ECHR, Hanan v. Germany

The European Court of Human Rights (ECHR) rejected a complaint by Afghan citizen Abdul Hanan and ruled that Germany thoroughly investigated a 2009 NATO bombing in Afghanistan that was ordered by a German commander and killed dozens of people. The judgment allows to discuss important aspects of the obligation to investigate in case of apparent IHL violations, the law of targeting and the relationship between IHL and International Human Rights Law.

Proceedings concerning the same events had previously been brought before the German courts. These are reflected in a separate case of this Casebook, see: Afghanistan, Bombing a civilian truck.

Acknowledgments

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GRAND CHAMBER CASE OF HANAN V. GERMANY (Application no. 4871/16) JUDGMENT STRASBOURG 16 FEBRUARY 2021

[Source: Hanan v. Germany, European Court of Human Rights, Grand Chamber, Application no. 4871/16, Judgment, Strasbourg, 16 February 2021; references partially omitted. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-208279%22]}]

[...]

PROCEDURE

[...]

3. The applicant alleged that the respondent State [Germany] had not conducted an effective investigation, as required by the procedural limb of Article 2 of the Convention, into an air strike of 4 September 2009 near Kunduz, Afghanistan, that had killed, inter alios, the applicant's two sons. […]

THE FACTS

I. THE BACKGROUND TO THE CASE

[...]

12. In the beginning of December 2001, twenty-five prominent Afghan leaders met in Bonn under the auspices of the United Nations to decide on a plan for governing the country. They set up an Afghan Interim Authority and chose its leader. In the agreement of 5 December 2001 […], the participants at the conference requested the assistance of the international community in maintaining security in Afghanistan and envisaged the establishment of an International Security Assistance Force ("ISAF").

13. On 20 December 2001 the United Nations Security Council authorised the establishment of ISAF. ISAF was to assist the Afghan Interim Authority in maintaining security in Kabul and surrounding areas and to enable the Interim Authority and the United Nations to operate in a safe environment. […]

[…].

15. On 11 August 2003 NATO assumed command of ISAF and subsequently ISAF's mission was expanded beyond the Kabul area. By the end of 2006 ISAF was responsible for all of Afghanistan.

16. After NATO assumed command of ISAF, ISAF Headquarters ("ISAF HQ") and the Commander of ISAF ("COMISAF") were placed under the command of the NATO Allied Joint Force Command and of the NATO Supreme Allied Commander Europe. Under ISAF HQ were five Regional Commands ("RCs"), which coordinated all regional civil-military activities conducted by the military elements of the Provincial Reconstruction Teams ("PRTs") in their respective areas of responsibility. While ISAF HQ / COMISAF retained operational control, the PRTs were placed under the command – in the form of tactical control – of the respective Regional Command.

17. German troops were deployed under RC North, which was led by Germany. At the relevant time, the Commander of RC North was the German Brigadier-General V. PRT Kunduz, which was part of RC North, was commanded by the German Colonel K.

18. Parallel to the command structure of ISAF, disciplinary and administrative command and control remained with the respective troop-contributing States […]. Therefore, the deployed troops in PRT Kunduz were in that regard under the command and control of Colonel K., who himself was under the command and control of Brigadier- General V. […]

[…]

20. After April 2009 […], the troops had had to expect attacks whenever they left their base.

[...]

II. THE CIRCUMSTANCES OF THE CASE

1. The air strike of 4 September 2009

21. On 3 September 2009 insurgents hijacked two fuel tankers, killing one of the two drivers. Later that day the fuel tankers became immobilised on a sand bank in the Kunduz River, around seven kilometres from the base of PRT Kunduz. To mobilise the fuel tankers again, the insurgents enlisted the population of nearby villages to siphon off (some of) the fuel from them.

22. At around 8 p.m. an informant tipped off PRT Kunduz about the hijacking of the fuel tankers. At around 9 p.m. PRT Kunduz was formally informed of the event. At 9.55 p.m. an aircraft previously tasked with another operation was instructed to locate the fuel tankers. At around 12.15 a.m. the tankers were spotted by the surveillance aircraft. The video footage transmitted from the aircraft to the command centre showed the two tankers as well as several vehicles next to the bank and numerous persons. In the course of the night, Captain X. – who was present at the command centre along with Staff Sergeants W. and Y. – repeatedly went to see the interpreter on duty in order to obtain direct information from the informant and/or to transmit questions from Colonel K. to the informant, who had first informed PRT Kunduz of the hijacking. At around 12.30 a.m. the informant reported the partial emptying of the tankers by the armed insurgents, as well as the absence of civilians at the sand bank. The informant's description corresponded to the conditions that could be discerned on the video footage. At 12.48 a.m., the surveillance aircraft ran low on fuel and returned to its base. […] At around 1 a.m., Colonel K. declared "troops in contact", even though there had been no enemy contact in the literal sense of the term, and two United States Air Force (USAF) F-15 aircraft were ordered to the riverbank, where the fuel tankers were still stuck and continued to be siphoned off.

23. The F-15 aircraft reached the air space above the sand bank at around 1.10 a.m. Discussions between the pilots and the command centre ensued about the use of 500-pound or 2,000-pound bombs and the potential damage to civilian objects near the sand bank. In response to Colonel K.'s repeated queries, the informant confirmed that only insurgents and no civilians were present near the sand bank. After refusing suggestions by the pilots to make a "show of force" by flying at low altitude over the tankers to disperse the

people on the ground, Colonel K. gave the order to bomb the still immobilised fuel tankers. Two 500-pound bombs were dropped at 1.49 a.m.

24. A first post-attack reconnaissance was performed by the USAF F-15 aircraft immediately after their air strike. In addition, an unmanned aircraft inspected the site of the air strike at around 8 a.m. the following morning.

25. The air strike destroyed the two fuel tankers and killed, inter alios, the applicant's two sons: Abdul Bayan and Nesarullah. They were 12 and 8 years old, respectively. The total number of victims of the air strike has never been established […]. The German Government made ex gratia payments of 5,000 United States dollars per person to the families of 91 killed individuals and to eleven injured persons.

2. Investigations into the air strike

1. On-site investigation

26. Later on that same morning, after being informed of the air strike, Brigadier-General V. sent an investigation team of the German military police (Feldjäger) from Masar-i-Sharif to Kunduz to support PRT Kunduz in the investigation into the air strike.

27. At 12.13 p.m. on the same day, a team from PRT Kunduz departed for the site of the air strike, which it reached at 12.34 p.m. No members of the team from Masar-i-Sharif, which had left from their base at 12.24 p.m. and had not yet arrived at the base of PRT Kunduz, participated in the on-site visit. The team from PRT Kunduz came across an extensively altered site, with only a few destroyed cars and no bodies. During the visit, the team, who were afforded protection by some one hundred members of the Afghan security forces, came under attack, but managed to continue investigating after returning fire. After the team's return to the base at 2.23 p.m., an evaluation meeting was held from 2.45 p.m. onwards, which involved Colonel K. and members of the military police team deployed from Masar-i-Sharif, who had arrived in the meantime.

28. On 4 and 5 September 2009, members of PRT Kunduz, the military police and the ISAF "Initial Action Team" […] visited hospitals and villages in the area and interviewed several persons regarding the air strike. Colonel K. was partially involved in some interviews and was kept up to date regarding the investigation.

29. The military police submitted their report to Brigadier-General V. on 9 September 2009.

2. Investigation by the German public prosecution authorities

30. On the day of the air strike, the chief legal officer of the armed forces informed the public prosecutor's office […]. After further preparatory work […], on 5 November 2009 the Dresden Public Prosecutor General requested the office of the Federal Prosecutor General to review the possibility of taking over the prosecution

of the case in the light of possible liability under the Code of Crimes against International Law […]. By this time, the Federal Prosecutor General's office was already in the process of establishing whether it had competence, having initiated a preliminary investigation on 8 September 2009.

31. As to the course of the investigation, the Federal Prosecutor General, by letter of 27 November 2009, asked the Bundeswehr Operations Command to forward all findings of fact relevant to the air strike in question for further clarification. Three days later the Bundeswehr Operations Command forwarded a considerable number of reports. […] On 23 February 2010 a letter with additional questions was addressed to the German Federal Ministry of Defence, which responded to these.

32. On 12 March 2010, on the basis of the factual findings up to that point, the Federal Prosecutor General opened a criminal investigation against Colonel K. and Staff Sergeant W., who had assisted Colonel K. on the night of the air strike. From 22 to 25 March 2010 the Federal Prosecutor General questioned the two suspects and interviewed two witnesses (Captain X. and Staff Sergeant Y.), who had been present at the command centre of the base in Kunduz at the relevant time. Moreover, the collection of documents and the video material from the aircraft were analysed.

33. On 16 April 2010 the Federal Prosecutor General discontinued the criminal investigation due to a lack of sufficient grounds for suspicion that the suspects had incurred criminal liability […]. He determined that the situation in Afghanistan at the material time, at least in the northern part of the country where the German armed forces were deployed, amounted to a non-international armed conflict within the meaning of international humanitarian law, notwithstanding the involvement of international troops. He concluded that Afghanistan had consented to the ISAF deployment in a manner valid under international law and ISAF was fighting on behalf of the Afghan authorities. The Taliban insurgency and the groups affiliated thereto, described in detail in the discontinuation decision, were to be classified as a "party to the conflict" under international law. The existence of this non-international armed conflict triggered the applicability of international humanitarian law […] and of the Code of Crimes against International Law. German soldiers forming part of ISAF were regular combatants and therefore not criminally liable for acts of war permitted under international law. The Federal Prosecutor General concluded that Colonel K.'s liability under the Code of Crimes against International Law […] was excluded because Colonel K. did not have the necessary intent to kill or harm civilians or damage civilian objects. Liability under the Criminal Code, for murder but also for any other offence, was excluded because the lawfulness of the air strike under international law served as an exculpatory defence.

[…]

36. The Federal Prosecutor General considered that two aspects, in particular, had to be clarified: Colonel K.'s subjective assessment of the situation when he ordered the air strike; and the exact number of persons who had suffered death or injury as a result.

37. He found credible Colonel K.'s account that he had assumed that only Taliban insurgents, and no civilians, had been located near the fuel tankers when he ordered the air strike. It had been corroborated by a large number of objective circumstances, the statements of the persons who had been present at the command centre, and the video footage from the aircraft prior to and during the air strike.

38. Given that the release of the bombs had occurred at 1.49 a.m., during Ramadan, with the nearest village located at least 850 metres away, in an area that was a stronghold of the insurgents, the presence of civilians would have seemed unlikely from the standpoint of an objective observer. There had also been an intelligence warning regarding a planned attack on the German base involving vehicles packed with explosives. Numerous such attacks had already been perpetrated in Afghanistan in the months leading up to 4 September 2009. Colonel K. had had no reason to doubt the accuracy of the intelligence provided by the informant. He had worked with that same informant only a few days before and the information provided had been reliable. Captain X., through whom he had had at least seven calls put through to the informant in order to verify the evolution of the situation and to confirm that only insurgents were present at the scene, had for his part regarded the informant as reliable. The intelligence given by the informant corresponded to the video feed from the aircraft. Colonel K.'s conduct was in line with the care he had exercised on earlier occasions in taking decisions that might cause collateral damage to civilian life.

39. The other persons present at the command post had all credibly testified that they had operated on the assumption that only insurgents and no civilians had been present at the location. It was unlikely that any additional insights as to whether or not Colonel K. had acted in the expectation of civilian casualties when he ordered the air strike could be gleaned by examining additional witnesses. Captain X., who was also examined, had been the only person present at the time the informant's intelligence was transmitted and there were no indications that he had transmitted the said intelligence incorrectly. The radio communication between the pilots and the command centre did not contain any indication that Colonel K. had acted in the expectation of civilian casualties. It had not been in dispute that the fuel tankers had been in the hands of Taliban fighters and there were no indications that these fighters were no longer near the fuel tankers at the time of the air strike. Moreover, as the Taliban were indistinguishable from civilians based on attire, it was not possible for the pilots to help establish whether it was visually apparent that the persons around the fuel tankers had included civilians.

40. In the case at hand, the number of civilian casualties could not serve as circumstantial evidence from which Colonel K.'s subjective expectations could be deduced. The number of persons killed or injured by the air strike, and how many of these were Taliban or civilians, could not be ascertained. Having regard to the divergent findings of the different reports in this respect, the methods by which they had been established and the available evidence, including the video material, it was probable that about fifty persons had been killed or injured. It was certain that two known Taliban commanders were among those killed, and the available reports allowed the conclusion that there were significantly more Taliban than civilians among the victims. It was not possible to clarify this matter further as the social and religious mores of the Afghan

population prevented use of modern forensic investigation techniques, including the exhumation of bodies or DNA analysis, that would be required. […]

41. […] [T]he Federal Prosecutor General considered that the air strike of 4 September 2009 […] constituted an attack by military means in connection with the non-international armed conflict in Afghanistan. The subjective constituent elements of the offence, by contrast, were not present. Direct intent to cause disproportionate collateral damage was required. Colonel K. had credibly testified that he had acted on the premise that only insurgents were present at the scene. Not only had he thus not expected damage to civilians with the certainty required by the provision; he had, in fact, not expected such damage to occur at all. The question of the disproportionality of the expected collateral damage thus did not even arise.

42. The fuel tankers had been hijacked by an organised group of armed Taliban fighters. Both the members of that group and the fuel tankers were legitimate military targets at the time Colonel K. had ordered the air strike. In respect of the Taliban, the Federal Prosecutor General explained that under international law all persons who had become functionally integrated into, and exercised a continuous combat function within, an organised armed group were not civilians but legitimate military targets. Such persons could also be attacked outside the scope of ongoing hostilities until they had given up this combat function in a lasting and conclusive manner […].

[…]

44. The international humanitarian law status of the victims of the air strike was crucial for determining its lawfulness. Armed fighters affiliated with a non-State party to a non-international armed conflict and civilians participating directly in hostilities were legitimate targets for military attacks, whereas civilians not directly participating in hostilities were not. The armed Taliban fighters who had hijacked the two fuel tankers – and who probably accounted for most of the victims of the air strike – were indeed members of an organised armed group that was party to the armed conflict. They were thus legitimate military targets whose "destruction" was permissible within the bounds of military necessity, in respect of which no restrictions could be inferred in the present case.

45. The air strike had also led to the killing of civilians who were protected under international humanitarian law and were not legitimate targets of military attack. It could be accepted as a premise that all those air strike victims who were not Taliban fighters were civilians not taking a direct part in the hostilities, including those who were helping the Taliban to free the fuel tankers from the sand bank and those who were trying to obtain fuel for their own benefit. However, Colonel K.'s order to launch the air strike was legitimate under international law even considering that it had also killed civilians protected under international humanitarian law. International humanitarian law only prohibited attacks launched against civilians as such or against a military objective when the civilian damage to be expected at the time of ordering the attack was disproportionate ("excessive") to the expected, actual and direct military advantage […]. The attacker's objectively based expectation at the time of the military action was decisive, both in respect of the tactical

military advantage and foreseeable civilian collateral damage. Civilian collateral damage was relevant to the proportionality test only if a commander had failed to take “feasible precautions” which would have enabled him to anticipate an event of major civilian collateral damage occurring. Disproportionality in this sense could be imputed only in a case of patent excess.

46. The air strike at issue had pursued two military objectives: to destroy the fuel tankers and the fuel hijacked by the Taliban; and to kill Taliban fighters. Given the circumstances known to Colonel K. (the distance of the sand bank from inhabited settlements, the time of night and the presence of armed Taliban), and given the statements made by the informant, Colonel K. had had no reason to suspect the presence of protected civilians at the scene. There had been no possibility of implementing further reconnaissance and/or precautionary measures in a timely manner. The danger that the fuel tankers or the fuel would be recovered by the Taliban was not one which Colonel K. had been obliged to accept. The circumstances provided sufficient indications that the persons in question were the legitimate target of a military attack: no absolute certainty was required.

47. However, even assuming for the sake of argument that Colonel K. ought to have anticipated the killing of several dozen protected civilians, this would not have been out of all proportion to the expected military advantage. Nor would it have breached the precept to use the mildest possible means. The question of means had in fact been discussed before the air strike among Colonel K., Staff Sergeant W. and the pilots. Contrary to the latter’s recommendation to deploy heavier ordinance, Colonel K. had opted for the smallest bomb size available and for the use of delayed detonation fuses, which limited the bombs’ effective range.

48. The conclusion that the attack order was permissible under international law was unaffected by the general obligation to give advance warnings before an attack that could potentially cause collateral damage to the civilian population. Not only had Colonel K. been working on the justifiable assumption that the attack he had ordered would not hit any civilians, but the aforementioned obligation could be dispensed with if the prevailing circumstances so dictated […]. In the case at hand giving a warning could have thwarted the legitimate military objective of killing the Taliban fighters.

49. Any alleged breach of internal rules such as the ISAF Rules of Engagement, which involved a self-imposed restriction in the interests of achieving a long-term political solution to the Afghan conflict and which afforded a higher level of protection to the civilian population than required under international law, was irrelevant for evaluating the lawfulness of military conduct.

3. The applicant’s involvement in the investigation and his challenges to the discontinuation decision

[…]

4. Proceedings before the Federal Constitutional Court

[…]

5. Other investigations

[…]

66. By order of the President of the Islamic Republic of Afghanistan, an inquiry commission was sent to Kunduz on 4 September 2009 and interviewed witnesses of the air strike and secured evidence. Its final report was published on 10 September 2009 and concluded that the air strike had killed 99 persons, of whom 69 were insurgents and 30 civilians. In addition, both insurgents and civilians had been injured. The report further stated that the air strike had been directed at the insurgents and had succeeded in weakening the Taliban network.

67. The United Nations Assistance Mission in Afghanistan (UNAMA) collected information about possible victims of the air strike. It compiled a list with personal details of 109 deceased and 33 injured. In addition, it reported on the air strike in its annual report (UNAMA, Annual Report on Protection of Civilians in Armed Conflict 2009, January 2010), as follows:

Air strike against hijacked oil tankers in Aliabad District, Kunduz Province

“On 3 September, a group of Taliban hijacked two fuel tankers along the main Kunduz-Baghlan road. They tried to cross the Kunduz river towards Chahar Dara District, near to Omarkhel village in Aliabad District. The trucks got stuck in the river bed and when the insurgents failed to release them, the Taliban invited nearby villagers to collect the fuel. As the villagers were siphoning off the fuel, several hours later, in the early hours of the morning of 4 September, an air strike was conducted. Investigations were complicated as a result of the ensuring [*sic*] fireball, which incinerated a large number of people making identification extremely difficult. It is not disputed that some Taliban were at the site but it should have been apparent that many civilians were also in the vicinity of the trucks. According to UNAMA HR’s investigations, 74 civilians, including many children, were killed.”

68. The International Committee of the Red Cross (“ICRC”) also investigated the air strike from 5 September 2009 onwards and submitted a confidential report to ISAF on 30 October 2009.

69. On 16 December 2009 the German Parliament established a commission of inquiry to assess, inter alia, whether the air strike was in compliance with the mandate given by Parliament to the German armed forces […]. On 20 October 2011 the commission concluded its investigation and published its report. As to the number of victims of the air strike, it noted that different reports indicated between 14 and 142 deceased (14 to 113 civilians) and 10 to 33 injured persons (4 to 9 civilians). Regarding the question of compliance with the applicable orders and rules of engagement, it came to the conclusion that Colonel K. made certain

procedural mistakes when ordering the air strike, and partially violated the applicable ISAF rules of engagement. Consequently, based on the information available to the commission, the air strike could not be considered proportionate and should not have been ordered. However, the commission also stated that Colonel K. acted at the relevant time to the best of his knowledge and to protect “his” soldiers. Therefore his decision to order the air strike was comprehensible.

6. Civil proceedings for compensation

[…]

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. INTERNATIONAL MATERIAL

1. United Nations Security Council Resolutions and international agreements concerning Afghanistan and ISAF

[…]

2. Investigations into the air strike

[…]

2. Case-law of the International Court of Justice

[…]

77. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (8 July 1996), the International Court of Justice stated as follows:

[The Court refers to paras 25 and 41 of ICJ, Nuclear Weapons Advisory Opinion]

78. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), the International Court of Justice rejected Israel’s argument that the human rights instruments to which it was a party were not applicable to occupied territory, and held:

[The Court refers to para. 106 of ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory]

79. In its judgment concerning *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* (19 December 2005), the International Court of Justice held as follows:

[The Court refers to paras 215-216 of ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo]

[…]

3. International humanitarian law

80. Article 50 of […] Protocol I […], which is applicable to international armed conflicts, defines civilians as persons who are not members of the armed forces. […] Protocol II […], which is applicable to non-international armed conflicts, does not contain a definition of civilians. The definition of civilians in […] Protocol I is a norm of customary international law which also applies to non-international armed conflicts (see Rule 5 of the Customary International Humanitarian Law study by the ICRC and the commentary thereon). Civilians are protected against attack in non-international armed conflict, unless and for such time as they take a direct part in hostilities (Article 13 (3) of […] Protocol II and Rule 6 of the […] [CIHL] study). In respect of non-international armed conflicts, the Customary International Humanitarian Law study indicated that there was ambiguity whether members of armed opposition groups could be considered civilians and be attacked lawfully only for such time as they took a direct part in hostilities, or whether they were, due to their membership, either considered to be continuously taking a direct part in hostilities or considered not to be civilians (see commentary on Rules 5 and 6). In 2009, the ICRC published Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, stating, inter alia, that in non-international armed conflict organised armed groups constituted the armed forces of a non-State party to the conflict and consisted only of individuals whose continuous function it was to take a direct part in hostilities ("continuous combat function"). Such members of organised armed groups belonging to a non-State party to an armed conflict ceased to be civilians, and lost protection against direct attack, for as long as they assumed their continuous combat function.

81. The prohibition of indiscriminate attacks, set forth in Article 51(4) of Additional Protocol I, constitutes a norm of customary international law applicable in both international and non-international armed conflicts (see [CIHL] Rules 11 to 13 […] and the commentaries thereon). The principle of proportionality in attack, codified in Article 51(5)(b) and repeated in Article 57(2)(a)(iii) of […] Protocol I, is recognised as a norm of customary international law which is applicable in both international and non-international armed conflict (see […] [CIHL] Rule 14 […]). It provides that launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited. State practice indicates that an ex ante perspective is decisive in this respect and Germany made a declaration to that effect upon ratification of […] Protocol I. The principle of precautions in attack, codified in Article 57 of […] Protocol I, is a norm of customary international law applicable in both international and non-international armed conflicts (see Rules 15 to 21 and the commentaries thereon). […] Everything feasible must be done to verify that targets are military objectives and to assess whether the attack may be expected to cause

incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit, such as in cases where the element of surprise is essential to the success of an operation or to the security of the attacking forces. The obligation to take all “feasible” precautions has been interpreted by many States as being limited to those precautions which are practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations.

82. The four Geneva Conventions of 1949 and their Additional Protocol I, all of which are applicable to international armed conflict only (with the exception of the common Article 3 to the Conventions), place an obligation on each Contracting State to investigate and prosecute alleged grave breaches of the Conventions, including the wilful killing of protected persons. Additional Protocol II does not contain a similar provision. […]

83. It is an established norm of customary international humanitarian law which is also applicable in non-international armed conflicts, that 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 (see [CIHL Rule 158 […] and the commentary thereon). States engaging in multinational operations under the auspices of an international organisation are under the obligation to ensure respect for the entire body of international humanitarian law, including customary international humanitarian law, by their national contingent, including by the exercise of disciplinary and criminal powers retained by them.

84. International humanitarian law assigns duties to commanders to ensure compliance with its rules, including in respect of initiating disciplinary or penal action against subordinates or other persons under their control (see Article 87 of […] Protocol I and the ICRC commentary thereon as well as [CIHL] Rule 153 […] and commentary thereon in respect of the corresponding rule of command responsibility for failure to prevent, repress or report war crimes).

85. In 2019, the ICRC and the Geneva Academy of International Humanitarian Law and Human Rights published the Guidelines on investigating violations of IHL: Law, policy and good practice (“Guidelines on investigating violations of IHL”). These Guidelines, while noting that international humanitarian law has few provisions on the specific way investigations should be carried out, draw on internationally recognised principles most commonly required for the effectiveness of an investigation (independence, impartiality, thoroughness and promptness, and in a modified form, transparency) and elucidate their practical application to investigations in armed conflict.

4. United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian

Law (“UN Basic Principles and Guidelines”)

86. The UN Basic Principles and Guidelines, adopted by General Assembly Resolution 60/147 of 16 December 2005 (A/RES/60/147), call for States to investigate violations of international humanitarian law “effectively, promptly, thoroughly and impartially” (under II., 3. lit. b).

5. United Nations Human Rights Committee

[…]

6. The Minnesota Protocol

[…]

7. Inter-American Court of Human Rights

[…]

II. COMPARATIVE LAW MATERIAL

[…]

III. DOMESTIC LAW AND PRACTICE

[…]

THE LAW

I. ADMISSIBILITY

A. The Court’s competence *ratione personae* and *ratione loci*

1. The parties’ submissions

(a) The respondent Government

[…]

(ii) Compatibility *ratione loci*

(α) No exercise of extraterritorial jurisdiction in Afghanistan

104. In the Government's submission, the Court was […] not competent ratione loci to examine the application. The deaths of the applicant's sons had not occurred in the exercise of extraterritorial jurisdiction by Germany. According to the Court's well-established case-law, a Contracting State only exercised jurisdiction outside its own territory if the case involved either "effective control over an area" or the exercise of "State agent authority and control". Neither of these two exceptions were applicable in the present case.

105. Germany had not had effective control over the Kunduz region and the bomb release area. In September 2009, German ISAF troops in the region were involved in the conduct of hostilities in an active combat zone, which was under the control of the insurgents. The number of insurgents in that area was nearly as high as the number of ISAF troops. The ISAF troops stationed in Kunduz were in danger of being attacked by the insurgents or of falling victim to their booby traps whenever they left the garrison. They were only able to take reactive measures and suffered serious losses in battles with the insurgents. ISAF's troop strength was far too small, when measured against the approximately 8,000 square kilometres of territory concerned and the large number and high level of organisation of Taliban insurgents active in the region, for ISAF to have effective control over the Kunduz region.

106. As regards jurisdiction based on "State agent authority and control", the case was not comparable to *Al-Skeini and Others* or *Jaloud* […]. At no time during the ISAF deployment in Afghanistan was there ever a situation comparable to that in Iraq in 2003 and 2004. The ISAF mission focused solely on lending support to the Afghan civil government in the fight against armed insurgents and in building up Afghan security forces. The Afghan civil government had its own security forces, in particular in the Kunduz area. On the morning following the air strike at issue, it was the Afghan security forces who had cleared the sand bank of the residual weapons still lying there before the arrival of German and other reconnaissance units. The German reconnaissance unit was able to search the site only after a unit of the Afghan security forces afforded it protection against attacks by Taliban insurgents. ISAF did not exercise governmental powers or assume executive functions, for example by exercising police powers in order to maintain general security and order.

107. The air strike of 4 September 2009 did not establish a jurisdictional link between the persons affected by it and the respondent State, as it was an instantaneous extraterritorial act and the provisions of Article 1 [of The Convention for the Protection of Human Rights and Fundamental Freedoms] did not admit a "cause and effect" notion of "jurisdiction" […]. This did not lead to an accountability gap, since Contracting States had to comply with their obligations under international humanitarian law.

2. Third-party interveners

(a) The Governments of Denmark, France, Norway, Sweden and the United Kingdom

123. Relying on Behrami and Saramati […], the intervening Governments submitted that the applicant's

complaints were not compatible ratione personae with the Convention. The United Nations Security Council exercised ultimate authority and control over ISAF.

124. The intervening Governments asserted that Germany had not exercised extraterritorial jurisdiction for the purposes of Article 1. Germany had neither exercised effective control over the area in question nor State agent authority and control.

125. There were fundamental differences between the present case and that of Güzelyurtlu and Others […]. Opening an investigation at the domestic level concerning facts occurring in the framework of a military operation abroad under the mandate of an international organisation could not in itself suffice to establish a jurisdictional link for the purposes of Article 1. To hold otherwise would put in question the Behrami and Saramati and Banković and Others jurisprudence and could risk resulting in a universal application of the Convention. This could affect States' willingness and ability to engage in multilateral military operations abroad and could have a chilling effect on States instituting investigations. International humanitarian law was the lex specialis governing situations of armed conflict and Contracting States had to comply with its obligations even in the absence of the Convention being applicable. There was deliberately no general duty under international humanitarian law to investigate each and every death occurring in armed conflict; instead a duty to investigate arose only under certain circumstances.

[…]

127. The Governments of France and the United Kingdom added that […] the ISAF Status of Forces Agreement dealt with disciplinary matters of service personnel and concerned investigative measures taking place in Germany. Neither ISAF nor the United Nations nor the Afghan authorities had such disciplinary powers. The provision had a limited nature, which did not allow for broader conclusions and which did not make the respective investigatory measures attributable to troop-contributing States. It did not constitute a "special feature" in respect of jurisdiction for the purposes of Article 1 in cases concerning the procedural limb of Article 2. When looking at the investigation in isolation, the legal constraints imposed by the legal framework of the United Nations and the ISAF mission, as well as Afghan law, had to be considered. Notably, the German prosecution authorities were not allowed to conduct investigations in Afghanistan.

[…]

(b) The Human Rights Centre of the University of Essex, the Open Society Justice Initiative, the Institute of International Studies of the Università Cattolica del Sacro Cuore di Milano and Rights Watch (UK)

129. The Open Society Justice Initiative and the Institute of International Studies of the Università Cattolica del Sacro Cuore di Milano submitted that there was a trend in international law towards recognising States' procedural obligations where they had direct control or authority over a victim's rights, irrespective of where the incident took place and regardless of whether the State also had jurisdiction over the victim's substantive

right under Article 2.

130. Alternatively, if jurisdiction over a victim's substantive right under Article 2 were required in order to establish whether a procedural obligation arose, the Open Society Justice Initiative and Rights Watch (UK) pointed to the growing recognition that international human rights law obligations arose where a State exercised power, control or authority over a person's rights. The Human Rights Centre of the University of Essex asserted that extraterritorial jurisdiction existed in relation to the right to life on the basis of targeting or the use of force. Rights Watch (UK) and the Institute of International Studies of the Università Cattolica del Sacro Cuore di Milano advocated a functional approach to the analysis of jurisdiction, as envisaged by Judge Bonello in his concurring opinion in Al-Skeini and Others […].

131. The Open Society Justice Initiative added that if international humanitarian law applied to the conflict and to the extraterritorial incident in question, then the State was bound by international humanitarian law obligations to conduct an investigation and no further question of jurisdiction would arise.

3. The Court's assessment

(a) As to the applicable principles

132. The applicant complained exclusively under the procedural limb of Article 2 of the Convention [The Convention for the Protection of Human Rights and Fundamental Freedoms] about the criminal investigation into the air strike which had killed his two sons. In Güzelyurtlu and Others […], the Court recently set out the principles concerning the existence of a "jurisdictional link" for the purposes of Article 1 of the Convention in cases where the death occurred outside the territory of the Contracting State in respect of which the procedural obligation under Article 2 of the Convention was said to arise. […] [T]he Court held:

(b) The Court's approach

188. In the light of the above-mentioned case-law it appears 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 […].

189. […]. In this sense it can be considered to be a detachable obligation arising out of Article 2 and capable of binding the State even when the death occurred outside its jurisdiction […].

190. 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, […] [a]lthough 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, according to the principles developed in Rantsev […]. However, the Court does not consider that it has to define in abstracto which 'special features' trigger the existence of a jurisdictional link in relation to the procedural obligation to investigate under Article 2 […]."

133. Applying those principles to the case at hand, the Court went on to find that a "jurisdictional link" between the applicants – who had complained under the procedural limb of Article 2 in respect of their relatives' deaths in the Cypriot government-controlled part of Cyprus – and Turkey was established on two grounds, each of which would have sufficed in itself to establish such a jurisdictional link within the scope of that case […]. A jurisdictional link was established, first, because the authorities of the "Turkish Republic of Northern Cyprus" (the "TRNC") had instituted their own criminal investigation into the murder of the applicants' relatives, which gave the "TRNC" courts criminal jurisdiction over the individuals […]. A jurisdictional link was also established because there were two special features related to the situation in Cyprus: (i) the northern part of Cyprus was under effective control of Turkey for the purposes of the Convention, which justified a departure from the general approach established in Rantsev […] and therefore engaged Turkey's procedural obligation under Article 2; and (ii) the presence of the murder suspects in the territory controlled by Turkey had been known to the Turkish and "TRNC" authorities and prevented Cyprus from fulfilling its Convention obligations.

(b) Application of these principles to the present case

134. The German authorities instituted, under domestic law, a criminal investigation into the deaths of the applicant's two sons and of other civilians in connection with the air strike on 4 September 2009 near Kunduz.

135. Without calling into question the principles set out in Güzelyurtlu and Others […] and the application of those principles to the facts of that case, the Court considers that there are significant differences between that case and the present one. In its opinion, the principle that the institution of a domestic criminal investigation or proceedings concerning deaths which occurred outside the jurisdiction ratione loci of that State, not within the exercise of its extraterritorial jurisdiction, is in itself sufficient to establish a jurisdictional link between that State and the victim's relatives who bring proceedings before the Court […], does not apply to the factual scenario at issue in the present case. The latter indeed differs from Güzelyurtlu and Others in that 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 acting under Chapter VII of the United Nations Charter, outside the territory of the Contracting States to the Convention.

136. However, in Güzelyurtlu and Others the Court found that a jurisdictional link had also been established in view of the "special features" of that case. It considered that such special features, which it did not define

in abstracto, could establish a jurisdictional link bringing the procedural obligation imposed by Article 2 into effect, even in the absence of an investigation or proceedings having been instituted in a Contracting State in respect of a death which occurred outside its jurisdiction […]. This also applies in respect of extraterritorial situations outside the legal space of the Convention […] as well as in respect of events occurring during the active hostilities phase of an armed conflict […].

137. In the present case the Court considers, firstly, that Germany was obliged under customary international humanitarian law to investigate the air strike at issue, as it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime (see, in particular, [CIHL] Rule 158 […], and the obligation of States engaging in multinational operations under the auspices of an international organisation to ensure respect for the entire body of international humanitarian law, including customary international humanitarian law, by their national contingent, including by the exercise of disciplinary and criminal powers retained by them […]; see also the UN Basic Principles and Guidelines […]). The existence of a duty to investigate under international law, with which the respondent Government agreed in the present case, reflects the gravity of the alleged offence […].

138. The Court considers, secondly, that the Afghan authorities were prevented, for legal reasons, from themselves instituting a criminal investigation against Colonel K. and Staff Sergeant W. in respect of the alleged offence. Under section I, subsection 3, 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 might commit on the territory of Afghanistan […], as is common practice for troop-contributing States in United Nations-authorised military missions. The respondent Government and third-party Governments submitted that that provision constituted a rule on immunity. In the Court's opinion, this is true in so far as it shields the ISAF personnel of troop-contributing States from prosecution by the Afghan authorities. At the same time, however, it is also a rule regulating jurisdiction, as the applicant submitted: it clarifies who has jurisdiction over ISAF personnel in criminal matters and provides that only the troop-contributing States are entitled to institute a criminal investigation or proceedings against the personnel they contribute to ISAF, even in cases of alleged war crimes. If the troop-contributing States do not exercise the criminal jurisdiction to investigate allegations that the personnel they contribute to ISAF (or other multinational military missions) committed criminal offences, this may lead to situations of impunity, including in respect of offences entailing individual criminal responsibility under international law.

[…]

141. The Court further observes that according to the information available to it, in the majority of those Contracting States which participate in military deployments overseas, the competent domestic authorities are obliged under domestic law to investigate alleged war crimes or wrongful deaths inflicted abroad by members of their armed forces, and the duty to investigate is considered essentially autonomous […].

142. In the present case the fact that Germany retained exclusive jurisdiction over its troops in respect of serious crimes which, moreover, it was obliged to investigate under international and domestic law constitutes “special features” which in their combination trigger the existence of a jurisdictional link for the purposes of Article 1 of the Convention in relation to the procedural obligation to investigate under Article 2.

[…]

II. MERITS

154. The applicant complained under the procedural limb of Article 2 of the Convention that the investigation into the air strike that killed, inter alios, his two sons had not been effective. […]

B. Third-party intervener

1. The Governments of France, Norway and the United Kingdom

193. The intervening Governments asserted that the procedural obligation under Article 2 as applied to situations of armed conflict outside national territory had to be interpreted in a manner consistent with international humanitarian law, which constituted lex specialis. This concerned not only the threshold issue when the duty to investigate arose, but also the content of such a duty. As to the latter, the Government of the United Kingdom emphasised that Article 6 of Additional Protocol II was essentially limited to prosecutorial obligations of independence and did not contain a broader reference to transparency requirements or the involvement of next of kin. With respect to the requirement of independence, the Governments of France and the United Kingdom further elaborated on the special role assigned to commanders in the conduct of investigations under international humanitarian law and submitted that the lex specialis obligations as regards the specific investigative duties of commanders would be disavowed if the procedural obligations under Article 2 were to be interpreted so as to require the exclusion from investigations of military commanders.

194. The intervening Governments submitted that the practical realities of military deployments had to be considered. These could include the housing of those investigating, such as military police, jointly with other members of the military contingent; the investigators having a certain hierarchical or institutional link with the military leadership responsible for the operation; and the impact of limited resources on the promptness and number of investigatory steps, especially in respect of smaller Contracting States and contingents. The Governments of France and the United Kingdom pointed to the legal constraints imposed by the legal framework of the United Nations and the ISAF mission, as well as Afghan law, notably that German prosecution authorities were not allowed to conduct investigations in Afghanistan.

195. The Governments of France and the United Kingdom added that it followed from State practice that

States considered that “lawful acts of war”, referred to in Article 15 of the Convention, derogated from Article 2, even in the absence of prior notification of derogation.

2. The Human Rights Centre of the University of Essex, the Open Society Justice Initiative, the Institute of International Studies of the Università Cattolica del Sacro Cuore di Milano and Rights Watch (UK)

196. The Human Rights Centre of the University of Essex asserted that international humanitarian law became applicable on the basis of objective criteria. Where it was applicable and a State chose to invoke international humanitarian law, the concurrent application of international humanitarian law and human rights law might result in a significant modification of the content of human rights law obligations of the State. Where a State chose not to invoke international humanitarian law, the Court should acknowledge that it was applicable, while noting that the State had chosen to be examined exclusively on the basis of human rights law. For the State to invoke international humanitarian law, it was sufficient that it was applicable and that the respondent State invoked it before the Court; a derogation was unlikely to be required in international armed conflict and might not be required in extraterritorial non-international armed conflict. Where the concurrent application of international humanitarian law did not result in a modification of a relevant human rights law rule, a human rights body could draw upon international humanitarian law to confirm a human rights analysis, without a need for the State to invoke international humanitarian law. The Institute of International Studies of the Università Cattolica del Sacro Cuore di Milano emphasised that reliance on international humanitarian law required very careful consideration in order not to contradict Article 15 of the Convention, in particular.

197. The Human Rights Centre of the University of Essex submitted that international humanitarian law required, in respect of the use of force, that everything feasible be done to verify that the objectives to be attacked were military objectives. There was an obligation under international humanitarian law to investigate suspected violations, with the Guidelines on investigating violations of IHL elaborating on the respective standards. The Open Society Justice Initiative, the Institute of International Studies of the Università Cattolica del Sacro Cuore di Milano and Rights Watch (UK) argued that the standards developed in international human rights law regarding the duty to investigate into civilian deaths during armed conflict should not be lowered by reference to international humanitarian law.

C. The Court’s assessment

1. The relevant general principles

198. In the domestic proceedings the situation in which the air strike that killed the applicant’s two sons occurred was characterised as a non-international armed conflict for the purposes of international humanitarian law. […] [T]he Government submitted that international humanitarian law provided the appropriate yardstick for determining what was required from the respondent State in the circumstances […].

199. The Court notes that there is no substantive normative conflict in respect of the requirements of an

effective investigation between the rules of international humanitarian law applicable to the present case […] and those under the Convention. The Court can therefore confine itself to examining the facts of the present case based on its case-law under Article 2, without having to address whether in the present case the requirements allowing it to take account of the context and rules of international humanitarian law when interpreting and applying the Convention […] are met […].

200. Reiterating that the procedural duty under Article 2 must be applied realistically […], the Court considers 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 undertaken throughout the investigation, including by the civilian prosecution authorities in Germany. Accordingly, the standards applied to the investigation conducted by the civilian prosecution authorities in Germany should be guided by those established in respect of investigations into deaths in extraterritorial armed conflict […].

[…]

202. In order to be "effective", as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate […]. This means that it must be capable of leading to the establishment of the facts, a determination of whether the force used was justified in the circumstances and of identifying and – if appropriate – punishing those responsible […]. This is not an obligation of result, but of means […]. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard […].

203. In particular, the investigation's conclusions must be based on a thorough, objective and impartial analysis of all relevant elements, failing which the investigation's ability to establish the circumstances of the case and the identity of those responsible will be undermined to a decisive extent […]. Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. The nature and degree of scrutiny must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work […]. It is not possible to reduce the variety of situations which might occur to a bare checklist of acts of investigation or other simplified criteria […].

204. It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has also observed, concrete constraints may compel the use of less effective measures of investigation or may cause an

investigation to be delayed […]. Nonetheless, the obligation under Article 2 entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life […].

205. The investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life […].

206. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence […].

207. A requirement of promptness and reasonable expedition is implicit in this context. It must, however, be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. That said, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts […].

208. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case. The investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests […]. However, the investigative materials may involve sensitive issues and disclosure cannot be regarded as an automatic requirement under Article 2 […].

209. The adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation are interrelated and each of them, taken separately, does not amount to an end in itself. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues must be assessed […].

[…]

2. Application to the present case

(a) Adequacy

211. At the outset the Court notes that the criminal investigation established that the applicant's two sons were killed by the air strike which had been ordered by Colonel K. on 4 September 2009. It was undisputed

that the fuel tankers, which the air strike targeted, had been hijacked and remained under the control of insurgents and that there had been civilian casualties. The cause of death of the applicant's sons, and the person(s) responsible for it, were known from the start of the investigation […].

212. The Federal Prosecutor General determined that Colonel K. had not incurred criminal liability mainly because he had been convinced, at the time of ordering the air strike, that no civilians were present at the sand bank […]. Thus he had not acted with the intent to cause excessive civilian casualties which would have been required for him to be liable under the relevant provision of the Code of Crimes against International Law. His liability under general criminal law was ruled out owing to the lawfulness of the air strike under international humanitarian law. […]

213. For the purposes of answering the relevant questions of law regarding Colonel K.'s criminal liability, the Federal Prosecutor General's investigation focused, in essence, on clarifying two questions of fact: Colonel K.'s subjective assessment of the situation when he ordered the air strike, which was crucial as regards both his liability under the Code of Crimes against International Law and the lawfulness of the air strike under international humanitarian law; and the number of victims […].

214. The Court notes that the German civilian prosecution authorities, including the Federal Prosecutor General, did not have legal powers to undertake investigative measures in Afghanistan under the ISAF Status of Forces Agreement, but would have been required to resort to international legal assistance to that end. However, the Federal Prosecutor General could rely on a considerable amount of material from different sources concerning the circumstances and the impact of the air strike. The reports from on-site investigations conducted in the aftermath of the air strike, including by the German military police, ISAF, UNAMA and the Afghan civil authorities, were available to him […], as were the documents (such as photographic evidence) and minutes of the meetings and examinations held in the course of those investigations […].

215. The Federal Prosecutor General questioned the suspects and the other soldiers present at the command centre and found credible their testimonies that they had operated on the assumption that only insurgents and no civilians had been present at the sand bank […]. He noted that this account was corroborated by objective circumstances (distance from inhabited settlements, time of night, presence of armed Taliban) and evidence which could not be tampered with, such as audio-recordings of the radio traffic between the command centre and the pilots of the USAF F-15 aircraft and the thermal images from the aircraft's infrared cameras, which had been secured immediately. The Federal Prosecutor General established that Colonel K. had had at least seven calls put through to the informant in order to verify that no civilians were present at the scene and that the information given by the informant, who had previously proven to be reliable, corresponded to the video feed from the aircraft. To that end, he examined Captain X., who had been the only person present at the time the informant's intelligence was transmitted.

216. […] The Court takes note of the Federal Prosecutor General's determination that the number of civilian

casualties could not serve as circumstantial evidence from which Colonel K.'s subjective expectations could be deduced and that the number of people present at the scene at the time of the air strike did not constitute a reason to question Colonel K.'s assumption that he was dealing exclusively with Taliban fighters […].

[…]

218. The Court observes that under normal circumstances the establishment of the precise number and status of the victims of the use of lethal force is an essential element of any proper investigation of incidents involving a high number of casualties. In the present case, having regard to the divergent findings of the various reports, the methods by which they had been established and the available evidence, including the video material, the Federal Prosecutor General concluded that about fifty persons were likely to have been killed or injured by the air strike and that there were significantly more Taliban fighters than civilians among the victims […]. The Court is prepared to acknowledge that a more accurate assessment would not appear to have been possible in the circumstances, given that the air strike occurred in an active combat zone at night-time, that the bodies were removed from the scene by the local population within hours of the air strike, and that the use of modern forensic techniques was difficult in view of the social and religious mores of the local population. At any rate, the Court notes that the precise number of civilian victims did not have any bearing on the legal assessment in respect of the criminal liability of Colonel K., which focused on his subjective assessment at the time of ordering the air strike. […]

219. In view of the foregoing, the Court finds that the facts surrounding the air strike which killed the applicant's two sons, including the decision-making and target verification process leading up to the order of the air strike […], were established in a thorough and reliable manner in order to determine the legality of the use of lethal force.

[…]

(b) Promptness, reasonable expedition and independence

223. In so far as the applicant alleged a delay and a lack of independence in relation to the on-site reconnaissance, the Court considers that this aspect has to be examined against the background of ongoing hostilities in the bomb release area. The members of PRT Kunduz who arrived on the scene at 12.34 p.m. to perform the initial on-site reconnaissance were afforded protection by some one hundred members of the Afghan security forces, but nonetheless came under fire […]. Under these circumstances, the Court does not consider that the German military contingent could realistically have been expected to perform on-site reconnaissance more promptly than they did. […] While the Court concurs with the applicant that it would have been preferable, in terms of independence, if the initial on-site assessment had not been done exclusively by members of PRT Kunduz, who were under Colonel K.'s command, it notes that the investigation team from the German military police, whose deployment from Masar-i-Sharif had been ordered that morning, had not yet arrived at the time the on-site reconnaissance was conducted […]. Ensuring their

participation would thus have resulted in a delay, albeit one of a minor nature, illustrating the interrelatedness of promptness and independence.

224. Reiterating that the procedural duty under Article 2 must be applied realistically […] and that the German civilian prosecution authorities did not have legal powers to undertake investigative measures in Afghanistan, the Court does not consider that the fact that the German military police were under the overall command of the German ISAF contingent affected their independence to the point of impairing the quality of their investigations […]. [The Court] would not suggest that commanders must be excluded from investigations against their subordinates entirely, having regard also to the duty assigned to commanders in this respect under international humanitarian law […].

225. By contrast, the Court considers that Colonel K. should not have been involved in investigative steps in Afghanistan, including interviews and visits on 4 and 5 September 2009 […], given that the investigation concerned his own responsibility in connection with ordering the air strike.

226. Yet the Court cannot conclude that this involvement of Colonel K. as such rendered the investigation ineffective […]. The responsibility for the criminal investigation rested with the civilian prosecution authorities, notably the Federal Prosecutor General, who could rely on a considerable amount of material from investigations conducted by different actors and who undertook further investigative measures […]. More importantly still, the Federal Prosecutor General's determination that Colonel K. had not incurred criminal liability was primarily based on the finding in respect of Colonel K.'s mens rea at the time of ordering the air strike, which was corroborated by evidence which could not be tampered with, such as audio-recordings of the radio traffic between the command centre and the pilots of the USAF F-15 aircraft and the thermal images from the latter's infrared cameras, which had been secured immediately.

227. In these circumstances there was, realistically, no risk that evidence decisive for the determination of Colonel K.'s criminal liability could become contaminated and unreliable. […]

228. In so far as the applicant alleged a lack of promptness of the investigation by the civilian prosecution authorities in Germany, the Court observes that on the day of the air strike, the chief legal officer of the armed forces informed the Potsdam public prosecutor of the air strike […]. The public prosecutor launched a preliminary investigation three days later, which was eventually transferred to the Federal Prosecutor General, who had in parallel initiated a preliminary investigation on 8 September 2009, four days after the air strike. […]

[…]

3. Conclusion

236. In view of the foregoing, and having regard to the circumstances of the present case, the Court concludes that the investigation into the deaths of the applicant's two sons which was performed by the German authorities complied with the requirements of an effective investigation under Article 2 of the Convention. There has accordingly been no violation of the procedural limb of Article 2 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the part of the application relating to the lack of independence of the investigation undertaken in Germany inadmissible;
2. *Declares*, by a majority, the remainder of the application admissible;
3. *Holds*, unanimously, that there has been no violation of the procedural limb of Article 2 of the Convention.

[...]

Discussion

I. Classification of the Situation and Applicable Law

1. *(Paras 2-18, 33, 198)*

1. How would you classify the situation in Afghanistan at the time of the airstrike? How did the Federal Prosecutor General classify the situation? Did the European Court ("ECHR") proceed to the classification itself? (GC I-IV, Art. 3; P II, Art. 1).
2. Did Additional Protocol II apply to the airstrike? (P II, Art. 1)

2. *(Paras 83, 137)* How is State responsibility determined when it comes to multinational operations under the auspices of an international organisation? (ICRC, Commentary on the First Geneva Convention, Common Art. 1, paragraphs 125-26, 133-37, and 143-49)

3. Can the ECHR apply humanitarian law?

II. Conduct of Hostilities

4. *(Paras 21-25, 211-212)*

1. Who and/or what was targeted in this incident? Does the classification of the situation as an IAC or a NIAC matter in determining whether IHL was violated by conducting the air strike? Why/Why not? (GC I-IV, Art. 3; CIHL, Rule 1)
2. Based on the information Colonel K. claimed to have had at the time of the airstrike, was the target lawful? Does the fuel truck qualify as a military objective? Why/Why not? (P I, Art. 52 (2); CIHL, Rule 8)
3. *(Paras 39, 42-45)* What is the status of the Taliban fighters? Are they combatants? Are they civilians? Do they have an obligation to distinguish themselves from civilians based on their attire? If they do not distinguish themselves, what can be the consequences for them? If it was not visually apparent that the

persons around the fuel tankers had included civilians, did that mean those persons could have been targeted? (CIHL, Rule 3)
4. Does it matter in a NIAC whether an armed group belongs to a party to the armed conflict?
5. *(Para. 80)* Under what circumstances do civilians lose protection from attack in armed conflicts? If they were helping the Taliban to free the fuel tankers from the sand bank did they lose their protection? What is the conclusion of the Federal Prosecutor General? (P I, Arts 50 (1) and (2), 51(2) (1) and (3); P II, Art. 13 (2)(1) and (3); CIHL Rules 5 and 6)

5. *(Paras 36, 40-41, 80-81)*

1. Does Colonel K.'s subjective assessment of the situation when he ordered the air strike matter in order to judge the lawfulness of the strike? (P I, Arts 51 (5) (b) and 57 (2) (a) (iii); CIHL, Rule 14)
2. *(Paras. 216, 218)* According to the ECHR, did Colonel K. respect the rule of proportionality? Do you agree with the Court that the final number of casualties is irrelevant for the purposes of the proportionality assessment?
3. From what perspective must the proportionality evaluation be made, ex ante or ex post? Is the State practice the ECHR mentions relevant to the interpretation of the rule?

6. *(Para. 69)*

1. Is the commission of inquiry established by the German Parliament right when it concludes that the air strike was not proportionate as a consequence of procedural mistakes made by Colonel K? Should a breach of procedural rules be taken into account when assessing the proportionality of an attack?
2. Should the commission of inquiry take into account the protection by Colonel K. of his own forces in its rationale?
3. Does the decision to order an air strike have to be "comprehensible"? May "comprehensible" be a synonym of "lawful"?

7. *(Paras 23, 45-48, 217)*

1. According to the ECHR, did Colonel K. take all feasible precautionary measures? What precautionary measures did he take? Should he have authorised a "show of force" by flying at low altitude? Could this have constituted a warning? Was a warning necessary if he thought no civilians were present? Could a "show of force" have been an additional verification measure? (P I, Art. 57 (2) (a) (i); CIHL, Rules 15, 16 and 20)
2. Does the fact that Colonel K. had opted for the smallest bomb size available and for the use of delayed detonation fuses, which limited the bombs' effective range, show compliance with the rules governing the conduct of hostilities? Which one(s) in particular? (CIHL, Rule 17)

III. Implementation and Enforcement of IHL

8. *(Paras 82-85, 199)*

1. Which category of violations of IHL must be investigated? (GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; CIHL, Rule 158)

2. Was Germany under an IHL obligation to investigate the airstrike? Would the answer be different if the situation was classified as an IAC? Did Afghanistan have an obligation to cooperate? (CIHL, Rule 161)

9. *(Paras 85-86)* Which rules do the ICRC/Geneva Academy, and the UN guidelines designate as practically applicable to investigations in armed conflict? What is the legal basis for their conclusions? (ICRC/Geneva Academy, Guidelines on investigating violations of IHL)

10. *(Para. 68)* The ICRC also submitted a confidential report to ISAF regarding this airstrike. Why did they not make the report public? Under what circumstances would they publicise it?

11. *(Paras 193-197)* According to the third-party interveners, are the standards developed by IHRL regarding the duty to investigate civilian deaths applicable during an armed conflict?

12. *(Paras 202-209)* What does the ECHR consider the general requirements to be fulfilled in order for an investigation to be effective? How does the Court reflect the challenges stemming from the fact that the deaths occurred in an armed conflict?

13. *(Paras 214, 217-219)*

1. What were the sources regarding the circumstances and the impact of the airstrike that the Federal Prosecutor General relied on during its investigation?
2. Was the ECHR satisfied with the quantity and quality of the sources relied on during the Federal Prosecutor General's investigation? Did the Court consider establishing the precise number and status of the victims of the use of lethal force necessary in the present case? Why/Why not?

14. *(Paras 223-228)*

1. How does the ECHR balance the requirement of independence of an investigation and the duty assigned to commanders under IHL to investigate war crimes committed by soldiers under their command? (P I, Art. 86 (2); CIHL, Rule 153)
2. The ECHR recognised that Colonel K. should not have been involved in some investigation steps. In the Court's opinion, what was the decisive factor that precluded this involvement from rendering the investigation ineffective? Do you agree with the Court's conclusion?

IV. Extraterritorial jurisdiction and interplay between IHL and IHRL

15. *(Paras 104-107, 123-128)* According to Germany, under what conditions can extraterritorial jurisdiction of a State be established? What risks do the intervening Governments warn about, should opening an investigation concerning facts occurring during an armed conflict trigger the applicability of the European Convention?

16. *(Paras 135-138)*

1. Why did the victims only invoke the procedural limb of Article 2 of the European Convention? Why would extraterritorial jurisdiction be broader for the procedural limb of the right to life than for the substantive guarantees?
2. *(Para 136)* According to the ECHR, when must a State conduct an investigation after death it caused extraterritorially? When is such an investigation necessary even when the deceased has never been under the jurisdiction of the State? Is there any particularity in this respect for deaths occurring “active hostilities phase of an armed conflict”?
3. According to the ECHR, must a State each time it actually conducts an investigation after extraterritorial death respect the requirements deduced by the Court from Art. 2 of the European Convention?

17. *(Paras 135-142)*

1. How did the ECHR modify the principles concerning the existence of a “jurisdictional link” in *Güzelyurtlu and Others*? How did it apply the principles in the present case? What did it consider as “special features?”
2. What was the relevance of (customary) IHL for establishing extraterritorial jurisdiction of a Contracting Party to the European Convention in this case? Is it truly a feature special to this particular case?
3. What would be the advantages and disadvantages of broadening the scope of State jurisdiction through mere instituting investigations? What would be the consequence for human rights violations happening in armed conflicts outside of the territory of the Council of Europe?

18. *(Paras 78, 198-200, 211)*

1. What is the ECHR's opinion on *lex specialis* in this case? Does it differ from the opinion of the ICJ expressed in its Advisory Opinion on the Legal Consequences of the Construction of a Wall? (See also: ECHR, Hassan v. UK, paras 98 et seq.)
2. How does the ECHR approach the parallel existing requirements of an effective investigation under IHL and under IHRL? Which requirements does it apply in the present case?