras 87–88; *Georgia Andreou v. Turkey* App no 45653/99 (ECHR 3 June 2008); *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECHR 23 February 2012), para 81.

17. *Al-Skeini* (n 8) para 136.

18. *Hassan v. The United Kingdom* App 29750/09 (ECHR 16 September 2014), paras 76–77.

19. *Medvedyev and Others v. France* App no 3394/03 (ECHR 29 March 2010), para 64.

20. This decision was viewed as an opportunity for the Court to clarify some of the principles established in *Bankovic*, see e.g. C Mallory, ‘European Court of Human Rights Al-Skeini and

and killed during an exchange of fire between British troops and Iraqi gunmen. The Court found that the United Kingdom assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government: 'In these circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link'.²¹ Hence, the jurisdictional link was based on the exercise of public powers by the United Kingdom, rather than on the acts of killing per se. The *Banković*'s legacy, according to which ('instantaneous') acts of killing are not enough control over individuals to trigger jurisdiction, was therefore left unchanged. This case law suggests that the ability to kill someone is 'authority and control' over the concerned individual if the acting State has public powers or if the State is detaining the individual, but it is not if the State is merely firing missiles from an aircraft.²²

However, in other strands of its jurisprudence, the Strasbourg Court found extraterritorial jurisdiction to be established in cases of one-off /instantaneous killing acts.²³ For instance, the case *Pad and Others v. Turkey*²⁴ concerned notably two Iranian nationals who were arguably killed by Turkish helicopters which fired rockets at them while they approached the Turkish border without authorization. This was an analogous aerial killing as in *Banković*. The Court found that 'it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicant's relatives [...]'.²⁵ Thus, the ECtHR accepted that because the applicants were killed by Turkish agents they were brought within Turkish jurisdiction, regardless of the killings' location.²⁶ Likewise, the Court found extraterritorial jurisdiction to be established in *Isaak and Others v. Turkey* where a person, who had crossed into the UN-controlled buffer zone, was beaten to death by Turkish-Cypriot protesters and Turkish authorities.²⁷ An analogous reading applied in *Andreou v. Turkey*. The case involved the shooting down of a demonstrator by the Turkish authorities inside the UN buffer zone in Cyprus, from within Turkish territory. The Court found that 'even though the applicant sustained her injuries in territories over which Turkey exercised no control, opening fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as within the jurisdiction of Turkey'.²⁸ Accordingly, these cases contradict *Banković* and *Al-Skeini*,²⁹ as jurisdiction was established for acts of killing occurring outside of detention, exercise of public powers or effective territorial control.

Others v. United Kingdom (Application No. 55721/07) Judgment of 7 July 2011' (2012) 61 International & Comparative Law Quarterly 301, 301; M Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 European Journal of International Law 121, 121.

21. *Al-Skeini* (n 8) para 149.

22. Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (n 20) 130.

23. V Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press, 2017) 279; Mallory (n 20) 310.

24. *Pad* (n 16).

25. *Ibid* at paras 53–54.

26. Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 8) 185.

27. *Isaak* (n 16) paras 103–14.

28. *Andreou* (n 16) para 25.

29. R Lawson, 'Really out of Sight? Issues of Jurisdiction and Control in Situations of Armed Conflict under the ECHR' in A Buyse (ed), *Margins of Conflict. The ECHR and Transitions to and from Armed Conflict. Series on transitional justice no. 5* (Intersentia, 2011) 70.

The Court's case law regarding the relationship between instantaneous acts and jurisdiction is thus difficult to reconcile together.³⁰

In its recent decision *Georgia v. Russia II*, the Court attempted to distinguish this panoply of contradicting cases, in an unconvincing manner. Admitting that the personal model cannot be confined to acts of detention but can also be applied in cases concerning fire aimed by a State's armed forces,³¹ the Court nonetheless specified that the cases in which it found jurisdiction to be established on the basis of mere 'instantaneous' uses of lethal force are distinguishable because 'they concerned isolated and specific acts involving an element of proximity'.³² The Court further ruled that '[b]y contrast, the active phase of hostilities [...] in the context of an international armed conflict is very different, as it concerns bombing and artillery shelling by Russian armed forces seeking to put the Georgian army *hors de combat* and to establish control over areas forming part of Georgia'.³³ One can say that the Court's distinguishing criteria remain unclear. Milanovic suggests for instance that the Court might be saying that one-off uses of lethal force, such as extraterritorial assassinations or uses of drones, or uses of lethal force involving the physical proximity of a State agent, for example a soldier shooting someone directly, are more deserving of protection under Article 2 than a massive, systematic and distant use of lethal force, such as airstrike or artillery shelling.³⁴ In *Hanan*, the first case brought before the Court after *Georgia v. Russia II* which involved similar military 'instantaneous' rather than 'isolated' airstrikes, the Court did not clarify the implications arising out of this decision, and it thus remains unclear under which circumstances the ECHR applies to an instantaneous act.

In conclusion, it follows that, in the context of aerial bombardment or artillery shelling, outside of effective territorial control on the ground and outside of physical detention, the ECtHR is reluctant to establish an extraterritorial jurisdictional link capable of triggering the substantive duty of refraining from unlawful killings under Article 2. In its decision *Georgia v. Russia II*, the Court concluded that such a restrictive (factual) understanding of the notion of jurisdiction may seem unsatisfactory to victims of airstrikes or artillery shelling carried out by States in the context of an armed conflict outside its territory.³⁵ However, it further noted that:

[H]aving regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of 'jurisdiction' as established to date.

If [...] the Court is to be entrusted with the task of assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State, it must be for the Contracting Parties to provide the necessary legal basis for such a task.³⁶

30. Costa (n 8) 245; S Wallace, *The Application of the European Convention on Human Rights to Military Operations* (Cambridge University Press, 2019) 53–56, 61–62.

31. *Georgia* (n 14) paras 130–31.

32. *Georgia* (n 14) para 132.

33. *Georgia* (n 14) para 133.

34. Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (n 13).

35. *Georgia* (n 14) paras 140–42.

36. *Ibid.*

The Strasbourg Court here chose to justify its restrictive conception of jurisdiction.³⁷ It openly acknowledges that it does not find itself in the position to assess the lawfulness of the use of lethal force in the conduct of hostilities within an IAC, and in particular as part of massive military operations such as airstrikes or artillery shelling. The Court rather denies the application of Article 2 in its substantive limb and avoids any discussion on the merits, considering the political difficulties of this type of case, the difficult relationship and intertwining between the ECHR and international humanitarian law (IHL), and the potential detrimental effect this could have on the Convention system as a whole.³⁸ In other terms, the Court is ready to give up on alleged massive violations of the substantive right to life because they are too difficult to deal with, thereby creating a very questionable incentive for States to engage in open massive wars rather than conduct isolated and specific targeted military acts.³⁹

2.2 *Banković* status quo left unchanged for the extraterritorial applicability of Article 2 in its procedural limb

The above Section has demonstrated that, under the jurisprudence of the ECtHR, extraterritorial jurisdiction is not created, per se, by massive military operations carried out abroad by Contracting States which do not simultaneously involve an effective territorial control on the ground nor physical detention, such as airstrikes or artillery shelling. The Court restrictively considers that such operations – taken solely – do not create sufficient effective territorial control, nor do they assert ‘control and authority’ over persons.

37. In *Georgia v. Russia II*, the Court indeed confines its holding to IACs only, leaving it unclear how it would treat situations of NIACs or falling short of armed conflict.

38. Milanovic, ‘Georgia v. Russia No. 2: The European Court’s Resurrection of Bankovic in the Contexts of Chaos’ (n 13); for an overview of the main differences between IHL and ECHR when it comes to the legality of the use of force, see Wallace (n 30) paras 73–109. Beyond even the question of jurisdiction and its competence *ratione loci*, the Court seems to argue that questions that are too intrinsically linked to IHL are not within its competence *ratione materiae*. It argues that IHL is a *lex specialis* that cannot enter its realm of competence *ratione materiae*, through the right to life of Art 2 for instance, and that a specific framework must be provided for this purpose. Otherwise, the Court would become an ‘international humanitarian law Court’, which it is not ready for. This seems to contrast with its previous long-standing jurisprudence, under which the Court had always been willing to interpret the Convention in light of IHL. For an overview see e.g. C Landais and L Bass, ‘Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law’ (2015) 97 (900) *International Review of the Red Cross* 1295.

39. K Dzehtsiarou, ‘The Judgement of Solomon That Went Wrong: Georgia v. Russia (II) by the European Court of Human Rights’ (*Völkerrechtsblog*, 26 January 2021), available at <<https://voelkerrechtsblog.org/the-judgement-of-solomon-that-went-wrong-georgia-v-russia-ii-by-the-european-court-of-human-rights/>> (accessed 28 September 2021); K Dzehtsiarou, ‘Georgia v. Russia (II)’ (2021) 115 *American Journal of International Law* 288. In this regard, the partly dissenting judges in *Georgia v. Russia II* noted that: ‘We are simply astonished by these arguments. In our view, the role of this Court consists precisely in dealing in priority with difficult cases characterised by “the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances”’, see *Georgia* (n 14) partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia, para 9.

However, the cases above-mentioned were essentially concerned with the extraterritorial application of the substantive limb of Article 2. The Court's approach allowed it to avoid assessing the lawfulness of deprivations of lives occurring during the conduct of hostilities within an armed conflict. In *Hanan v. Germany* though, the question was whether Article 2 in its procedural limb applied in the context of the Kunduz airstrike. One could therefore have hoped for the Court to, this time, consider that the military operation in Afghanistan in itself triggered jurisdiction, since the potential difficulties in assessing the *lawfulness* of killings during conflicts would thus not hinder the Court's assessment of the *effectiveness* of the investigation. However, the majority in *Hanan* did not even engage in an assessment of whether a jurisdictional link could have been created by the Kunduz airstrike itself through the exercise of a factual territorial and/or personal control.⁴⁰ The Court did not wish to come back to – and perhaps soften – its restrictive approach by stating the airstrikes alone constitute sufficient territorial control or sufficient personal control capable of triggering an extraterritorial jurisdictional link.⁴¹ However, in the view of the present author, had the Court decided that Article 2 in its procedural limb is triggered through a jurisdictional link created by the territorial or personal control that airstrikes themselves entail, this would also logically mean that the substantive limb of Article 2 may also be triggered in the context of extraterritorial airstrikes through that same jurisdictional link – thereby overruling *Banković*. The Court was however not willing to come back to *Banković*.

As will be further developed, the Court indeed decided to clearly dissociate between the substantive dimension under Article 2 on the one hand, which continues to follow the strict jurisdictional (factual) threshold as established in *Banković*, and the procedural dimension on the other hand, whose jurisdictional threshold follows an alternative model (the jurisdictional test of 'special features') that goes beyond merely factual control.⁴² This allowed the Court to skirt its obscure position that airstrikes alone are not sufficient personal control over victims, instead focusing on another jurisdictional threshold. Since the Court's reasoning is limited to the extraterritorial application of Article 2 in its procedural limb, it does not affect its constant finding that Article 2 does not apply to airstrikes in its substantive limb.⁴³ The following Section further reviews this alternative jurisdictional threshold.

40. The partly dissenting judges did assess whether a jurisdictional link could have been created by the Kunduz airstrike and came to the conclusion that the military operations in Afghanistan do not involve a sufficient territorial or personal control capable of triggering the procedural obligation under Article 2. *Hanan* (n 1) partly dissenting opinion of Judges Grozev, Ranzoni and Eicke, paras 25–31.

41. K Pentney, 'A Run on the Bank(Ović): 18 Years Later, Will the Court Provide Clarity in *Hanan v. Germany*?' (*Leiden Law Blog*, 6 January 2020), available at <<https://leidenlawblog.nl/articles/a-run-on-the-banković-18-years-later-will-the-court-provide-clarity-in-hanan-v-germany>> (accessed 28 September 2021).

42. See s 2.4.1.

43. *Hanan* (n 1) para 143: 'It [the Court] emphasizes, however, that it does not follow from the mere establishment of a jurisdictional link in relation to the procedural obligation under Article 2 that the substantive act falls within the jurisdiction of the Contracting State or that the said act is attributable to that State.'

2.3 The jurisdictional test of ‘special features’ for the procedural limb of Article 2

On 16 February 2021, the ECtHR decided unanimously that Germany did investigate effectively the Kunduz airstrike and the killings of the applicant’s sons, and consequently found no breach of Germany’s procedural duty under Article 2. Following its well-established case law, the ECtHR successively examined whether the investigative measures were adequate and capable of leading to a determination whether the use of force was justified; whether reasonable steps were taken to secure the evidence available on-site and surrounding circumstances concerning the incident; whether the investigation fulfilled criteria of promptness, reasonable expedition and independence; and whether there was participation of the victims’ next-of-kin and sufficient elements of public scrutiny in the investigatory process.⁴⁴

Despite such ruling, viewed by some as a disappointing end considering the many irregularities tarnishing the investigatory process,⁴⁵ the judgment remains noteworthy because the Grand Chamber decided that Germany was exercising its extraterritorial jurisdiction for the purpose of effectively investigating potentially unlawful uses of lethal force under Article 2. As was explained above, extraterritorial jurisdiction has primarily been conceived in terms of factual effective control exercised over an area, or over persons. These are the two traditional models of extraterritorial jurisdiction. In holding that Germany was obliged to investigate the lethal use of force in Kunduz, the Strasbourg Court, however, relied on an alternative jurisdictional test of ‘special features’ in a given case, which it had introduced in its jurisprudence two years ago for the specific purpose of the procedural duty under Article 2, and which it has so far applied in only two other cases.

In January 2019, the Strasbourg Court issued its judgment in *Güzelyurtlu and Others v. Cyprus and Turkey*.⁴⁶ The case concerned the investigation into the killing of three Cypriot nationals of Turkish Cypriot origin in the Cypriot-Government controlled area of Cyprus in 2005. The killers fled back to the ‘Turkish Republic of Northern Cyprus’ (TRNC). Parallel investigations into the murders were conducted by the authorities of the Cypriot Government and the Turkish Government, including those of the ‘TRNC’. However, both investigations reached an impasse in 2008. In their case before the ECtHR, relying on Article 2, the victims’ relatives complained that both the Cypriot and Turkish authorities had failed to conduct an effective investigation into the killings and alleged that the refusal of Turkey and Cyprus to cooperate meant that the killers had not faced justice. The Court’s Grand Chamber decided that there had been no violation of Article 2 by Cyprus but that there had indeed been a violation of that same provision by Turkey. To reach such conclusion, the Court in particular dismissed the Turkish Government’s argument that it did not exercise jurisdiction because the murders had occurred in Cyprus. The Court reiterated that, as a rule, the obligation to ensure an effective investigation into a murder applied to the State in whose jurisdiction the victim was found to be at the time of death.⁴⁷

44. *Hanan* (n 1) paras 198â 235; for an overview of the ECtHR’s case law on the procedural obligation under Article 2, see European Court of Human Rights, ‘Guide on Article 2 of the European Convention on Human Rights – Right to Life’, available at <https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf> (accessed 28 September 2021).

45. *Metha* (n 4); *Baelen* (n 4).

46. *Güzelyurtlu and Others v. Cyprus and Turkey* App no 36925/07 (ECHR 29 January 2019).

47. *Ibid* at para 180.

However, a departure from this general approach could be justified. As such, the Court decided that

if the investigative or judicial authorities of a Contracting 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 (e.g. under provisions on universal jurisdiction or on the basis of the active or passive personality principle), the institution of that investigation or those proceedings is sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim's relatives who later bring proceedings before the Court.⁴⁸

The institution of an investigation was therefore presented by the Court as a legal basis capable of creating a jurisdictional link between the State and the relatives of the victims whose deaths had been caused outside that State's territory. In addition, the Court further ruled that

where no investigation or proceedings have been instituted in a Contracting State, according to its domestic law, in respect of a death which has occurred outside its jurisdiction, the Court will have to determine whether a jurisdictional link can, in any event, be established for the procedural obligation imposed by Article 2 to come into effect in respect of that State. Although the procedural obligation under Article 2 will in principle only be triggered for the Contracting State under whose jurisdiction the deceased was to be found at the time of death, 'special features' in a given case will justify departure from this approach.⁴⁹

Accordingly, *Güzelyurtlu* laid down a new jurisdictional test applicable in cases where the death occurred outside the Contracting State's territory, for the specific purpose of determining if and when the procedural obligation under Article 2 arises. Under this new test, two elements might be taken as decisive for the establishment of jurisdiction: the institution of a criminal investigation by a State, or the existence of 'special features' in a given case. In the case of *Güzelyurtlu*, a jurisdictional link was established on the basis of these two elements, each of which would have nonetheless sufficed in itself:⁵⁰ first because Turkish authorities had instituted their own criminal investigation into the murder of the victims; secondly because of two special features related to the situation in Cyprus: the northern part of Cyprus was under the effective control of Turkey and Cyprus was prevented from investigating the murders since the suspects were located in the territory controlled by Turkey.

Earlier this year, in January 2021, the Grand Chamber of the ECtHR relied on the jurisdictional test set of 'special features' set forth in *Güzelyurtlu*, for the purpose of the procedural obligation under Article 2, in its interstate decision *Georgia v. Russia II*.⁵¹ Dealing with the armed conflict that took place between these two States in August 2008, the ECtHR unanimously found that Russia exercised extraterritorial jurisdiction for the purpose of investigating potentially unlawful uses of force committed during the active phase of the conflict. The Court held that:

[...] Indeed, the prosecuting authorities of the Russian Federation took steps to investigate those allegations [...]. Furthermore, although the events which occurred during the active phase of the hostilities did not fall within the jurisdiction of the Russian Federation [...],

48. Ibid at para 188.

49. Ibid at para 190.

50. Ibid at para 196.

51. *Georgia* (n 14).

it established 'effective control' over the territories in question shortly afterwards [...]. Lastly, given that all the potential suspects among the Russian service personnel were located either in the Russian Federation or in territories under the control of the Russian Federation, Georgia was prevented from carrying out an adequate and effective investigation into the allegations.

Accordingly, having regard to the 'special features' of the case, the Court considers that the Russian Federation's jurisdiction within the meaning of Article 1 of the Convention is established in respect of this complaint [...].⁵²

In *Hanan*, the ECtHR also decided to rely on the jurisdictional test of 'special features'. The Court found that while German authorities instituted, under their domestic law provisions, a criminal investigation into the deaths of the applicant's sons, 'the principle that the institution of a domestic criminal investigation or proceedings concerning deaths which had occurred outside the jurisdiction *ratione loci* of that State [...] is *in itself* sufficient to establish a jurisdictional link [for the purpose of the procedural limb of Article 2] between that State and the victim's relatives who bring proceedings before the Court [...] does not apply to the factual scenario at issue in the present case'.⁵³ The Court indeed distinguished *Güzelyurtlu* from *Hanan* in which 'the deaths investigated by the German prosecution authorities had occurred in the context of an extraterritorial military operation within the framework of a mandate given by a resolution of the United Nations Security Council'.⁵⁴ According to the Court, this particularity implies that jurisdiction cannot solely be established on the basis of the first element announced in *Güzelyurtlu*, notably, the criminal investigation instituted by Germany. This did not mean however that Article 2, in its procedural limb, was not applicable. In fact, alternatively, the majority resorted to the 'special features' test, laid out in *Güzelyurtlu* as the second possible element allowing for the establishment of jurisdiction, features which have to be decided on a case-by-case basis.

The ECtHR held in *Hanan* that, when combined, the following three special features triggered the existence of a jurisdictional link, even if there had been no investigation carried out by Germany – or, more precisely, even though the institution of an investigation by Germany was insufficient for establishing jurisdiction in itself, given the factual circumstances.⁵⁵

First, Germany was obliged under customary IHL to investigate the airstrike as it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime.⁵⁶ Secondly, the Afghan authorities were, for legal reasons, prevented from instituting themselves a criminal investigation against Colonel K. In fact, by virtue of the ISAF Status of Forces Agreement, the troop-contributing States had indeed retained exclusive jurisdiction over the personnel they contributed to ISAF in respect of any criminal or disciplinary offences which their troops may commit in Afghanistan. This exclusive jurisdiction therefore shields ISAF personnel of troop-contributing States from prosecution by the Afghan authorities. Thus, if Germany did not have the obligation to investigate the airstrike, this could have led to situations of impunity, including in respect of offences entailing individual criminal responsibility under international law.⁵⁷ Thirdly, German prosecution authorities were also

52. Ibid at paras 331–32.

53. *Hanan* (n 1) para 135.

54. Ibid.

55. *Hanan* (n 1) paras 136; 142.

56. Ibid at para 137.

57. Ibid at para 138.

obliged under domestic law to institute a criminal investigation, by virtue of Germany's ratification of the Rome Statute.⁵⁸ Under domestic law, German authorities could only have been dispensed with such an investigation if the alleged offence had been investigated either before an international tribunal or by the authorities on whose territory the alleged offence occurred or whose nationals were victims. However, these two scenarios were precluded by Germany's retention of exclusive jurisdiction over its troops pursuant to the ISAF Agreement.⁵⁹ According to the Court, taken together, these three 'special features' allowed for the establishment of a jurisdictional link triggering the procedural obligation imposed by Article 2 of the Convention.

In *Hanan*, the special features which, according to the Court, allowed for the establishment of jurisdiction are therefore similar to the ones the Court found relevant in *Georgia v. Russia II*: both Germany and Russia were obliged to investigate according to IHL and domestic law provisions; and while Afghanistan was legally prevented from instituting a criminal investigation, Georgia was, on its side, prevented from doing so for factual reasons (i.e. the location of the potential suspects outside of its territory). This last feature was also emphasized by the ECtHR in *Güzelyurtlu*. Contrary to *Hanan*, in *Georgia v. Russia II* (and in *Güzelyurtlu*), the ECtHR accorded importance to a fourth feature: the effective territorial control exercised by Russia.

In sum, these three decisions demonstrate the establishment, by the Strasbourg Court, of an alternative jurisdictional test for the purpose of triggering the procedural duty under Article 2 to investigate unlawful uses of lethal force abroad. Extraterritorial jurisdiction can be triggered on the basis of: (a) the institution of its own criminal investigation by a State concerning a death that occurred abroad, or (b) on the basis of 'special features' in a given case.⁶⁰ These features seem to primarily take into consideration the existence of obligation(s) to investigate a death that occurred abroad, and the risk of impunity in respect of offences entailing individual criminal responsibility under international law.

When replaced in the broader discussion of the extraterritorial applicability of Article 2 in the specific context of airstrikes carried out by Contracting States, this new jurisdictional test and its particular application in the case of *Hanan* constitute a (small) step forward. As was developed above, the Strasbourg Court had so far adopted a very restrictive factual approach to extraterritorial jurisdiction in relation to the substantive obligation under Article 2 (i.e. the duty to refrain from unjustified uses of lethal force) as part of massive military operations such as airstrikes. Hence, under the current Court's case law, Article 2 does not apply in its substantive form and does not protect the victims' right not to be deprived unlawfully of their lives. In this regard, the jurisdictional threshold newly established by the Court to trigger the procedural duty under Article 2 offers a more generous approach to jurisdiction and may be seen as a mitigating solution which might have major implications for foreign military interventions, despite the non-applicability of Article 2 in its substantive limb.

58. The Rome Statute of the International Criminal Court (signed 17 July 1998 entered into force 1 July 2002, 2187 UNTS 90).

59. Ibid at para 139.

60. As specified in *Güzelyurtlu* (n 46) para 196, each of these two elements (institution of an investigation and the 'special features') in principle suffice in itself. However, if the deaths had occurred in the context of an extraterritorial military operation within the framework of a mandate given by a resolution of the UN Security Council, the first element of the institution of an investigation is solely not enough for the establishment of jurisdiction, according to *Hanan*.

2.4 Mitigating solution: a tailored extraterritorial jurisdictional threshold for the procedural duty to investigate under Article 2 ECHR?

The alternative jurisdictional threshold for the procedural duty under Article 2 and its application in *Hanan* constitute an important achievement that potentially extends the standards of protection under the ECHR to situations where States are carrying out operations in armed conflicts – even within the framework of a UN mandate – that goes beyond the requirement of a strong factual control. Hence, the application of Article 2 in its procedural limb to such military operations appears as a compromise to the restrictive application of the substantive limb of Article 2 – yet creating incoherence in the ECHR’s right to life system (see Section 2.4.1). Nonetheless, the Court’s reasoning and its jurisdictional model translate a cautious approach of the Court, which retains a discretionary control on each case, thereby attempting to achieve a balance not to affect States’ willingness and ability to engage in UN military operations (see Section 2.4.2).

2.4.1 A mitigating jurisdictional threshold going beyond mere factual control, triggering significant investigation duties

First, the tests of ‘the institution of an investigation’ and of ‘special features’ conceive extraterritorial jurisdiction beyond purely factual terms and take into consideration *de jure* or procedural elements. In particular, the ‘institution of an investigation’ test takes as a decisive element for establishing jurisdiction the fact that the concerned State has chosen to open up a criminal investigation, and therefore to express its governmental authority through *de jure* and procedural means according to its own domestic law (e.g. under provisions on universal jurisdiction or on the basis of the active or passive personality principle). Likewise, in the few cases in which it has been applied to date, the ‘special features’ test established jurisdiction on the basis of *de jure* elements, pertaining primarily to a State’s obligations to investigate under domestic law and IHL and to a risk of impunity with respect to serious offences under international law. Such an approach to jurisdiction timidly aligns itself with the expansive trend that can be observed in international human rights law regarding extraterritoriality.

In fact, as explained above, extraterritorial jurisdiction has traditionally been construed by human rights organs as requiring factual control over persons or areas. However, several emerging and significantly increasing scenarios which lack obvious, sufficient or any factual control, put into question such a factual understanding which creates gaps in the applicability of fundamental rights abroad. The interpretation of the notion of jurisdiction as requiring a certain – and relatively high – physical control on the ground or over individuals makes it misplaced to several situations in which individuals suffer from adverse and significant effects on their rights abroad because of acts or omissions carried out by States which take a less hands-on role and lack any direct or sufficient physical contact with affected persons.⁶¹ Among others, the requirement of physical control prevents the establishment of jurisdiction in cases of

61. T Altwicker, ‘Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts’ (2018) 29 *The European Journal of International Law* 581, 581–606; V Moreno-Lax and M Pedersen-Lemberg, ‘Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization’ (*QIL* 56, 28 February 2019) 5–7, available at <<http://www.qil-qdi.org/border-induced-displacement-the-ethical-and-legal-implications-of-dis>

transboundary environmental harm, cross-border harmful economic policies, transnational electronic surveillance and interception of communication, use of drones, international cooperation measures aiming at deterring migrants and refugees from reaching European asylum territories, or, as in *Hanan* or *Banković*, aerial bombardment and artillery shelling.⁶² This array of situational examples shows that States are multiplying external measures and policies which significantly impact human rights from afar, without the physical presence of States' agents on the ground or without physical authority over persons, yet with similarly devastating effects as those caused by a physical control and thus, with an equivalent pressing need for fundamental rights' protection.

With the proliferation of these complex cross-border harmful measures, the idea that these States' conducts should be amenable to human rights claims is more and more encountered in the legal literature through new approaches to jurisdiction and has led human rights courts and bodies to sometimes adopt broader jurisdictional approaches.⁶³ For example, some scholars have suggested the concept of functional jurisdiction focusing on the exercise of a State's governmental powers and on its capacity to protect fundamental rights abroad,⁶⁴ others defend an impact theory⁶⁵ which would establish jurisdiction on the basis of the direct and foreseeable causality

tance-creation-through-externalization/> (accessed 28 September 2021); T Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' (2018) 20 *European Journal of Migration and Law* 373, 373–95.

62. M Milanovic, 'Foreign Surveillance and Human Rights, Part 3: Models of Extraterritorial Application' (*EJIL: Talk!*, 27 November 2013), available at <<https://www.ejiltalk.org/foreign-surveillance-and-human-rights-part-3-models-of-extraterritorial-application/>> (accessed 28 September 2021); P Vedel Kessing, 'Transnational Operations Carried out from a State's Own Territory: Armed Drones and the Extraterritorial Effect of International Human Rights Conventions' in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control* (Routledge, 2016) 81–98; JC Hathaway and T Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' [2014] *U of Michigan Law & Econ Research Paper* 17–27, available at <<https://pdfs.semanticscholar.org/4527/638efa619ed28702e50573f3a803b36cc1b4.pdf>> (accessed 28 September 2021); V Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21 *German Law Journal* 436, 436–58; V Moreno-Lax and M Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migration Flows' in SS Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing, 2019) 82–108, available at <<https://papers.ssrn.com/abstract=3009331>> (accessed 28 September 2021).

63. For instance, V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control â On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) 21 *German Law Journal* 385; Y Shany, 'The Extraterritorial Application of International Human Rights Law', *Collected Courses of the Hague Academy of International Law*, vol Tome 409 (Brill Nijhoff, 2020); A Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?' (2020) 20(2) *Human Rights Law Review* 306; Altwickier (n 61); Kessing (n 62).

64. *Al-Skeini* (n 8) concurring opinion of Judge Bonello; T De Boer, 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection' (2015) 28 *Journal of Refugee Studies* 118, 128; Moreno-Lax (n 63); T Gammeltoft-Hansen, *Access to Asylum: International Refugee Law And The Globalisation Of Migration Control* (Reprint edition, Cambridge University Press, 2013).

65. Also called a 'cause-and-effects' or an 'extraterritorial effects' theory.

nexus between extraterritorial human rights effects and States' actions,⁶⁶ whereas others argue for the doctrine of control over rights.⁶⁷

Similarly, recent decisions of human rights Courts and treaty bodies point towards a more generous understanding of jurisdiction.⁶⁸ For instance, the ECtHR itself found extraterritorial jurisdiction to be established in cases concerning the transnational monitoring of private telecommunications⁶⁹ and mass surveillance regimes.⁷⁰ The Court also held that by adopting a national legislation implementing an entry ban on the one hand in *Nada v. Switzerland*, and making it impossible for Croatians to withdraw money on the other hand in *Kovačić and Others v. Slovenia*, Switzerland and Slovenia respectively exercised jurisdiction because these domestic measures had a significant human rights curtailing effect on the applicants.⁷¹ Likewise, the Human Rights Committee (HRC) articulated the view that human rights must apply to national surveillance system and to the use of drones,⁷² and that the issuance of a 'fatwa' authorizing the killing of individuals abroad may amount to a violation of the International Covenant on Civil and Political Rights (ICCPR).⁷³ Also, in *Mohammad Munaf v. Romania*, the Committee held that 'a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time [...]'.⁷⁴ In addition, in its General

66. Among others Kessing (n 62) 81–95; Altwicker (n 61); L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 25 *European Journal of International Law* 1071, 1071–91; H King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521, 551 ff; R Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in F Coomans and T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 104–20; Shany (n 63).

67. B Çali, 'Has 'Control over Rights Doctrine' for Extra-Territorial Jurisdiction Come of Age? Karlsruhe, Too, Has Spoken, Now It's Strasbourg's Turn' (*EJIL: Talk!*, 21 July 2020), available at <<https://www.ejiltalk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/>> (accessed 28 September 2021).

68. M den Heijer and R Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in M Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press, 2012) 176–82.

69. *Weber and Saravia v. Germany* App no 54934/00 (ECHR 29 June 2006), para 72.

70. *Big Brother Watch and Others v. the United Kingdom* App nos 58170/13 62322/14 24960/15 (ECHR 25 May 2021), para 272; *Centrum För Rättvisa v. Sweden* App no 35252/08 (ECHR 25 May 2021).

71. *Kovačić and Others v. Slovenia* App no 44574/98 (ECHR 9 October 2003). See also *Stephens v. Malta no 1* App no 11956/07 (ECHR 21 April 2009), paras 51–52 where the Court ruled that the detention of the applicant by Spanish authorities under the instructions of Malta had its sole origin in the measure taken exclusively by Malta requesting for the applicant's detention, and thereby amounted to the exercise of its jurisdiction.

72. HRC Concluding Observations on the Fourth Period Report of the United States of America UN Doc CCPR/C/USA/CO/4, 23 April 2014, paras 9, 22.

73. HRC Concluding Observations Islamic Republic of Iran UN Doc CCPR/12/Add.1 vol. 2, 1992, para 256. The International Covenant on Civil and Political Rights (adopted 19 December 1966 entered into force 23 March 1996, 999 *UNTS* 171).

74. HRC *Mohammad Munaf v. Romania* Comm 1539/2006, 21 August 2009, UN Doc CCPR/C/96/D/1539/2006, para 14.2.

Comment no. 36 on the right to life, the Committee adopted a functional approach to jurisdiction, establishing that ‘persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner’ falls under the State’s jurisdiction.⁷⁵ In this regard, States must ‘ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory’ are consistent with Article 6 of the ICCPR.⁷⁶ Earlier this year, the Committee applied this functional approach in the context of search-and-rescue operations at sea. Despite the lack of factual control exerted over the individuals in distress in the high sea, the HRC found Italy’s extraterritorial jurisdiction to be established because, in the particular circumstances of the case, ‘a special relationship of dependency had been established between the individuals on the vessel in distress and Italy’, under which Italy had the capacity to help the vessel and was thus obliged to do so under the ICCPR.⁷⁷

In the same vein, the Inter-American Court of Human Rights (IACtHR) recently recognized a jurisdictional link on the basis of a State’s effective control over domestic activities with extraterritorial effects.⁷⁸ In scenarios involving transboundary environmental harm, the Court ruled that: ‘when transboundary damage occurs [...], it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory’.⁷⁹ The exercise of jurisdiction, according to the Court, arises when the State of origin exercises effective control over the harmful activities, and thus is in a position to prevent harm through its control over the rights involved.⁸⁰

Ultimately, these developments demonstrate an emergence of reflections from experts and human rights bodies acknowledging that the lack of physical control should not, solely, be taken as an obstacle for establishing jurisdiction in situations where States’ activities involve harmful human rights effects abroad. There is nowadays a perception that a purely factual understanding of jurisdiction is unsatisfying to encompass an increasing number of human rights abuse situations. The ECtHR seems to share this perception at least in the context of airstrikes or artillery shelling when it noted in *Georgia v. Russia II* that ‘such an interpretation [i.e. strictly factual] of the notion of jurisdiction [...] may seem unsatisfactory to the alleged victims’.⁸¹ Hence, new jurisdictional approaches that take into account causal, *de jure* or procedural elements are emerging.

75. HRC General Comment no 36 ‘Article 6: Right to life’ UN Doc CCPR/C/GC/36, 3 September 2019, para 63.

76. Ibid at para 22.

77. HRC *AS DI OI and GD v. Italy* Comm 3042/2017, 27 January 2021, UN Doc CCPR/C/130/D/3042/2017, para 7.8.

78. Advisory Opinion OC-23/17 *The Environment and Human Rights (state obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of articles 4(1) and 5(1) in relation to articles 1(1) and 2 of the American Convention on Human Rights)* (IACtHR 15 November 2017).

79. Ibid at paras 79â 80, 101. See further ML Banda, ‘Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm’ (2018) 103 Minn. L. R.

80. Advisory Opinion (n 78) paras 102, 104h; Çali (n 67).

81. *Georgia* (n 14) para 140.

Through the tests of the institution of an investigation and/or special features, for the specific purpose of extraterritorially triggering the procedural duty under Article 2, the ECtHR is timidly distancing itself from a factual conception of jurisdiction and confirms the overarching trend in international jurisprudence. In this respect, it has even been argued that a third type of effective control has emerged in the jurisprudence of the ECtHR. This may be coined the ‘procedural’ control jurisdictional test, of which the decision *Hanan* constitutes a further example.⁸² As such, the ECtHR’s case law underlines the importance of existing specific legal procedures in the establishment of jurisdiction, and already found that the subjection to some form of legal process triggers the applicability of the Convention.⁸³ This has been applied, for instance, in the context of the legal competence to extradite under the European Arrest Warrant Scheme pertaining to a crime where the right-holder is a victim,⁸⁴ in the context of *in absentia* trials or execution of judgments where applicants live abroad,⁸⁵ the initiation of judicial proceedings,⁸⁶ and now obligations to institute criminal investigations under domestic law and IHL.⁸⁷ However, and as mentioned above, the ECtHR remains reluctant to depart from a very restrictive factual understanding of jurisdiction when it comes to the applicability of the substantive limb of Article 2.

Secondly, the judgment in *Hanan* has major implications for international military operations carried out abroad by ECHR Member States, including when conducted within the framework of a UN mandate. In fact, the ‘special features’ that the ECtHR relied on in *Hanan* will exist in the vast majority of situations where European States use force abroad.⁸⁸ As such, all European States are bound by peacetime IHL obligations, while those engaged in armed conflict are bound by IHL provisions applicable in international and non-international armed conflicts. In particular under rule 158 (‘prosecution of the war crimes’) of the *Customary International Humanitarian Law* study by the International Committee of the Red Cross, ‘States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.’⁸⁹ Additionally, the preamble to the Statute of the International Criminal Court –which the overwhelming majority of States parties to the ECHR has ratified – recalls ‘the duty of every State to exercise its criminal jurisdiction over those responsible

82. S Besson, ‘Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!’ (*ESIL Reflections*, vol. 9, Issue 1) 4, available at <<https://esil-sedi.eu/fr/esil-reflection-due-diligence-and-extraterritorial-human-rights-obligations-mind-the-gap-copy/>> (accessed 28 September 2021).

83. Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 8) 200–07.

84. *Castano v. Belgium* App no 8351/17 (ECHR 9 July 2019), paras 36–43.

85. For instance, *Sejdovic v. Italy* App no 56581/00 (ECHR 1 March 2006); *Martin v. the United Kingdom* App no 40426/98, (24 October 2006); *Mullai and Others v. Albania* App no 9074/07 (ECHR 23 March 2010); *Vrbica v. Croatia* App no 32540/05 (ECHR 1 April 2010).

86. *Markovic and Others v. Italy* App no 1398/03 (ECHR 14 December 2006).

87. *Güzelyurtlu* (n 46); *Hanan* (n 1); *Georgia* (n 14).

88. If the special features relied on in *Hanan* may be applied to other Contracting States intervening militarily abroad, it remains to be seen however whether the ECtHR will indeed apply them to other future similar cases. This is further discussed below (s 2.3.2).

89. J-M Henckaerts and L Doswald-Beck, ‘ICRC Customary International Humanitarian Law’ (ICRC/Cambridge University Press, 2009) Rule 158.

for international crimes' and affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.⁹⁰ Hence, all European States are bound by the IHL obligation to investigate incidents concerning the individual criminal responsibility of members of their armed forces for a potential war crime (and they also have to investigate other war crimes over which they have jurisdiction), and they are also obliged under their domestic law to investigate potential war crimes. In addition, as the ECtHR points out,⁹¹ it is a common practice for troop-contributing States in UN-authorized military missions to retain exclusive jurisdiction over the personnel they contribute. Under the three special features relied on in *Hanan*, Contracting States will thus almost inevitably have to conduct criminal investigations (at least when it comes to potential serious violations of IHL entailing a violation of the right to life) in application of Article 2 in its procedural aspect, even if the substantive aspect of this provision does not apply. In other terms, even though victims of airstrikes are not protected from an unlawful taking of their lives under Article 2, Contracting States will have to abide by their procedural duty to investigate those alleged unlawful killings.

This might significantly alter the way hostilities are conducted and impose on States a particular scrutiny regarding their military actions. In fact, the procedural obligation under Article 2 presents a significant challenge and burden on European States involved in extraterritorial military operations, to effectively, objectively and factually establish, investigate and assess the legality of uses of lethal force by their armed forces. This requires, inter alia, an extensive institutional support, the adoption and enforcement of adequate legal and judicial framework, proper logistic and material arrangements to guarantee an independent, effective and prompt investigation (in a context of conflict).⁹² Indirectly and on a long-term basis, this can therefore also influence the legal agreements governing a force's presence abroad, how many troops are deployed and which kind of agents, where and how they are stationed, etc., in order for States to face their upcoming procedural scrutiny. Nonetheless, the Strasbourg Court has shown willingness to make concessions for the unusual circumstances arising in extraterritorial military operations in order not to impose unrealistic burdens on States.⁹³ In particular, the Court noted in its *Al-Skeini* and *Jaloud* judgments that the procedural duty under Article 2 must be applied realistically and more flexibly in the context of an armed conflict due to the practical problems caused to the investigating authorities located in a foreign and hostile region.⁹⁴ This was reiterated in *Hanan*, where the Court considered that 'the challenges and constraints for the investigation authorities stemming from the fact that the deaths occurred in active hostilities in an (extraterritorial) armed conflict pertained to the investigation as a whole and continued to influence the feasibility of the investigative measures that could be

90. The Rome Statute (n 58) preamble; see also its Art 1: 'An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.'

91. *Hanan* (n 1) para 138.

92. Wallace (n 30) 73–109.

93. *Ibid* 110–140.

94. *Al-Skeini* (n 8) paras 163–68; *Jaloud v. The Netherlands* App no 47708/08 (ECHR 20 November 2014), para 186.

undertaken throughout the investigation, including by the civilian prosecution authorities in Germany'.⁹⁵

Furthermore, the finding in *Hanan* that German prosecution authorities must effectively investigate the Kunduz airstrike is particularly interesting considering that German armed forces were deployed in Afghanistan in the context of an extraterritorial military operation within the framework of a mandate given by a resolution of the UN Security Council. The ECtHR has always been cautious when confronted with situations involving the participation of Contracting States in international military NATO or UN operations. This is exemplified not only by *Banković*, but also by the judgments *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* in which the Court pointed out that '[s]ince operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations'.⁹⁶ Hence, to decide that even when acting as part of a UN mandate abroad, Contracting States must investigate unlawful uses of lethal force by their armed forces, is to set constraints to military operations which were at the limit of the ECHR's reach until now. It represents an important milestone when compared to *Banković* for example, in which airstrikes remained completely out of any fundamental rights protection under the ECHR.⁹⁷ Yet, this also meant for the Court to achieve a delicate balance not to affect Contracting States' willingness to engage in extraterritorial military operations within the framework of a UN mandate. The ECtHR did so by retaining a discretionary control on the extraterritorial application of Article 2 in its procedural limb. This will be further explained below in Section 2.3.2.

Accordingly, even in scenarios in which the conduct of hostilities itself is not covered by Article 2 in its substantive limb, the extraterritorial application of the procedural duty under the same provision might create a strong impetus for States to show more caution in the conduct of hostilities, and might thus eventually influence the way hostilities themselves are conducted. In fact, should the special features relied on in *Hanan* be met in a given case (or other relevant features according to the Court),⁹⁸ thereby triggering the procedural duty under Article 2, States would have to investigate in an effective manner whenever faced with a credible allegation that one of their own organs or agents unlawfully killed someone. To prevent this, States might then refrain from operations that might indeed end up on unlawful killings, even when these offences were not committed under the State's jurisdiction. Thus, while the Court considers that it is not in the best position to assess the conduct of hostilities and to decide whether persons have been unlawfully killed as part of active hostilities

95. *Hanan* (n 1) para 200. In *Hanan*, eventually, the Court decided that Germany had a certain degree of latitude seeing the extraordinary circumstances. See further Milanovic, 'Extraterritorial Investigations in *Hanan v. Germany*; Extraterritorial Assassinations in New Interstate Claim Filed by Ukraine against Russia' (n 4).

96. *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* App nos 71412/01 and 78166/01 (ECHR 2 May 2007), para 149.

97. *Bouhon* (n 4).

98. See s 2.4.2.

(especially when conducted under the auspice of the UN), as a compromise, it nonetheless decides that it is competent to assess the effectiveness of the investigation that States must conduct into these potentially unlawful killings. Alternatively thus, the Convention protects victims of an aerial bombardment, yet only to a limited extent: procedurally, and *a posteriori*.

Nonetheless, it is difficult to conceive that a Contracting State has a procedural obligation to investigate a loss of life which in itself is detached from any substantive violation that the State can be held responsible for, considering in particular that the procedural duty was implemented by the ECtHR to make the substantive prohibition of arbitrary killing by the Contracting States' agents more effective.⁹⁹ The clear dissociation that is operated by the Court between the substantive and the procedural obligations arising from Article 2 – i.e. a Contracting State owing the latter without the former – is dubious. This is a point also put forward by the dissenting judges in *Hanan*. They argue that such dissociation creates significant delineation problems to assess the potential limits of the procedural duty in terms of the underlying act or omission causing loss of life: 'if neither jurisdiction nor attribution is required, subject to "any special circumstances", would the procedural obligation be capable of arising in relation to loss of life caused by associated militias [...] or by the act of allies [...]'¹⁰⁰ for instance? Besides, the procedural duty to investigate unlawful uses of lethal force is a corollary of the substantive duty to refrain from unlawful deprivations of life, and is thereby derivative by nature.¹⁰¹ In other terms, it is because Contracting States have an obligation to refrain from unlawfully killing individuals that they consequently have an obligation to investigate, should it be alleged that unlawful killings occurred, in order to assess the legality of use of lethal force.¹⁰² In this regard, it has rightly been pointed out by Judge Wojtyczek that '[...] the procedural aspect is not detachable from the acts constitutive of a violation of the substantive limb of [Article 2]. The obligation to carry out an investigation is separate from, but instrumental and subsidiary to, the substantive protection. The procedural obligations are an instrument for implementation of the substantive obligations.'¹⁰³ The procedural obligation to investigate under Article 2 is a positive obligation which imposes on Contracting States to adopt reasonable measures – i.e. to conduct an effective investigation – in order to protect persons falling within their jurisdiction from unlawful uses of force, and thereby to protect their substantive right to life. By imposing on national authorities to conduct an effective investigation into alleged unlawful killings, the Strasbourg

99. *McCann and Others v. the United Kingdom* App no 18984/91 (ECHR 27 September 1995), para 161: '[...] a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. [...] [T]here should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.' See further J Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21 *European Journal of International Law* 701.

100. *Hanan* (n 1) partly dissenting opinion of Judges Grozev, Ranzoni and Eicke, para 16.

101. SAG Talmon, 'The Procedural Obligation under Article 2 ECHR to Investigate and Cooperate with Investigations of Unlawful Killings in a Cross-Border Context' (2019) 13 *Diritti Umani e Diritto Internazionale* 99.

102. *Oğur v. Turkey* App no 21594/93 (ECHR 20 May 1999), para 88; *Kaya v. Turkey* App no 22729/93 (ECHR 19 February 1998), para 87.

103. *Mocanu and others v. Romania* App nos 10865/09 45886/07 32431/08 (ECHR 17 September 2014) (partly dissenting opinion of Judge Wojtyczek, para 9.

Court seeks to make it possible to prosecute or initiate legal proceedings that are necessary in the event of a violation of the Convention.¹⁰⁴ Accordingly, if the procedural limb of Article 2 were genuinely independent of the substantive limb, its protection seems theoretical and emptied of its substance since it would supposedly protect a right to life that is said not to apply. In fact, if the purpose of the investigation is to assess the lawfulness of the use of force and thereby allow individuals and their relatives to seek justice, however the investigation is conducted – and thus, even if it is effective – what could potentially be its result if not that anyway the right to life in its substantive aspect has not been violated ... since it is not applicable?

The root of this discrepancy does not lay with the extraterritorial application of the procedural duty under Article 2, which is important for victims, but rather with the (too) restrictive extraterritorial application of the substantive obligation under Article 2 and the reluctance of the Strasbourg Court to apply it to massive airstrikes.¹⁰⁵ In the view of the present author, it would be more coherent for the Court to either strictly stick to *Banković* and decide that no extraterritorial jurisdictional link may be triggered, at all, in the context of airstrikes, even for the procedural duty under Article 2; or to decide that the whole incident is placed under the jurisdiction of the Contracting State, its investigation duty being an indicative factor of the control the State is exercising over the situation as a whole, including over the alleged unlawful killings. These options would avoid the situation falling short of absurdity where a duty to investigate an unlawful killing exists without any substantive obligation not to unlawfully kill. The incoherent approach adopted by the Court in *Hanan* translates its strategy to dodge the question of extraterritorial jurisdiction and to avoid repositioning itself on *Banković*. The Court indeed emphasized that ‘it does not follow from the mere establishment of a jurisdictional link in relation to the procedural obligation under Article 2 that the substantive act falls within the jurisdiction of the Contracting State’.¹⁰⁶

2.4.2 The ‘special features’ test: a tailored jurisdictional link

A closer look at the reasoning and the ‘special features’ relied on by the ECtHR in *Hanan* to conclude in the existence of a jurisdictional link triggering Germany’s procedural obligation under Article 2, discloses that the Court actually retains a discretionary control over the delineation of its new jurisdictional threshold.

First, the Court found that the case *Hanan* presented ‘significant’ differences with the case *Güzelyurtlu* and decided not to stop its jurisdictional analysis on the mere existence of a criminal investigation instituted by German authorities,¹⁰⁷ whereas in *Güzelyurtlu* this finding alone would have sufficed.¹⁰⁸ In the view of the German Government and the intervening governments (the United Kingdom, France, Norway, Denmark and Sweden), finding that opening an investigation at the domestic level concerning facts that occurred within the framework of a UN military operation abroad suffices in itself to establish a jurisdictional link would put into question the *Behrami* and *Banković* jurisprudence. In particular, they contended that this could risk ‘resulting

104. J-F Akandji-Kombe, ‘Les obligations positives en vertu de la Convention européenne des Droits de l’Homme’ 76, 34.

105. Milanovic, ‘Georgia v. Russia No. 2: The European Court’s Resurrection of Bankovic in the Contexts of Chaos’ (n 13).

106. *Hanan* (n 1) para 143.

107. *Hanan* (n 1) para 135.

108. *Güzelyurtlu* (n 46) paras 190; 196.

in a universal application of the Convention' and thereby affect 'States' willingness and ability to engage in multilateral military operations abroad and could have a chilling effect on States instituting investigations'.¹⁰⁹ According to the governments, IHL is the *lex specialis* governing situations of armed conflict (the ECHR being the *lex generalis*) and there is no general duty under IHL to investigate each and every death occurring in an armed conflict (accordingly, the ECHR could not impose such a duty).¹¹⁰ Echoing these concerns, the Strasbourg Court ruled that the principle that the institution of a domestic criminal investigation concerning deaths 'is, *in itself* sufficient to establish a jurisdictional link [...] does not apply to the factual scenario at issue' in *Hanan* because 'the deaths investigated by the German prosecution authorities had occurred in the context of an extraterritorial military operation within the framework of a mandate given by a resolution of the United Nations Security Council'.¹¹¹ This avoids 'excessively broadening the scope of application of the Convention' and creating a 'chilling effect on instituting investigations at the domestic level'.¹¹²

Hence, the Court is very timid in recognizing the extraterritorial applicability of the Convention to military operations conducted under the auspice of a UN mandate and simply ruled out that the mere institution of an investigation suffices in these circumstances.¹¹³ The Court prefers to stick to its *Behrami* position that the Convention cannot be interpreted in such a way as to place the actions of Contracting States covered by UN Security Council resolutions under the control of the ECtHR at risk of interfering with an essential mission of the UN. If extraterritorial jurisdiction was still established in *Hanan*, yet under another jurisdictional threshold, the case thus reveals that the Court sought to balance conflicting interests: bringing military operations conducted within the framework of a UN mandate under the cover of the ECHR, without affecting States' willingness to engage in such operations.¹¹⁴ However, the reasoning of the Court is not convincing.

First, it is difficult to conceive why the jurisdictional threshold of the – mere – institution of a criminal investigation would have a 'chilling effect' on the institution of investigations when States are acting as part of UN military operations, but not when they are acting outside such framework. Doesn't such chilling 'effect' equally exist in respect of extraterritorial military operations outside the UN context? The same can be said about the risk of a universal application of the Convention.¹¹⁵

109. *Hanan* (n 1) para 125.

110. *Ibid.*

111. *Hanan* (n 1) para 135.

112. *Ibid.*

113. On the question of the responsibility, under the ECHR system, of States acting in execution of a Security Council involving use of force as part of a UN peacekeeping operation and imposing economic sanctions, see e.g. L-A Sicilianos, 'UN Security Council, State Responsibility, and the European Court of Human Rights: Towards an Integrated Approach? – Oxford Scholarship' in J Motoc and A Van Aaken (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018).

114. *Bouhon* (n 4).

115. As such, it is difficult to see the role the distinguishing criterion of 'military operations conducted under the auspice of the United Nations' as relied on by the Court, plays on the jurisdictional analysis. Rather, it seems that the role of such a criterion would be confined to the preliminary question of attribution. As has already been established by the Court in its jurisprudence, military operations conducted within the framework of a UN mandate specifically raise the issue of whether such operations are attributable to the UN or to the contributing States. In *Hanan*, it seems relatively straightforward that the UN had neither effective control nor 'ultimate

In addition, one can even ask whether the reference to a potential ‘chilling effect’ means that the ECtHR is backtracking, more generally, from the idea that the institution of criminal investigations at the domestic level can, as such, trigger an extraterritorial jurisdiction for the purpose of the procedural duty existing under Article 2 ECHR, including beyond the military UN context.

Secondly, the distinguishing criterion seems rooted in the Court’s attempt to appease States and seems unfit to legally influence the establishment of jurisdiction. There is indeed no apparent convincing reason – or at the very least it has not been explained – for the separate treatment of UN military operations abroad and other extraterritorial military operations, for instance as part of a coalition of the willing, from a (human rights) jurisdictional perspective. After all, isn’t the purpose of jurisdiction, as the threshold criterion for the application of (universal) human rights, to identify when a pre-existing relationship between a right-holder and a duty-bearer must be normatively captured by human rights?¹¹⁶ Jurisdiction should be understood as an ‘all-or-nothing’ condition for triggering human rights and duties and not as a matter of degree: either there is a pre-existing relationship between a State and an individual that is human-rights relevant and that should be normatively regulated by fundamental rights, or there is none. What may then be ‘divided and tailored’ are the ensuing obligations, but not jurisdiction per se.¹¹⁷ Different exercises of jurisdiction entail different levels of human rights obligations and depending on the relevant circumstances of each situation, the scope of protection that needs to be ensured by the State will depend on the nature and intensity of its interaction with the concerned individual.¹¹⁸ Against this background, how can the relationship created between a State instituting an

authority’ over the airstrike conducted solely and independently by German military agents. See for instance *Al-Jedda v. United Kingdom* App no 27021/08 (ECHR 7 July 2011); *Behrami* (n 96). See further P Klein, ‘Responsabilité pour les faits Commis dans le Cadre d’Opérations de Paix et Étendue du Pouvoir de Contrôle de la Cour Européenne des Droits de l’Homme: Quelques Considérations Critiques sur l’Arrêt *Behrami* et *Saramati*’ (2007) 53 *Annuaire Français de Droit International* 55.

116. S Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to International Legal Theory’ (2012) 25 *Leiden Journal of International Law* 857, 860; 863; Moreno-Lax (n 63) 396–97; L Raible, ‘Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship’ (2018) 31 *Leiden Journal of International Law* 315, 325.

117. The author of the present contribution does not refer here to the ‘all-or-nothing approach’ advocated by the ECtHR in *Banković and Others v. Belgium* (n 6) para 75 in which it decided that the Convention rights and their correlative obligations could not be ‘tailored and divided’ in accordance with the particular circumstances of each extraterritorial act. However, in *Al-Skeini v. UK* (n 8) the Court overruled this critical aspect, finding in para 137 that ‘whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be “divided and tailored”’. The present author fully agrees with the position adopted by the Court in *Al-Skeini* – and reiterated constantly since then – and considers that the ECHR’s rights and obligations can (and must) be divided and tailored depending on the level of control exercised by the Contracting State, and thus, on the jurisdictional link.

118. O Ben-Naftali and Y Shany, ‘Living in Denial: The Application of Human Rights in the Occupied Territories’ (2003) 37 *ISR. L. REV* 17, 64; Besson (n 116) 878–79; Moreno-Lax (n 23) 278; Mallory (n 20).

investigation into an extraterritorial death and the victim's relatives be, on the one hand, human rights relevant under Article 2 when the death investigated occurred in the context of a military operation carried out by a State, but not when the death had occurred in the context of a UN military operation? Is the right to have an effective investigation into an alleged unlawful killing not at stake anymore, or not deserving of protection despite the exact same risks of breach? Put differently, it is difficult to conceive why Contracting States acting under the auspice of the UN – which purposes are supposed to be, among others, to promote and encourage respect for human rights and be a centre for harmonizing the actions of nations in the attainment of these ends –¹¹⁹ are less likely to be subject to the judicial scrutiny of the ECtHR than Contracting States acting outside such military operations. Such position almost appears like a blank check given to States to commit human rights violations provided they act within a specific legal framework.

Secondly, having stated that the mere institution of proceedings by Germany authorities does not suffice, the Court in *Hanan* resorted to the 'special features' test. As a reminder, the Court held that the case presented three special features which allowed for the establishment of a jurisdictional link: (1) the fact that Germany was obliged under customary IHL to investigate the airstrike; (2) the fact that the Afghan authorities were legally prevented from instituting themselves a criminal investigation; and (3) the fact that the German prosecution authorities were also obliged under domestic law to institute a criminal investigation. The ECtHR determined in *Hanan* that these 'special features' *in their combination* triggered the existence of a jurisdictional link.¹²⁰ The Court insists that the content of these 'special features' has to be determined on a case-by-case basis and cannot be defined in *abstracto*.¹²¹ Through the Court's analysis (and the same can be said about *Georgia v. Russia II*) it is impossible to know how important any of these factors is individually and how they would translate to other contexts.¹²² For instance, it has been pointed out that the feature of territorial control was taken into consideration in *Güzelyurtlu* and in *Georgia v. Russia II* but did not seem to matter in *Hanan*.¹²³ It was explained above that the first and third features in *Hanan* (i.e. the obligation to investigate under both IHL and domestic law) are not specific to Germany and could be easily applicable to other Contracting States as well (it was the case regarding Russia for instance in *Georgia v. Russia II*),¹²⁴ while the second feature of exclusive jurisdiction is a common practice for troop-contributing States in UN-authorized military missions.¹²⁵ Nonetheless, the Court does not specify which feature(s) is (are) essential to conclude to the existence of a jurisdictional link, and thereby allows itself to retain a discretionary control on its new jurisdictional model. On the one hand, the fact that the special features relied on in *Hanan* are so common among the majority of Contracting States (so as not to be 'special' anymore)¹²⁶ questions whether the Court intends to easily transpose them to

119. The Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945, 1 *UNTS* VXi) Article 1, paras 3–4.

120. *Hanan* (n 1) para 142.

121. *Hanan* (n 1) para 136.

122. Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (n 13).

123. Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (n 20).

124. See s 2.4.1.

125. See s 2.4.1; *Hanan* (n 1) para 138.

126. *Hanan* (n 1) partly dissenting opinion of Judges Grozev, Ranzoni and Eicke, para 24.

future similar scenarios. Such settled threshold would in turn create a genuine and relatively clear jurisdictional theory for the purpose of Article 2 in its procedural limb. On the other hand, the discretionary control of the Court over the content of each special feature questions whether these same features would in any case suffice in other similar scenarios, without the circumstances particular to the situation in Afghanistan. It could well be that in another case, these features are not relevant anymore according to the Court. Thus, while the Court was willing to open the door for violation claims of Article 2 in its procedural limb as part of extraterritorial military operations within the framework of a UN mandate, it retains a strict control on who gets in, in which context and according to which special circumstances.¹²⁷

In this regard, the dissenting judges clearly supported a – much – more restrictive approach than the one followed by the majority and would have declared the case inadmissible for lack of the required jurisdictional link. Among others, the dissenting judges point out the difficulty in discerning what makes the three special features as identified by the majority so ‘special’ as to justify the establishment of a jurisdictional link.¹²⁸ After arguing that the obligations to investigate under IHL are common to the vast majority of Contracting States to the ECHR, the dissenting judges indicate in respect of the second feature – also very common – of ‘exclusive jurisdiction provision’ legally preventing the Afghan authorities from themselves instituting a criminal investigation, that ‘in any event [...] there may be a host of other potential “legal reasons” preventing an effective criminal investigation against the perpetrators of acts or omissions leading to the loss of life, not least deriving from the sovereign equality of nations – which may limit the ability to investigate to situations where the suspect returns to the “jurisdiction” of the state in which the act or omission took place’.¹²⁹ In addition, the dissenting opinion raises a very interesting point questioning how there could be any ‘situation of impunity’ at all should the troop-contributing European States not exercise their domestic criminal jurisdiction since, after all, for the crimes of the gravity alleged, the respondent State is ultimately subject to the jurisdiction of the International Criminal Court.¹³⁰ Finally, the dissenting judges contend that the obligation to investigate under domestic law by virtue of the State’s ratification of the Rome Statute is again a very common feature among ECHR’s Contracting States and that ‘in so far as States have not (yet) adopted such a domestic law obligation to institute criminal proceedings, they may well be discouraged from doing so if this is the last “missing link” necessary to trigger a jurisdictional link’.¹³¹

Accordingly, the jurisdictional test of ‘special features’ is etched with a significant latitude of the ECtHR which, once again, refrains from providing a general and clear non-arbitrary jurisdictional threshold that would go beyond a casuistic approach, rather favoured by its traditional factual models. It will have to be seen how the jurisdictional test of ‘special features’ as used in *Hanan* will be applied – if at all – to other cases. In this respect, the dissenting opinion finds that this approach tailors jurisdiction beyond the limits of what can be agreed with so that ‘preserving ‘jurisdiction’ as a tenable concept [...] will entail a haphazard application of the concept, dependent on unclear legal considerations’ and that ‘legal certainty requires, inter alia, that the engagement of

127. Metha (n 4).

128. *Hanan* (n 1) partly dissenting opinion of Judges Grozev, Ranzoni and Eicke, paras 19–24.

129. *Ibid* at para 22.

130. *Ibid* at para 22.

131. *Ibid* at para 23.

obligations under the Convention be reasonably foreseeable for the Contracting Parties'.¹³²

Finally, the Court's reluctance in formulating a general theory of jurisdiction, for the purpose of the procedural duty under Article 2, may also draw from its decision not to pursue the alternative model of jurisdiction suggested by the applicant. Mr. Hanan submitted that Germany's jurisdiction was established because it was able to affect the right to life of his sons who were killed in the airstrike.¹³³ The applicant is here referring to the 'control over rights' or 'control over the impacts/effects' doctrine, suggested as an alternative jurisdictional model.¹³⁴ Under this model, jurisdiction ought to be established when States are effectively controlling the enjoyment of the rights of individuals through their activities (or ones over which they exert effective control), acts or omissions which adversely impact fundamental rights of persons abroad. As was illustrated, the HRC expressly adopted this functional approach to jurisdiction in its General Comment no. 36 regarding the right to life, in which it stated that persons over whose enjoyment of the right to life a State exercises power or effective control, including persons located abroad whose right to life is impacted by its military or other activities in a direct and reasonably foreseeable manner, fall within a State's jurisdiction.¹³⁵ In the same vein, the IACtHR held that a jurisdictional link can be found 'when the State of origin exercises effective control over the activities carried out that caused the harm and consequent violation of human rights'.¹³⁶

There is indeed no doubt that Germany was exercising its extraterritorial jurisdiction in Kunduz, under this alternative model: One particular airstrike, intended to target and kill individuals, ordered by a German commander in a context of armed conflict is indicative of an effective (and exclusive) control of Germany over the right to life of the persons hit by the aerial bombardment at the time of interference with their rights. In its case law to date, the ECtHR has not yet explicitly validated the 'effective control over rights' doctrine, contrary to the current positions of the HRC and the IACtHR. However, as it was demonstrated above,¹³⁷ the Strasbourg Court did find jurisdiction to be established in certain cases where the concerned State did not exert factual power over a foreign territory or over a person abroad, but directly interfered with the rights of persons located abroad and thereby exercised effective control over these rights. For instance, the Court found jurisdiction to be established in cases concerning the transnational monitoring of private telecommunications and mass surveillance regimes – yet without entering, at all, into jurisdiction discussions thereby avoiding to explain a general theory of jurisdiction relating to human rights effects caused by States' actions.¹³⁸ In a case like *Hanan*, it was

132. *Hanan* (n 1) partly dissenting opinion of Judges Grozev, Ranzoni and Eicke, paras 18â 21.

133. *Hanan* (n 1) para 120.

134. See s 2.3.1.

135. HRC General Comment no 36 (n 75); see also HRC *AS DI OI and GD v. Italy* (n 77).

136. Advisory Opinion OC-23/17 (n 78) para 104h; see also the African Commission on Human and Peoples' Rights, General Comment no 3 on The African Charter on Human and Peoples' Rights: The Right to Life (Art 4): 'A State shall respect the right to life of individuals outside its territory [...]. The nature of these obligations depends for instance on the extent that the State has jurisdiction or otherwise exercises effective authority, power, or control over either the perpetrator or the victim (or the victim's rights) or exercises effective control over the territory on which the victim's rights are affected, or whether the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life', point B, para 14.

137. See s 2.4.1.

138. *Weber* (n 69) para 72; *Big Brother Watch* (n 70) para 272; *Centrum För Rättvisa* (n 70).

therefore hoped for that the Court would seize the opportunity to expressly validate and elaborate on the control over rights doctrine for the establishment of extraterritorial jurisdiction.¹³⁹ Nonetheless, the ECtHR did not respond to the applicant's argument, thereby putting itself firmly against the overarching and expansive trend in international jurisprudence.

In conclusion, the jurisdictional tests of 'the institution of an investigation' and 'special features' introduced recently by the ECtHR in its jurisprudence, in relation to the extraterritorial application of the procedural obligation under Article 2, bring mixed and uncertain outcomes. On the one hand, these new jurisdictional tests may be welcomed as positive developments within the jurisprudence of the ECtHR for they conceive extraterritorial jurisdiction beyond factual terms. Moreover, these tests, and in particular the special features relied on in *Hanan*, may have major implications for international military operations carried out abroad by ECHR Member States, including when conducted within the framework of a UN mandate. Despite the non-applicability of Article 2 in its substantive limb to massive extraterritorial military operations such as airstrikes, the procedural duty under Article 2 might eventually influence and challenge the conduct of hostilities itself. On the other hand, the dissociation thereby introduced between the applicability of the procedural and the substantive obligations of Article 2, in a way that a State may owe the former without the latter, raises fundamental coherence issues regarding the ECHR's right to life protection. In addition, the Strasbourg Court retains a strict control on these new thresholds by – incongruously – excluding the 'institution of an investigation' test to extraterritorial UN military operations, by keeping an – arbitrary and casuistic – hand on the content of the 'special features' that will be deemed relevant in each given case, and by strictly confining the thresholds to the procedural obligation under Article 2 only. Hence, whether the decision *Hanan* and the jurisdictional link recognized therein might serve as a jurisdictional threshold at all and as a milestone in the Strasbourg Court's jurisprudence remains to be seen.

3 CONCLUSION

The case *Hanan v. Germany* confronted the ECtHR with the question of whether Germany must carry out effective investigations in accordance with Article 2 ECHR, into alleged unlawful killings – here the deaths of civilians – which occurred as part of an airstrike carried out by its armed forces in Kunduz within the framework of a UN Security Council resolution. The Court ruled that three special features of the case established an extraterritorial jurisdictional link capable of triggering Germany's procedural duty under Article 2: (a) the fact that Germany was obliged under IHL to investigate the airstrike; (b) the fact that the Afghan authorities were legally prevented from instituting themselves a criminal investigation; and (c) the fact that Germany was obliged under domestic law to institute a criminal investigation. Eventually, the Court recognized a wide latitude to German authorities and ruled that the investigation they conducted into the airstrike was effective.

The jurisdictional thresholds of the 'institution of a criminal investigation' and of 'special features' recently introduced by the ECtHR in its jurisprudence for the purpose of triggering the procedural duty under Article 2, and their particular application in the case *Hanan*, can be seen as a mitigating solution to the strict factual approach to

139. Çali (n 67); Meloni (n 4).

jurisdiction repeatedly adopted by the Court when it comes to the application of Article 2 in its substantive limb to massive extraterritorial military operations, such as airstrikes. The Court considers that airstrikes alone are not sufficient for triggering jurisdiction under the territorial model, nor do they constitute sufficient control over individuals through the personal model. The Court rather denies airstrikes' victims a protection against an unlawful deprivation of their lives under the Convention, concerned with the geopolitical difficulties arising from armed conflicts and from the interaction between the IHL and ECHR systems. Yet, without reversing this restrictive jurisprudence, the ECtHR in *Hanan* decided that the procedural duty under Article 2 can, by contrast, well apply in the context of extraterritorial airstrikes. The Court rather resorted to the 'institution of an investigation' and the 'special features' jurisdictional thresholds. This constitutes an important achievement that potentially extends the standards of protection under the ECHR to situations where Contracting States are carrying out military operations in armed conflicts, even within the framework of a UN mandate. States may have to investigate alleged war crimes even though these did not substantially fall under their jurisdiction.

Nonetheless, by refusing to reconsider *Banković* and its very strict jurisdictional approach in relation to the substantive limb of Article 2, the Court creates an incoherent dissociation between the applicability of the substantive and the procedural duties under Article 2, which seriously puts into question the objective and purpose of the procedural obligation to investigate alleged unlawful uses of lethal force. In addition, the Court is very cautious not to formulate general theories of jurisdiction that would expand the application of the Convention to most military operations carried out abroad within the framework of a UN Security Council mandate. The Court excludes the jurisdictional threshold of the 'institution of an investigation' when the investigated deaths occurred within the framework of a UN mandate, while the 'special features' threshold seems completely left to the discretionary appreciation of the Court in each case – thereby vanishing as a threshold at all. Hence, although the *Hanan* judgment certainly does have the potential to expand, to some extent, the ECHR to extraterritorial military operations – that were, until then, not subject to the Court's judicial scrutiny – it is premature at this stage to say whether this trend will further be followed and generalized by the Court in similar scenarios.