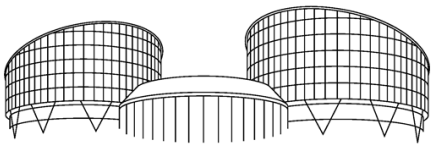

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF HANAN v. GERMANY

(Application no. 4871/16)

JUDGMENT

Art 1 • Jurisdictional link engaging the obligation to investigate civilian deaths due to airstrike ordered during active hostilities in extraterritorial armed conflict • Existence of "special features" establishing link: exclusive jurisdiction of Germany over its troops with respect to serious crimes and obligation to investigate under international humanitarian law (IHL) and domestic law • Afghan authorities prevented for legal reasons from instituting investigation
Art 2 (procedural) • Adequacy, promptness, reasonable expedition and independence of the investigation • Absence of substantive normative conflict between IHL and Art 2 • Facts established in a thorough and reliable manner in order to determine legality of use of lethal force • Participation of next-of-kin and public scrutiny • Existence of remedy to challenge effectiveness of investigation

STRASBOURG

16 February 2021

This judgment is final but it may be subject to editorial revision.

In the case of Hanan v. Germany,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Linos-Alexandre Sicilianos,
Ksenija Turković,
Paul Lemmens,
Yonko Grozev,
Helen Keller,
Aleš Pejchal,
Faris Vehabović,
Carlo Ranzoni,
Mārtiņš Mits,
Tim Eicke,
Lətif Hüseynov,
Lado Chanturia,
Arnfinn Bårdsen,
Erik Wennerström,
Saadet Yüksel,
Anja Seibert-Fohr, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 26 February 2020 and on 2 December 2020,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 4871/16) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national, Mr Abdul Hanan ("the applicant"), on 13 January 2016.

2. The applicant was represented by Mr W. Kaleck, a lawyer practising in Berlin. The German Government ("the Government") were represented by two of their Agents, Ms A. Wittling-Vogel and Ms. N. Wenzel, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged that the respondent State had not conducted an effective investigation, as required by the procedural limb of Article 2 of the Convention, into an airstrike of 4 September 2009 near Kunduz, Afghanistan, that had killed, *inter alios*, the applicant's two sons. Relying on Article 13 of the Convention taken in conjunction with Article 2 of the Convention, the applicant further alleged that he had had no effective domestic remedy to challenge the decision of the German Federal

Prosecutor General (*Generalbundesanwalt*) to discontinue the criminal investigation.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 2 September 2016 notice of the application was given to the Government. On 27 August 2019 a Chamber of that Section, composed of Yonko Grozev, President, Angelika Nußberger, André Potocki, Carlo Ranzoni, Mārtiņš Mits, Lətif Hüseynov, Lado Chanturia, judges, and Claudia Westerdiek, Section Registrar, decided to relinquish jurisdiction in favour of the Grand Chamber, none of the parties having objected (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1 of the Convention). At the second deliberations, Faris Vehabović and Arnfinn Bårdsen, substitute judges, replaced André Potocki and Robert Spano, who were unable to take part in the further consideration of the case (Rule 24 § 3). Jon Fridrik Kjølbro succeeded Linos-Alexandre Sicilianos as President of the Grand Chamber in the course of the proceedings.

6. The applicant and the Government each filed a memorial on the admissibility and merits of the case (Rule 59 § 1).

7. In addition, third-party comments were received from the Governments of Denmark, France, Norway, Sweden, and the United Kingdom, as well as from the Human Rights Centre of the University of Essex, the Institute of International Studies of the Università Cattolica del Sacro Cuore di Milano, the Open Society Justice Initiative and Rights Watch (UK), all of whom had been given leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rules 71 § 1 and 44 § 3). The parties replied to the third-party observations in the course of their oral submissions at the hearing (Rules 71 § 1 and 44 § 6).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 February 2020 (Rules 71 and 59 § 3). The Governments of France and the United Kingdom as well as Rights Watch (UK), which had been given leave by the President to participate in the oral proceedings before the Grand Chamber, took part in the hearing.

There appeared before the Court:

(a) *for the Government*

Ms A. WITTLING-VOGEL,
Ms N. WENZEL, *Agents,*
Ms H. KRIEGER, *Counsel,*
Ms S. WEINKAUFF,

Mr S. SOHM,
Ms M. WITTENBERG,
Ms J. DROHLA,
Mr C. RITSCHER,
Ms D. GMEL,
Ms S. HEINE,
Mr C. BARTHE, *Advisers;*

(b) *for the applicant*
Mr W. KALECK, lawyer,
Mr D. AKANDE, *Counsel*,
Mr F. JESSBERGER,
Ms C. MELONI,
Mr A. SCHÜLLER,
Ms I. SYCHENKOVA, *Adviser*s;

(c) *for the third-party intervener France*
Mr F. ALABRUNE, *Agent*,
Ms E. LEBLOND,
Mr R. STAMMINGER,
Mr E. GOUIN, *Advisers;*

(d) *for the third-party intervener the United Kingdom*
Mr C. WICKREMASINGHE, *Agent*,
Sir JAMES EADIE QC, *Counsel*,
Mr J. SWORDS, *Adviser;*

(e) *for the third-party intervener Rights Watch (UK)*
Mr S. WORDSWORTH QC, *Counsel*,
Mr C. YEGINSU,
Ms G. SCHUMACHER, *Advisers*.

The Court heard addresses by Ms Wittling-Vogel, Ms Krieger, Mr Kaleck, Mr Akande, Mr Alabrune, Sir James Eadie and Mr Wordsworth and the replies given by Ms Krieger, Mr Kaleck, Mr Akande, Sir James Eadie and Mr Alabrune to questions put by judges.

THE FACTS

I. THE BACKGROUND TO THE CASE

9. The applicant was born in Omar Khel, Afghanistan, and lives there.

10. Following the attacks of 11 September 2001, the United States, together with the United Kingdom, launched military operations in Afghanistan on 7 October 2001. Called Operation Enduring Freedom, these

operations included the destruction of terrorist training camps and infrastructure as well as the capture of al-Qaeda leaders and drove the Taliban from power.

11. On 16 November 2001 the German Parliament authorised the deployment of up to 3,900 German soldiers as part of Operation Enduring Freedom. The contingent included around 100 soldiers of the German Special Forces, who were subsequently involved in counterterrorism operations in Afghanistan.

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 Bonn Agreement", as to which see paragraph 71 below) 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. While ISAF mainly focused on maintaining security, the forces engaged in Operation Enduring Freedom continued to undertake counterterrorism and counter-insurgency operations.

14. On 22 December 2001 the German Parliament authorised the deployment of German armed forces as part of ISAF (see paragraph 91 below).

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 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[1] ("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.

[1] Provincial Reconstruction Teams were small teams of military and civilian personnel working in Afghanistan's provinces to provide security for aid works and help humanitarian assistance or reconstruction tasks in areas with ongoing conflict or high levels of insecurity (https://www.nato.int/docu/review/2007/issue3/english/art2.html).

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 (see paragraph 75 below). 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. The latter also commanded the entire German ISAF contingent in Afghanistan and was placed – via the commander of the *Bundeswehr* Joint Forces Operations Command – under the command of the Federal Ministry of Defence.

19. At the relevant time RC North consisted of approximately 5,600 troops, 4,245 of which were German soldiers. Around 1,500 soldiers were stationed at PRT Kunduz including two German special operations units.

20. After April 2009 the security situation in the Kunduz province deteriorated. Particularly during the elections in August and September 2009, an increased number of attacks on ISAF troops occurred, which resulted in several casualties. According to a statement made by Colonel K. before a German parliamentary commission of inquiry, the troops had had to expect attacks whenever they left their base.

II. THE CIRCUMSTANCES OF THE CASE

A. The airstrike 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 00.15 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 him, who had first informed PRT Kunduz about the hijacking. At around 00.30 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 00.48 a.m., the surveillance aircraft ran low on fuel and returned to its base. Shortly thereafter, Staff Sergeant W. contacted ISAF HQ to request a replacement aircraft. He was told that air support could be provided only if a "troops in contact" situation was declared, that is, if ISAF troops were in actual contact with insurgents. 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 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 US F-15 aircraft immediately after their airstrike. In addition, an unmanned aircraft inspected the site of the airstrike at around 8 a.m. the following morning.

25. The airstrike destroyed the two fuel tankers and killed, *inter alios*, the applicant's two sons: Abdul Bayan and Nesarullah. They were twelve and eight years old, respectively. The total number of victims of the airstrike has never been established (see paragraphs 40 and 65-69 below). 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.

B. Investigations into the airstrike

1. On-site investigation

26. Later on that same morning, after having been informed about the airstrike, 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 airstrike.

27. At 12.13 p.m. on the same day, a team from PRT Kunduz departed for the site of the airstrike, 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 100 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. as well as 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" (see paragraph 65 below) visited hospitals and villages in the area and interviewed several persons regarding the airstrike. 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 airstrike, the chief legal officer of the armed forces informed the public prosecutor's office in Potsdam (where the *Bundeswehr* Operations Command is located) about the airstrike. On 7 September 2009, the latter launched a preliminary investigation, which was later transferred to the public prosecutor's office in Leipzig (the then-duty station of Colonel K.) and subsequently to the Dresden Public Prosecutor General (the prosecution authority superior to the Leipzig public prosecutor). After further preparatory work, which included exchanges with the Federal Ministry of Defence concerning the legal framework of the military deployment in Afghanistan and the potential existence of an exculpatory defence (*Rechtfertigungsgrund*), the Dresden Public Prosecutor General on 5 November 2009 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 (see paragraphs 94-95 and 101 below). 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 airstrike in question for further clarification. Three days later the *Bundeswehr* Operations Command forwarded a considerable number of reports. It provided further additional documentation on 16 December 2009. By letter of 8 December 2009, the Federal Prosecutor General asked for copies of the files presented to the parliamentary commission of inquiry (see paragraph 69 below), which were subsequently provided to him; he also received copies of the

transcripts of the commission's hearings. On 21 December 2009 the Federal Prosecutor General sent a comprehensive catalogue of questions to the *Bundeswehr* Operations Command, which were answered in a letter dated 8 February 2010. 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, based on 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 airstrike. From 22 to 25 March 2010 the Federal Prosecutor General interrogated 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. Furthermore, the collected 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 under either the Code of Crimes against International Law or the Criminal Code. 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 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 (see also Article 25 of the Basic Law, paragraph 93 below) 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, notably its Article 11 § 1 no. 3 (see paragraph 95 below), 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 airstrike under international law served as an exculpatory defence.

34. A press release summarising the main findings of the Federal Prosecutor General and indicating that most of the factual information was classified was issued on 19 April 2010. A redacted version of the discontinuation decision was prepared on 13 October 2010.

35. It stated that the following pieces of evidence had been assessed:

- COMISAF investigation report with all annexes;

- NATO/ISAF provisions (Standard Operating Procedures, Rules of Engagement, Tactical Directives, Intelligence Evaluation Matrix, Special Instructions for Air and Space Operations);

- report of the Military Police of 9 September 2009, with 44 annexes (including photographs and video footage);

- written statement by Colonel K. of 5 September 2009 made to the Chief of Staff of the German Armed Forces;

- report by Colonel N., member of the ISAF fact-finding team, of 6 September 2009;

- report of the representative of the Kunduz region to the Afghan President of 4 September 2009;

- report of the Afghan commission of inquiry to the Afghan President;

- United Nations Assistance Mission in Afghanistan ("UNAMA") list of potential civilian victims of the airstrike;

- NGO report of 5 September 2009 [classified];

- report of the ISAF Initial Action Team of 6 September 2009;

- minutes of the conversations at PRT Kunduz with the Afghan commission of inquiry, with local representatives and with a delegation of the Initial Action Team;

- written statement by the Operations Command of the German Armed Forces of 8 February 2010 in response to the questions by the Federal Prosecutor General of 21 December 2009;

- 164 file folders of the Federal Ministry of Defence;

- minutes of the meetings of the Parliamentary Defence Committee sitting as First Commission of Inquiry, in which the two suspects and Captain X. were examined;

- examinations of the two suspects as well as of the witnesses Captain X. and Staff Sergeant Y. by the Federal Prosecutor General;

- minutes of the radio traffic between the pilots of the F-15 aircraft and Staff Sergeant W. and video footage.

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 airstrike 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 airstrike. 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 airstrike.

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 in taking decisions that might cause collateral damage to civilian life on earlier occasions.

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 airstrike 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 airstrike. 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 airstrike, 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 the modern forensic investigation techniques, including the exhumation of bodies or DNA analyses, that would be required. In any event, the number of people

present on the scene at the time of the airstrike did not constitute a reason to question Colonel K.'s assumption that he was dealing exclusively with Taliban fighters.

41. Regarding Colonel K.'s liability under the Code of Crimes against International Law, the Federal Prosecutor General considered that the airstrike of 4 September 2009 met the functional context requirement and the objective constituent elements of Article 11 § 1 no. 3 of the Code, as it 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 airstrike. 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 (see paragraph 80 below).

43. The Federal Prosecutor General considered that general criminal law had remained applicable and concluded that his competence extended to prosecuting offences under the Criminal Code where the military action fell within the scope of the Code of Crimes against International Law. However, Colonel K. could also not be held liable under the Criminal Code, and Staff Sergeant W. could not be liable for having aided and abetted Colonel K. While the objective and subjective constituent elements of the offence of murder had been present, Colonel K.'s actions had been lawful under international law, which served as an exculpatory defence in respect of military action.

44. The international humanitarian law status of the victims of the airstrike 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 airstrike – 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 airstrike 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 airstrike 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 airstrike 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 (see paragraph 81 below). The military standard of disproportionality, that is to say, the prohibition of excessiveness, could not be equated with the stricter benchmark of a lack of reasonableness. 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 airstrike 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 on 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

airstrike 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 (see paragraph 81 below). 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

(a) Access to the investigation file

50. On 12 April 2010 the applicant, through his legal representative, filed a criminal complaint with the Federal Prosecutor General regarding the death of, *inter alios*, his two sons. He also requested access to the investigation file. The applicant's representative presented an authority to act on the applicant's behalf, as well as another authority entitling him to act on behalf of the relatives of a further 113 persons allegedly killed by the airstrike. By letter of 27 April 2010 the Federal Prosecutor General informed the applicant's representative that the criminal investigation had been discontinued in the meantime, without the applicant having been heard, and that the applicant's request for access to the investigation file would require a more detailed assessment concerning the applicant's victim status. The applicant subsequently made submissions by letters of 9 June 2010 and 7 July 2010, which the Federal Prosecutor General by letters of 16 July 2010 and 3 September 2010 rejected as ill-founded. On 1 September 2010 the applicant's legal representative limited his request for access to the investigation file, previously made on behalf of all the persons he was representing, to that of the applicant. On 3 September 2010 the applicant was granted access to the unclassified parts of the investigation file. A redacted version of the discontinuation decision was served on the applicant's representative on 15 October 2010, two days after it was

finalised. The applicant's representative inspected the file at the Federal Prosecutor General's office on 26 October 2010.

(b) Motion to compel public charges

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

52. On 13 December 2010 the Federal Prosecutor General submitted his observations and moved for the motion to be dismissed as inadmissible for failure to comply with the formal requirements or, in the alternative, as ill-founded on the basis that the applicant's submissions could not establish a sufficient ground for suspicion that the suspects were criminally liable. Refuting the applicant's argument as to the alleged deficiencies of the investigation, he maintained that all necessary investigative measures which offered any prospect of success had been carried out. Moreover, even on the basis of the applicant's factual submissions, there would not have been a breach of international humanitarian law.

53. On 16 February 2011 the Düsseldorf Court of Appeal dismissed the applicant's motion to compel public charges as inadmissible. It considered that the applicant's submission did not satisfy the formal requirements (see paragraph 99 below). The applicant had failed to discuss – to a sufficient extent or at all – some of the evidence, on which the Federal Prosecutor General's discontinuation decision of 13 October 2010 was based and which was listed there. It was not clear from his submissions which pieces of evidence he had had, and which he had not had, access to. Contrary to his obligation to also present facts which may exonerate the suspects, the applicant had limited himself to presenting selected parts of certain pieces of evidence, in particular those which appeared to him to corroborate the accusations. Notably, he had not thoroughly discussed (i) the two-page statement given by Colonel K. to the Chief of Staff of 5 September 2009; (ii) the report of the military police of 9 September 2009; (iii) the minutes of the radio traffic between the pilots and Staff Sergeant W. immediately prior to the bomb release; or (iv) the video footage from the F-15 aircraft, and had not argued why the Federal Prosecutor General's assessment of those pieces of evidence had allegedly been wrong. Insofar as the applicant had submitted that the NGO report, to which he had been granted access, had concluded that the airstrike was unlawful and in breach of international humanitarian law, he had failed to state the key considerations that led to this assessment. The same held true for the applicant's reference to the note of Brigadier-General V. of 4 September 2009. As a consequence, his factual

submissions did not enable the Court of Appeal to determine, based on the applicant's brief alone, whether there was sufficient ground for suspicion against the suspects and hence reason to bring public charges. The applicant had furthermore failed to offer suitable evidence, or any evidence at all, for a number of submissions incriminating the suspects, notably the allegation that the local informant had not been present at the sand bank, that the pilots of the F-15 aircraft had demanded further reconnaissance, that many civilians had been outside during the night of the airstrike as it was Ramadan, and that the Taliban insurgents normally acted in groups of ten individuals or less.

(c) Complaint of a breach of the right to be heard

54. On 28 March 2011 the applicant filed a complaint of a breach of the right to be heard (*Gehörsrüge*) in respect of the Court of Appeal's order. He asserted that the Court of Appeal had taken its decision without having given him the opportunity to comment on either the Federal Prosecutor General's observations or those of defence counsel. Moreover, it had not been foreseeable that he had to elaborate on his knowledge of specific pieces of evidence relied on by the Federal Prosecutor General and to present the essential content of those documents. The Court of Appeal should have advised him accordingly prior to dismissing his motion. In any event, requiring him to discuss each and every piece of evidence relied on by the Federal Prosecutor General would render the motion to compel public charges ineffective, given the scope of the file.

55. By order of 31 March 2011 the Court of Appeal dismissed the applicant's complaint as ill-founded. The decision of 16 February 2011 had exclusively been based on the applicant's submissions as such, in order to establish whether the formal requirements had been complied with. It had taken into account that he had been granted access to the investigation file in a limited manner. There had been no duty on the court to point out gaps in the applicant's submissions, as the time-limit for the submission of the motion to compel public charges had expired and the formal defects could no longer be rectified.

4. Proceedings before the Federal Constitutional Court

56. On 17 March 2011 and 27 April 2011 the applicant, represented by counsel, lodged constitutional complaints with the Federal Constitutional Court. The later complaint encompassed the earlier one and, in addition, challenged the Court of Appeal's decision of 31 March 2011. In alleging that the criminal investigation had been ineffective, the applicant argued in particular that not all necessary investigative measures had been taken in order to comprehensively establish the objective circumstances of the airstrike; neither the applicant, nor eyewitnesses, nor military experts had

been examined with a view to determining whether the suspects could justifiably base their decision to order the airstrike on the information available to them, and whether sufficient precautionary measures had been taken. The number of victims had not been established, nor had there been medical reports on the cause of death. Moreover, the applicant as the next-of-kin of two victims of the airstrike had been insufficiently involved in the proceedings, in view of the limited and delayed access to the investigation file, the failure to be heard, the delay in the service of the Federal Prosecutor General's discontinuation decision and the excessive admissibility requirements applied by the Court of Appeal.

57. On 8 December 2014 the Federal Constitutional Court refused to admit the constitutional complaint for adjudication (no. 2 BvR 627/14) insofar as it concerned access to the investigation file. The applicant did not challenge this decision in the present application.

58. On 19 May 2015 the Federal Constitutional Court refused to admit the constitutional complaint for adjudication (no. 2 BvR 987/11) insofar as it concerned the effectiveness of the criminal investigation, finding that it was, in any event, ill-founded. While the applicant had a right to an effective criminal investigation, both the discontinuation decision of the Federal Prosecutor General and the decision of the Düsseldorf Court of Appeal in respect of his motion to compel public charges had satisfied the respective requirements.

59. The discontinuation decision of the Federal Prosecutor General had neither misjudged the importance of the right to life and the resulting obligations of the State to protect it nor the requirement to carry out an effective investigation into deaths as defined by the case-law of the Federal Constitutional Court and of the European Court of Human Rights. The Federal Prosecutor General's decision had described the investigations that he had carried out and concluded that there were insufficient indications to establish reasonable grounds for suspicion. That decision had mainly been based on the presumption that the suspects had been convinced, at the time of ordering the airstrike, that the persons in the immediate vicinity of the fuel tankers were armed insurgents, which excluded the intent required for liability under Article 11 § 1 no. 3 of the Code of Crimes against International Law. That determination had not been arbitrary and thus did not warrant objections under constitutional law.

60. Additional investigatory measures, such as the examination of witnesses who had observed the airstrike, would not have changed this. The bombing itself and the deaths of numerous civilians had never been in doubt. The key aspect of the decision to discontinue the investigation had been that it could not be proven that the suspects knew with certainty that the airstrike would injure or even kill civilians. Neither that finding nor the investigations carried out to that end raised concerns under constitutional law. Lastly, the Federal Prosecutor General's position – that he was also

competent to investigate offences under the Criminal Code that might have been committed through the same act that led him to investigate offences under the Code of Crimes against International Law – was not arbitrary.

61. The Federal Constitutional Court further held that the Düsseldorf Court of Appeal's decision of 16 February 2011 did not raise concerns under constitutional law either. The investigations that had been carried out and their documentation by the Federal Prosecutor General satisfied constitutional requirements. A subsequent review decision by a court thus could not result in a breach of the right to an effective criminal investigation. In this respect, it was not decisive whether the court had dismissed the motion to compel public charges as inadmissible or as ill-founded, as long as an examination of the challenged decision to discontinue the investigation could be discerned. The Court of Appeal had dismissed that motion as inadmissible, but the manner and the scope of the Court of Appeal's reasoning showed that it had conducted a detailed examination of the Federal Prosecutor General's discontinuation decision and the investigations documented therein.

62. Moreover, the Federal Constitutional Court found that the Court of Appeal's decision had not misjudged the importance and scope of the applicant's right to effective protection of his legal interests (*Grundrecht auf effektiven Rechtsschutz*). The requirements applied by the Court of Appeal in respect of the content of the motion to compel public charges did not raise concerns under constitutional law in this respect. As the applicant had, to a significant extent, based his motion seeking to compel public charges on the content of the investigation file, he had to provide the essential content of the pieces of evidence which he cited; otherwise the legislature's intent that the competent court had to be able to examine the motion's conclusiveness solely based on the brief itself would be undermined. A selective, or even distorted, representation of parts of a suspect's account or of witness examinations could create an inaccurate image of the result of the investigation which could not easily be corrected. This might oblige the applicant to also submit information on circumstances which could exonerate a suspect. In the present case, the applicant had not satisfied these requirements.

63. Lastly, the Court of Appeal's decision had not breached the applicant's right to be heard. In this respect, the Federal Constitutional Court endorsed the reasons advanced by the Court of Appeal in its order of 31 March 2011.

64. The Federal Constitutional Court's decision was served on the applicant's counsel on 13 July 2015.

5. Other investigations

65. After COMISAF learned of the airstrike on the morning of 4 September 2009, he initiated an investigation. The so-called "Initial

Action Team" arrived in Kunduz late that afternoon, was shown video footage from the F-15 aircraft and interviewed several members of PRT Kunduz, including Colonel K. The following day, it conducted an on-site investigation, visited a hospital and met with Afghan officials. In its report of 6 September 2009, it recommended further assessment of the events by a Joint Investigation Board. This board concluded its investigation on 26 October 2009 and published its findings in a second report ("COMISAF investigation report"). Both reports are classified "NATO-/ISAF-Confidential".

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 airstrike and secured evidence. Its final report was published on 10 September 2009 and concluded that the airstrike 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 airstrike had been directed at the insurgents and succeeded in weakening the Taliban network.

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

> **Airstrike 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 also investigated the airstrike 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 airstrike was in compliance with the mandate given by Parliament to the German armed forces, with the operative planning and with the applicable orders and rules of engagement. On 20 October 2011 the commission concluded its investigation and published its report. As to the number of victims of the airstrike, it noted that different reports indicated between 14 and 142 deceased (14 to 113 civilians) and ten to 33 injured persons (four to nine

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 airstrike, and partially violated the applicable ISAF rules of engagement. Consequently, based on the information available to the commission, the airstrike 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 airstrike was comprehensible.

6. Civil proceedings for compensation

70. The applicant together with another individual lodged a civil action for compensation against the Federal Republic of Germany in connection with the killing of their relatives by the airstrike of 4 September 2009. After the Bonn Regional Court had rejected the action and the plaintiffs' appeal before the Cologne Court of Appeal had been to no avail, the Federal Court of Justice, by judgment of 6 October 2016, rejected as ill-founded the plaintiffs' appeal on points of law. It left open the question whether Germany could be sued for extraterritorial military operations of the *Bundeswehr* under NATO operational command. However, it found, firstly, that the plaintiffs, as individuals, could not claim compensation from Germany for a breach of international humanitarian law based directly on international law; such right could, as a rule, only be exercised by their State. It found, secondly, that German law on State liability was not applicable to harm done to foreign citizens by the German armed forces in the framework of a deployment to an armed conflict overseas. Irrespective of this question of applicability, such a claim by the plaintiffs was ruled out in any event because there had been no breach of official duty by a German soldier or authority, notably no culpable breach of the rules of international humanitarian law by Colonel K. The Court of Appeal had not erred in law when it determined, basing itself on the facts established by the Regional Court, that the presence of civilians at the site of the airstrike had not been objectively foreseeable for Colonel K. at the time of ordering the airstrike, all feasible precautionary measures having been taken. The Federal Constitutional Court declined to consider the applicant's constitutional complaint lodged in respect of these civil proceedings (file no. 2 BvR 477/17, order of 18 November 2020, delivered on 16 December 2020).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. INTERNATIONAL MATERIAL

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

1. Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions of 5 December 2001 ("the Bonn Agreement")

71. The relevant passages of the above agreement read as follows:

"The participants in the UN talks on Afghanistan,

…

Reaffirming the independence, national sovereignty and territorial integrity of Afghanistan,

Acknowledging the right of the people of Afghanistan to freely determine their own political future in accordance with the principles of Islam, democracy, pluralism and social justice,

...

Recognizing that some time may be required for a new Afghan security force to be fully constituted and functional and that therefore other security provisions detailed in Annex I to this agreement must meanwhile be put in place,

...

Have agreed as follows:

THE INTERIM AUTHORITY

...

V. Final provisions

...

3) The Interim Authority shall cooperate with the international community in the fight against terrorism, drugs and organized crime. It shall commit itself to respect international law and maintain peaceful and friendly relations with neighbouring countries and the rest of the international community.

...

ANNEX I

INTERNATIONAL SECURITY FORCE

1. The participants in the UN Talks on Afghanistan recognize that the responsibility for providing security and law and order throughout the country resides with the Afghans themselves. To this end, they pledge their commitment to do all within their means and influence to ensure such security, including for all United Nations and other personnel of international governmental and non-governmental organizations deployed in Afghanistan.

2. With this objective in mind, the participants request the assistance of the international community in helping the new Afghan authorities in the establishment and training of new Afghan security and armed forces.

3. Conscious that some time may be required for the new Afghan security and armed forces to be fully constituted and functioning, the participants in the UN Talks on Afghanistan request the United Nations Security Council to consider authorizing the early deployment to Afghanistan of a United Nations mandated force. This force will assist in the maintenance of security for Kabul and its surrounding areas. Such a force could, as appropriate, be progressively expanded to other urban centres and other areas.

4. The participants in the UN Talks on Afghanistan pledge to withdraw all military units from Kabul and other urban centers or other areas in which the UN mandated force is deployed. It would also be desirable if such a force were to assist in the rehabilitation of Afghanistan's infrastructure."

2. United Nations Security Council Resolution 1386 (2001) of 20 December 2001

72. The above resolution reads as follows:

"The Security Council,

Reaffirming its previous resolutions on Afghanistan, in particular its resolutions 1378 (2001) of 14 November 2001 and 1383 (2001) of 6 December 2001,

Supporting international efforts to root out terrorism, in keeping with the Charter of the United Nations, and reaffirming also its resolutions 1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001,

Welcoming developments in Afghanistan that will allow for all Afghans to enjoy inalienable rights and freedom unfettered by oppression and terror,

Recognizing that the responsibility for providing security and law and order throughout the country resides with the Afghan themselves,

Reiterating its endorsement of the Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions, signed in Bonn on 5 December 2001 (S/2001/1154) (the Bonn Agreement),

Taking note of the request to the Security Council in Annex 1, paragraph 3, to the Bonn Agreement to consider authorizing the early deployment to Afghanistan of an international security force, as well as the briefing on 14 December 2001 by the Special Representative of the Secretary-General on his contacts with the Afghan authorities in which they welcome the deployment to Afghanistan of a United Nations-authorized international security force,

Taking note of the letter dated 19 December 2001 from Dr. Abdullah Abdullah to the President of the Security Council (S/2001/1223),

Welcoming the letter from the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom of Great Britain and Northern Ireland to the Secretary-General of 19 December 2001 (S/2001/1217), and *taking note* of the United Kingdom offer contained therein to take the lead in organizing and commanding an International Security Assistance Force,

Stressing that all Afghan forces must adhere strictly to their obligations under human rights law, including respect for the rights of women, and under international humanitarian law,

Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan,

Determining that the situation in Afghanistan still constitutes a threat to international peace and security,

Determined to ensure the full implementation of the mandate of the International Security Assistance Force, in consultation with the Afghan Interim Authority established by the Bonn Agreement,

Acting for these reasons under Chapter VII of the Charter of the United Nations,

1. *Authorizes*, as envisaged in Annex 1 to the Bonn Agreement, the establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment;

2. *Calls upon* Member States to contribute personnel, equipment and other resources to the International Security Assistance Force, and invites those Member States to inform the leadership of the Force and the Secretary-General;

3. *Authorizes* the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate;

4. *Calls upon* the International Security Assistance Force to work in close consultation with the Afghan Interim Authority in the implementation of the force mandate, as well as with the Special Representative of the Secretary-General;

5. *Calls upon* all Afghans to cooperate with the International Security Assistance Force and relevant international governmental and non-governmental organizations, and welcomes the commitment of the parties to the Bonn Agreement to do all within their means and influence to ensure security, including to ensure the safety, security and freedom of movement of all United Nations personnel and all other personnel of international governmental and non-governmental organizations deployed in Afghanistan;

6. *Takes note* of the pledge made by the Afghan parties to the Bonn Agreement in Annex 1 to that Agreement to withdraw all military units from Kabul, and calls upon them to implement this pledge in cooperation with the International Security Assistance Force;

7. *Encourages* neighbouring States and other Member States to provide to the International Security Assistance Force such necessary assistance as may be requested, including the provision of overflight clearances and transit;

8. *Stresses* that the expenses of the International Security Assistance Force will be borne by the participating Member States concerned, *requests* the Secretary-General to establish a trust fund through which contributions could be channelled to the Member States or operations concerned, and encourages Member States to contribute to such a fund;

9. *Requests* the leadership of the International Security Assistance Force to provide periodic reports on progress towards the implementation of its mandate through the Secretary-General;

10. *Calls on* Member States participating in the International Security Assistance Force to provide assistance to help the Afghan Interim Authority in the establishment and training of new Afghan security and armed forces;

11. *Decides* to remain actively seized of the matter."

3. Subsequent United Nations Security Council Resolutions

73. In its Resolution 1510 (2003) of 13 October 2003 the United Nations Security Council expanded the mandate of ISAF to areas of Afghanistan outside of Kabul and its environs.

74. In addition, the United Nations Security Council continuously renewed the authorisation for ISAF given by Resolution 1386 (2001). For the relevant time, United Nations Security Council Resolution 1833 (2008) of 22 September 2008 extended the authorisation for a period of twelve months beyond 13 October 2008. The relevant parts read:

"The Security Council,

...

Recognizing that the responsibility for providing security and law and order throughout the country resides with the Afghan Authorities, stressing the role of the International Security Assistance Force (ISAF) in assisting the Afghan Government to improve the security situation and *welcoming* the cooperation of the Afghan Government with ISAF,

...

Stressing the central and impartial role that the United Nations continues to play in promoting peace and stability in Afghanistan by leading the efforts of the international community, *noting*, in this context, the synergies in the objectives of the United Nations Assistance Mission in Afghanistan (UNAMA) and of ISAF, and *stressing* the need for strengthened cooperation, coordination and mutual support, taking due account of their respective designated responsibilities,

...

Expressing also its concern over the harmful consequences of violent and terrorist activities by the Taliban, Al-Qaida and other extremist groups on the capacity of the Afghan Government to guarantee the rule of law, to provide security and basic services to the Afghan people, and to ensure the full enjoyment of their human rights and fundamental freedoms,

Reiterating its support for the continuing endeavours by the Afghan Government, with the assistance of the international community, including ISAF and the Operation Enduring Freedom (OEF) coalition, to improve the security situation and to continue to address the threat posed by the Taliban, Al-Qaida and other extremist groups, and *stressing* in this context the need for sustained international efforts, including those of ISAF and the OEF coalition,

...

Recognizing the efforts taken by ISAF and other international forces to minimize the risk of civilian casualties, and *calling* on them to take additional robust efforts in this regard, notably by the continuous review of tactics and procedures and the conduct of after-action reviews and investigations in cooperation with the Afghan Government in

cases where civilian casualties have occurred and when the Afghan Government finds these joint investigations appropriate,

...

Recalling the leading role that the Afghan Authorities will play for the organization of the next presidential elections, with the assistance of the United Nations, and *stressing* the importance of the assistance to be provided to the Afghan Authorities by ISAF in ensuring a secure environment conducive to the elections,

...

Expressing its appreciation for the leadership provided by the North Atlantic Treaty Organization (NATO), and for the contributions of many nations to ISAF and to the OEF coalition, including its maritime interdiction component, which operates within the framework of the counter-terrorism operations in Afghanistan and in accordance with the applicable rules of international law,

Determining that the situation in Afghanistan still constitutes a threat to international peace and security,

Determined to ensure the full implementation of the mandate of ISAF, in coordination with the Afghan Government,

Acting for these reasons under Chapter VII of the Charter of the United Nations,

1. *Decides* to extend the authorization of the International Security Assistance Force, as defined in resolution 1386 (2001) and 1510 (2003), for a period of twelve months beyond 13 October 2008;

2. *Authorizes* the Member States participating in ISAF to take all necessary measures to fulfil its mandate;

...

5. *Calls upon* ISAF to continue to work in close consultation with the Afghan Government and the Special Representative of the Secretary-General as well as with the OEF coalition in the implementation of the force mandate;

6. *Requests* the leadership of ISAF to keep the Security Council regularly informed, through the Secretary-General, on the implementation of its mandate, including through the provision of quarterly reports;

7. *Decides* to remain actively seized of this matter."

4. Military Technical Agreement between the International Security Force (ISAF) and the Interim Administration of Afghanistan ('Interim Administration') of 4 January 2002

75. The above agreement reads, insofar as relevant, as follows:

"Article I: General Obligations

...

4. For the purpose of this Military Technical Agreement, the following expressions shall have the meaning described below:

...

g. Area of Responsibility (AOR) is the area marked out on the map attached at Annex B.

...

i. An 'Offensive Action' is any use of armed military force.

...

Article II: Status of the International Security Force

1. The arrangements regarding the Status of the ISAF are at Annex A.

Article III: Provision of Security and Law and Order

1. The Interim Administration recognises that the provision of security and law and order is their responsibility. This will include maintenance and support of a recognised Police Force operating in accordance with internationally recognised standards and Afghanistan law and with respect for internationally recognised human rights and fundamental freedoms, and by taking other measures as appropriate.

2. The Interim Administration will ensure that all Afghan Military Units come under its command and control in accordance with the Bonn Agreement. The Interim Administration agrees it will return all Military Units based in Kabul into designated barracks detailed at Annex C as soon as possible. Such units will not leave those Barracks without the prior approval of the Interim Administration and notification to the ISAF Commander by the Chairman of the Interim Administration.

3. The Interim Administration will refrain from All Offensive Action within the AOR.

...

ANNEX A

Arrangements Regarding the Status of the International Security Assistance Force ("ISAF Status of Forces Agreement")

Section 1: Jurisdiction

1. The provisions of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 concerning experts on mission will apply *mutatis mutandis* to the ISAF and supporting personnel, including associated liaison personnel.

...

3. The ISAF and supporting personnel, including associated liaison personnel, will under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan. The Interim Administration will assist the ISAF contributing nations in the exercise of their respective jurisdictions.

4. The ISAF and supporting personnel, including associated liaison personnel, will be immune from personal arrest or detention. ISAF and supporting personnel, including associated liaison personnel, mistakenly arrested or detained will be immediately handed over to ISAF authorities. The Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or

any other entity or State without the express consent of the contributing nation. ISAF Forces will respect the laws and culture of Afghanistan.

…"

B. International law and practice

1. The Vienna Convention on the Law of Treaties

76. Article 31 of the Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention") provides as follows:

Article 31 General Rule of Interpretation

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

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:

"25. The Court observes that the protection of the International Covenant for the Protection of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life, however, is not such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can

only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

...

41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*: there is a 'specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law' (*I. C. J. Reports 1986*, p. 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."

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:

"106. ... the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the [International Covenant on Civil and Political Rights]. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."

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:

"215. The Court, having established that the conduct of the UPDF [Uganda People's Defence Force] and of the officers and soldiers of the UPDF is attributable to Uganda, must now examine whether this conduct constitutes a breach of Uganda's international obligations. In this regard, the Court needs to determine the rules and principles of international human rights law and international humanitarian law which are relevant for this purpose.

216. The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In this Advisory Opinion the Court found that

'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others

> may be matters of both these branches of international law.' (I.C.J. Reports 2004, p. 178, para. 106.)
>
> It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories (ibid., pp. 178-181, paras. 107-113)."

3. International humanitarian law

80. Article 50 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977 ("Additional Protocol I"), which is applicable to international armed conflicts, defines civilians as persons who are not members of the armed forces. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977 ("Additional Protocol II"), which is applicable to non-international armed conflicts, does not contain a definition of civilians. The definition of civilians in Additional 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 International Committee of the Red Cross ("ICRC") and the commentary thereon[2]). 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 Additional Protocol II and Rule 6 of the *Customary International Humanitarian Law* 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*,[3] 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

[2] J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (Geneva/Cambridge: ICRC/Cambridge University Press, 2005).

[3] N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009).

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 Rules 11 to 13 of the *Customary International Humanitarian Law* study 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 Additional Protocol I, is recognised as a norm of customary international law which is applicable in both international and non-international armed conflict (see paragraph 77 above and Rule 14 of the *Customary International Humanitarian Law* study). 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 Additional Protocol I. The principle of precautions in attack, codified in Article 57 of Additional 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). It provides that in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects and that all feasible precautions must be taken, including in the choice of means and methods of warfare, to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects. 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.[4] Additional Protocol II does not contain a similar provision. Its Article 6 contains certain guarantees to be respected in the prosecution and punishment of criminal offences related to the armed conflict, including a court "offering the essential guarantees of independence and impartiality" and that the accused be informed "without delay" of the grounds against him.

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 Rule 158 of the *Customary International Humanitarian Law* study 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.[5]

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 Additional Protocol I and the ICRC commentary thereon[6] as well as Rule 153 of the *Customary International Humanitarian Law* study 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

[4] Articles 49 and 50 of the Geneva Convention (I) for the Amelioration of the Condition of the Sick and Wounded in the Field (of 12 August 1949) ("the First Geneva Convention"); Articles 50 and 51 of the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (of 12 August 1949) ("the Second Geneva Convention"); Articles 129 and 130 of the Geneva Convention (III) relative to the Treatment of Prisoners of War (of 12 August 1949) ("the Third Geneva Convention"); Articles 146 and 147 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (of 12 August 1949) ("the Fourth Geneva Convention"); and Articles 85 and 86 of Additional Protocol I.

[5] ICRC, *Commentary on the First Geneva Convention* (2nd ed., Cambridge: Cambridge University Press, 2016), in respect of the common Article 1 of the four Geneva Conventions of 1949 (at paragraphs 125-126, 133-137, and 143-149).

[6] Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC/Martinus Nijhoff Publishers, 1987), in respect of Article 87 of Additional Protocol I (at paragraphs 3549-3563).

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

87. In its General Comment No. 36 on the right to life under Article 6 of the International Covenant on Civil and Political Rights, adopted on 30 October 2018, the Human Rights Committee stated:

> "63. ... In light of article 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes 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 ...
>
> 64. Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities. While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive. Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields would also violate article 6 of the Covenant. States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered. They must also investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards ..."

6. The Minnesota Protocol

88. In 2017, the Office of the UN High Commissioner for Human Rights published a revised version of the Minnesota Protocol on the Investigation of Potentially Unlawful Death ("the Minnesota Protocol"), a set of international guidelines, which provides:

> "21. Where, during the conduct of hostilities, it appears that casualties have resulted from an attack, a post-operation assessment should be conducted to establish the facts, including the accuracy of the targeting. Where there are reasonable grounds to suspect that a war crime was committed, the State must conduct a full investigation and prosecute those who are responsible. Where any death is suspected or alleged to have resulted from a violation of IHL that would not amount to a war crime, and where an investigation ('official inquiry') into the death is not specifically required under IHL, at a minimum further inquiry is necessary. In any event, where evidence of unlawful conduct is identified, a full investigation should be conducted."

7. Inter-American Court of Human Rights

89. In its judgment of 15 September 2005 on the merits, reparations and costs in *Mapiripán Massacre v. Colombia*, which concerned a massacre of civilians carried out by a paramilitary group with the alleged assistance of the State authorities, the Inter-American Court of Human Rights recognised the existence of a non-international armed conflict and stated that it would take international humanitarian law into account in interpreting the American Convention on Human Rights (paragraphs 114-115). The court went on to determine that the standard against which the investigations into the extra-legal executions had to be measured was one of a "serious, impartial and effective investigation that must not be undertaken as a mere formality destined beforehand to be fruitless" (paragraph 223). Such investigation must draw on all available means in order to discover the truth within a reasonable timeframe, bearing in mind the complexity of the events under investigation and their context (see, in particular, *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 20 November 2013, paragraphs 370-373).

II. COMPARATIVE LAW MATERIAL

90. According to the information available to the Court, notably of the legislation and practice in thirteen member States of the Council of Europe which participate in military operations abroad (Belgium, France, Ireland, Italy, the Netherlands, Poland, Romania, the Russian Federation, Spain, Sweden, Turkey, Ukraine and the United Kingdom), all of these States empowered the competent domestic authorities to investigate alleged war crimes or wrongful deaths inflicted abroad by members of their armed forces. The investigation is mandatory in eight States; in three States it is in

principle non-mandatory according to the broader meaning of discretionary prosecution (*opportunité des poursuites*). The duty to investigate is considered as essentially autonomous in seven States, while in two States it depends on the State jurisdiction to a larger extent, although it seems that attribution to the State of the impugned acts is not a necessary requirement. As regards the procedural guarantees during the investigation of criminal offences allegedly committed by members of the armed forces abroad, domestic law in ten States refers to the general procedural guarantees applicable in any criminal case, whereas in two States, specific legal provisions or principles apply, the extent and quality of which do, however, not seem to be substantially different from those applicable in ordinary criminal cases.

III. DOMESTIC LAW AND PRACTICE

A. Authorisation of the deployment of German troops as part of ISAF

91. On 22 December 2001 the German Parliament authorised the deployment of German troops to Afghanistan and their participation in ISAF. The authorisation referred to the Bonn Agreement and United Nations Security Council Resolution 1386 (2001) regarding the tasks and responsibilities of the troops. Moreover, the authorisation clarified the right to individual and collective self-defence:

> "The exercise of the right to individual and collective self-defence remains unaffected [by the participation in ISAF]. The troops deployed in this [ISAF] operation are further authorised to use military force for the defence of others."

92. On 16 October 2008 the German Parliament prolonged the deployment of German troops in Afghanistan until 13 December 2009.

B. Basic Law (*Grundgesetz*)

93. Article 25 of the German Basic Law reads:

> "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."

C. Code of Crimes against International Law *(Völkerstrafgesetzbuch)*

94. In June 2002, the Code of Crimes against International Law was adopted and entered into force, amending domestic law with a view to the entry into force of the Rome Statute of the International Criminal Court ("the Rome Statute") on 1 July 2002, including in respect of Germany. Article 153f of the Code of Criminal Procedure (see paragraph 96 below)

was introduced at the same time. A key objective of the legislative amendments was to enable the investigation and prosecution of offences falling within the scope of the Rome Statute at the domestic level, not least in view of the principle of complementarity foreseen in the Rome Statute (see Publication of the Federal Parliament (*Bundestagsdrucksache*) no. 14/8524, at p. 12).

95. The relevant provisions of the Code of Crimes against International Law, as in force at the material time, read as follows:

Article 1

"This Act shall apply to all criminal offences against international law designated under this Act and to serious criminal offences designated therein even when the offence was committed abroad and has no connection to Germany."

Article 2

"General criminal law shall apply to offences under this Act, except insofar as Articles 1 and 3 to 5 of this Act contain special provisions."

Article 11

War crimes consisting in the use of prohibited methods of warfare

"(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

...

3. carries out an attack by military means and anticipates with certainty that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated,

...

shall be punished with imprisonment for not less than three years. ...

(2) Where the perpetrator causes the death or serious injury of a civilian (Article 226 of the Criminal Code) or of a person who is protected under international humanitarian law through an offence pursuant to paragraph (1), numbers 1 to 6, he shall be punished with imprisonment for not less than five years. Where the perpetrator intentionally causes death, the punishment shall be imprisonment for life or for not less than ten years.

..."

D. Criminal investigations

96. The relevant provisions of the German Code of Criminal Procedure regulating criminal investigations read as follows:

Article 152

"(1) The public prosecutor's office shall have the authority to prefer public charges.

(2) Except as otherwise provided by law, the public prosecutor's office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications."

Article 153c

"(1) The public prosecutor's office may dispense with prosecuting criminal offences

1. which have been committed outside the territorial scope of this statute ...;

...

Offences for which there is criminal liability pursuant to the Code of Crimes against International Law shall be subject to Article 153f.

..."

Article 153f

"(1) The public prosecutor's office may dispense with prosecuting a criminal offence for which there is criminal liability pursuant to Articles 6 to 14 of the Code of Crimes against International Law in the cases referred to in Article 153c, paragraph (1), numbers 1 and 2, if the suspect is not resident in Germany and is not expected to so reside. If, in the cases referred to in Article 153c, paragraph (1), number 1, the suspect is a German national, however, this shall only apply if the offence is being prosecuted before an international court of justice or by a state on whose territory the offence was committed or a citizen of which was injured by the offence.

(2) The public prosecutor's office may dispense with prosecuting an offence for which there is criminal liability under Articles 6 to 14 of the Code of Crimes against International Law in the cases referred to in Article 153c, paragraph (1), numbers 1 and 2, in particular if

1. no German national is suspected of having committed the crime;

2. the offence was not committed against a German national;

3. no suspect is, or is expected to be, resident in Germany;

4. the offence is being prosecuted by an international court of justice or by a country on whose territory the offence was committed, a citizen of which is either suspected of the offence, or suffered injury as a result of the offence.

..."

Article 160

"(1) As soon as the public prosecutor's office obtains knowledge of a suspected criminal offence either through a criminal information or by other means it shall investigate the facts to decide whether public charges are to be preferred.

(2) The public prosecutor's office shall ascertain not only incriminating but also exonerating circumstances and shall ensure that evidence, the loss of which is to be feared, is taken. ..."

Article 170

"(1) If the investigations provide sufficient reason for preferring public charges, the public prosecutor's office shall prefer them by submitting a bill of indictment to the competent court.

(2) In all other cases the public prosecutor's office shall terminate the proceedings. The public prosecutor shall notify the suspect thereof if he was examined as such or a warrant of arrest was issued against him; the same shall apply if he requested such notice or if there is a particular interest in the notification."

Article 171

"If the public prosecutor's office does not grant an application for preferring public charges or after conclusion of the investigation it orders the proceedings to be terminated, it shall notify the applicant, indicating the reasons. The decision shall inform the applicant, if he is at the same time the aggrieved person, of the possibility of contesting the decision and of the time-limit provided therefor (Article 172(1))."

97. According to well-established domestic practice, indications that a person may have committed a criminal offence which fall below the threshold of "sufficient factual indications" as set out in Article 152 § 2 of the Code of Criminal Procedure are insufficient for the opening of a formal criminal investigation under Article 160 § 1 of the Code of Criminal Procedure. In such a scenario, the public prosecutor's office may conduct preliminary investigations in order to establish whether there are "initial grounds for suspicion" (*Anfangsverdacht*) justifying the opening of a formal criminal investigation. In such preliminary investigations, the person concerned does not have the status of an "accused" and no coercive investigatory measures may be undertaken. However, the public prosecutor's office is authorised to examine witnesses and to procure a judicial examination of witnesses where appropriate (see Offenburg Regional Court, no. Qs 41/93, order of 25 May 1993).

E. Possibilities to challenge a decision by the public prosecutor not to bring charges

98. Decisions made by the public prosecutor's office not to bring charges are not final determinations in the sense of *res judicata*. Prosecution may be reopened if there is new evidence or the evidence presents itself in a different light (see Federal Court of Justice, no. 2 StR 524/10, judgment of 4 May 2011, at paragraph 9), for example in the form of subsequent submissions by an aggrieved party.

99. A decision to discontinue a criminal investigation may be challenged by any aggrieved party within one month of receipt of notification, by lodging a motion seeking to compel public charges (Articles 172 et seq. of the Code of Criminal Procedure). The brief in support of such a motion must indicate the facts intended to substantiate the charges and the evidence as to the offence having been committed. This formal requirement is to enable the court to determine whether or not there is a sufficient suspicion as to an offence having been committed exclusively based on the contents of the brief, without having to study the files or annexes (see Hamm Court of Appeal, no. 3 Ws 209/09, order of 14 July 2009). The petitioner must present the essence of the public prosecutor's discontinuation decision (Hamm Court of Appeal, no. 1 Ws 135/11, order of 28 April 2011; Federal Constitutional Court, no. 2 BvR 967/07, order 4 September 2008, at paragraph 17). If the petitioner seeks to rely on additional evidence

contained in the investigation file, he must provide the essential content of the respective pieces of evidence in his brief, which may require him to elaborate on evidence that may exonerate the suspect (see Federal Constitutional Court, no. 2 BvR 2040/15, order 27 July 2016, at paragraph 15). In assessing whether there is sufficient ground for suspicion, the court may consider whether the suspect would have to be acquitted in subsequent criminal proceedings based on the principle *in dubio pro reo* (see Federal Constitutional Court no. 2 BvR 2318/07, order of 13 December 2007, at paragraph 2).

100. The Federal Constitutional Court is empowered to review and reverse decisions to discontinue proceedings made by public prosecutors and has made use of that power (see no. 2 BvR 878/05, order of 17 November 2005, at paragraph 23). It may find a violation of a person's fundamental rights where a decision dismissing a motion to compel public charges was based on the excessively formalistic application of the requirements (see no. 2 BvR 912/15, order of 21 October 2015). In cases concerning killings for which State officials may possibly bear responsibility, it has aligned itself with the requirements of this Court's case-law in respect of effective investigations under Article 2 of the Convention (see no. 2 BvR 2307/06, order of 4 February 2010; no. 2 BvR 2699/10, order of 26 June 2014).

F. Courts Constitution Act (*Gerichtsverfassungsgesetz*)

101. The relevant provisions of the German Courts Constitution Act read as follows:

Section 120

"(1) In criminal matters, the Court of Appeal for the district in which the *Land* government has its seat shall have jurisdiction for the territory of the given *Land* for hearing and deciding cases at first instance involving ...

8. criminal offences pursuant to the Code of Crimes against International Law.

..."

Section 142a

"(1) The Federal Prosecutor General shall discharge the duties of the public prosecutor's office in respect of the criminal matters falling under the first instance jurisdiction of the Courts of Appeal pursuant to section 120(1) and (2) at these courts as well. In order for the prosecution to be transferred to the Federal Prosecutor General it is sufficient if adequate factual indications exist to fulfil the preconditions for his jurisdiction. The public prosecutor's office shall inform the Federal Prosecutor General without delay of any events that give cause to examine the transfer of prosecution to him or her. If, in the cases covered by section 120(1), the officials of the public prosecutor's office of a *Land* and the Federal Prosecutor General cannot agree which of them should take over the prosecution, the Federal Prosecutor General shall decide."

Section 146

"The officials of the public prosecutor's office must comply with the official instructions of their superiors."

Section 147

"The right of supervision and direction shall lie with:

1. the Federal Minister of Justice and Consumer Protection in respect of the Federal Prosecutor General and the federal prosecutors; ...".

THE LAW

I. ADMISSIBILITY

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

1. The parties' submissions

(a) The respondent Government

102. The respondent Government maintained that the application was incompatible *ratione personae* and *ratione loci* with the provisions of the Convention.

(i) Compatibility ratione personae

103. As regards the Court's competence *ratione personae*, the Government referred to *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* ((dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007) and submitted that military actions conducted under the ultimate authority and control of the United Nations Security Council, the latter acting pursuant to Chapter VII of the United Nations Charter, could not be attributed to the respective Contracting State. Therefore, the Court was not competent *ratione personae* to review the military action at issue. The Government further argued that the conclusion in *Behrami and Behrami* had been confirmed in multiple later decisions by the Court and had to be considered settled case-law. Insofar as the Court had concluded that certain military actions in Iraq were attributable to the respective Contracting States in the cases of *Jaloud v. the Netherlands* ([GC], no. 47708/08, ECHR 2014), *Al-Jedda v. the United Kingdom* ([GC], no. 27021/08, ECHR 2011), and *Al-Skeini and Others v. the United Kingdom* ([GC], no. 55721/07, ECHR 2011), this was founded on the exceptional circumstances of those cases. These special circumstances were, however, not present in the current case, which was comparable to *Behrami and Behrami* on a factual level:

- ISAF was created by United Nations Security Council Resolution 1386 (2001); it had not existed previously. The Security Council delegated its

powers by authorising States participating in ISAF to "take all necessary measures". The mandate was sufficiently precise and defined the objects of the mission as well as the roles and responsibilities of all parties involved. In addition, a reporting requirement was provided for.

- ISAF was commanded and controlled in a manner comparable to KFOR, as a unified command over troops from a large number of States forming a multinational force. The States involved in the military presence included States that were not party to the Convention.

- The security presence of ISAF and its military activities in Afghanistan had been repeatedly endorsed by the Security Council and the UN bodies. This endorsement included the airstrikes to combat the Taliban.

- This assessment was not changed by the fact that what is termed "full command" over the contingent made available by Germany rested with German commanders. Concerning the troop-contributing States there was thus no difference between KFOR and ISAF.

(ii) Compatibility ratione loci

(1) No exercise of extraterritorial jurisdiction in Afghanistan

104. The Court was furthermore not competent *ratione loci* to examine the application. The deaths of the applicant's sons did not occur 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 did not have 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 organization 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* (both cited above). 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 airstrike at issue, it was the Afghan security forces who 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 airstrike 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 did not admit a "cause and effect" notion of "jurisdiction" (relying on *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 75, ECHR 2001-XII, and *Medvedyev and Others v. France* [GC], no. 3394/03, § 64, ECHR 2010). This did not lead to an accountability gap, since Contracting States had to comply with their obligations under international humanitarian law.

(2) No competence *ratione loci* based on institution of criminal proceedings

108. The investigative measures that the German authorities instituted were, in the particular circumstances of the present case, not sufficient to make the complaints under the procedural limb of Article 2 compatible *ratione loci* with the Convention. Both *Güzelyurtlu and Others v. Cyprus and Turkey* ([GC], no. 36925/07, 29 January 2019) and *Romeo Castaño v. Belgium* (no. 8351/17, 9 July 2019) concerned mutual obligations of cooperation, notably duties of cooperation under the procedural limb of Article 2 of the Convention between two Contracting States in criminal matters within the legal space of the Convention. The jurisdictional link for such an obligation to cooperate resulted from the special nature of the Convention as a treaty for the collective enforcement of human rights. It aimed at preventing a vacuum in the system of human-rights protection between two Contracting States within the legal space of the Convention and at ensuring that each Contracting State can fulfil its procedural obligation under Article 2 of the Convention. That rationale limited the principle that a jurisdictional link is established by the institution of investigations into deaths that occur outside of the territory of a State to cases where two or more Contracting States must assume their respective responsibility for the collective enforcement of the Convention.

109. The present case did not concern a failure on the part of Germany to assume its responsibility for the collective enforcement of the Convention. No mutual obligations of cooperation between Contracting States in criminal matters within the legal space of the Convention were at

stake. The deaths that were investigated had occurred in military action outside the territory of Council of Europe member States. The special character of the Convention as a collective enforcement treaty among the Contracting States did not come into play.

110. Referring to *Güzelyurtlu and Others* (cited above), *Markovic and Others v. Italy* ([GC], no. 1398/03, ECHR 2006-XIV) and *Chagos Islanders v. the United Kingdom* ((dec.), no. 35622/04, 11 December 2012), the Government asserted that the institution of investigations or proceedings could establish jurisdiction only with regard to measures that the State could take exclusively within its territorial jurisdiction – thus limiting the subject matter of the Court's review to acts which took place there – or, in the case of Turkey in the *Güzelyurtlu and Others* case, on the basis of jurisdiction otherwise established. Where extraterritorial investigations were conducted, jurisdiction was established in line with the exceptional nature of extraterritorial jurisdiction in military missions outside the territories of the Contracting States (*Al-Skeini and Others*, cited above, § 149; *Jaloud*, cited above, § 152). The formal and instantaneous act of a Contracting State to decide to institute a criminal investigation could not, in itself, establish a jurisdictional link and trigger the procedural obligation under Article 2, irrespective of any other circumstance of a given case. It was decisive whether the impugned investigation itself was of an extraterritorial nature. The essence of the applicant's objections concerned investigatory measures which were, or in his view should have been, taken outside German territory and otherwise outside its jurisdiction. The specific challenges for the investigation, which stemmed from the extraterritorial situation in an active combat zone during a non-international armed conflict, continued to decisively influence the ensuing domestic proceedings.

111. There was no need to expand the reach of the Convention in order to avoid an accountability gap, as Germany was already required by international humanitarian law and domestic criminal law to examine the death of civilians during the conduct of hostilities. Moreover, Germany was also obliged to investigate under international criminal law in the present case. The Rome Statute of the International Criminal Court, however, concerned the jurisdiction of that court, not that of Germany for the purposes of Article 1 of the Convention.

112. If the scope of *Güzelyurtlu and Others* were extended to investigations into extraterritorial military action in the conduct of hostilities not involving the exercise of extraterritorial jurisdiction within the meaning of Article 1, States would be obliged to perform impossible tasks in terms of establishing facts extraterritorially. Such an approach would also circumvent the existing case-law in respect of the exceptional nature of extraterritorial jurisdiction and the Court's competence *ratione personae*. Moreover, the establishment of jurisdiction under Article 1 would become arbitrary. If the mere fact of instituting proceedings was sufficient to

establish a jurisdictional link even where no other grounds for a jurisdictional link were shown to exist, this could create an incentive not to conduct such proceedings at all. In addition, such an approach could entail an inconsistent application of the Convention among the Contracting States participating in the same extraterritorial military mission. If one State instituted proceedings and another did not, the latter could evade responsibility under the Convention.

113. The special features that exceptionally triggered a jurisdictional link in the *Güzelyurtlu and Others* case were not present in this case. In particular, the retention of exclusive criminal jurisdiction over German ISAF personnel in respect of offences which might be committed by them on the territory of Afghanistan, under section I, subsection 3, of the ISAF Status of Forces Agreement (see paragraph 75 above) did not constitute a "special feature" for the purposes of establishing a jurisdictional link within the meaning of Article 1 of the Convention (referring to *Güzelyurtlu and Others*, cited above, § 190). That provision was a rule on immunity, which excluded ISAF personnel from prosecution by the Afghan authorities. This retention of criminal jurisdiction concerned the internal relationship between the soldier and the sending State. It did not open up any possibility for the civilian law-enforcement authorities of troop-contributing States to pursue criminal investigations of their own on Afghan territory, nor did the delegation of powers in the pertinent United Nations Security Council Resolutions. Such investigations might have interfered with the sovereignty of Afghanistan. The legal powers of the military police in connection with their authorisation to conduct internal investigations were limited. They were not allowed to summon Afghan witnesses, nor to adopt investigative or coercive measures in order to secure evidence. These restrictions on Germany's legal powers to investigate in Afghanistan reinforced the argument that the UN was the entity responsible, not Germany. There was no basis for attribution or extraterritorial jurisdiction in respect of the investigation. A rule similar to section I, subsection 3, of the ISAF Status of Forces Agreement had also been included in the status of forces agreement in the *Behrami and Behrami* case (cited above) and had not given rise to doubts there.

(b) The applicant

114. The applicant submitted that the facts of which he complained had occurred within the jurisdiction of Germany for the purposes of Article 1 of the Convention.

(i) Establishment of a jurisdictional link by instituting a criminal investigation

115. The criminal investigation concerning the death of the applicant's sons carried out by the German authorities was sufficient to establish a

jurisdictional link for the purposes of Article 1 between Germany and the applicant. In *Güzelyurtlu and Others* (cited above), the deaths that were investigated had also occurred outside the territorial jurisdiction of the State in respect of which the institution of the criminal investigation established a jurisdictional link. That approach was in line with the nature of the procedural obligation under Article 2, which had evolved into a separate and autonomous obligation, which the Court had recognised as being "detachable" and capable of binding the State even if the death had occurred outside its jurisdiction. The approach also followed the same rationale as *Markovic and Others* (cited above), *Aliyeva and Aliyev v. Azerbaijan* (no. 35587/08, 31 July 2014) and *Gray v. Germany* (no. 49278/09, 22 May 2014).

116. Contrary to the Government's submission, the obligation to seek cooperation, as a component of the procedural obligation under Article 2, was not confined to seeking mutual cooperation between Contracting States. The Court had made clear in *Güzelyurtlu and Others* (cited above) that there were two types of cases where the duty to cooperate may arise with respect to the procedural obligation under Article 2. First, there were cases where a State, as a part of its own obligation to investigate, may have an obligation to seek cooperation from other States. Second, there were cases where a State may have an obligation to assist another State that is conducting an investigation under its jurisdiction. It was only in relation to that latter scenario that the Court had spoken of the obligation of mutual cooperation among Contracting States in the *Güzelyurtlu and Others* judgment. The present case, however, concerned the former scenario, as it related to Germany's obligation to seek cooperation for an investigation that it was conducting. There was nothing in the case-law or in logic that limited Germany to seeking cooperation only from other Contracting States.

117. Finding that the initiation of investigations was sufficient to establish a jurisdictional link would not render the establishment of jurisdiction arbitrary or act as a deterrent to the opening of investigations. Even where no investigation or proceedings have been instituted, a jurisdictional link based on the procedural obligation imposed by Article 2 would be present where a case had "special features" (relying on *Güzelyurtlu and Others*, cited above, § 190). Those special features depended on the particular circumstances of the case and would, in the applicant's submission, include whether the State had an obligation under domestic or international law to conduct an investigation. In the present case, such obligation existed under both domestic and international law, as the Government had conceded, given that the criminal liability of Colonel K. for, *inter alia*, an alleged war crime was at issue.

118. The retention of criminal jurisdiction over its service personnel under section I, subsection 3, of the ISAF Status of Forces Agreement (see paragraph 75 above) was of significance in this respect. Contrary to the

Government's submission, this was not a rule on immunity, but one on jurisdiction. Germany explicitly retained criminal jurisdiction over its service personnel *vis-à-vis* the Afghan authorities, the UN, and ISAF. This supported the argument that the acts undertaken by German actors in Afghanistan were attributable to Germany. Moreover, Germany retained full control over that investigation, interrogated the suspect, heard witnesses, collected evidence and took investigative steps which also, however insufficiently, involved the applicant. Germany's jurisdiction had never been contested over the course of that investigation. All alleged violations, whether on German territory or abroad, were committed by German officials.

119. If the jurisdictional link were based merely on the initiation of proceedings in Germany, the Court's review would not be confined to investigative measures within Germany's territory. To hold otherwise would be contrary to the Court's case-law, which saw the jurisdictional link in line with the nature of the procedural obligation to carry out an effective investigation. Some of the investigative flaws which he alleged had occurred in Afghanistan, others in Germany. It was not decisive that the facts that triggered the investigation took place outside the Council of Europe member States' territory. The Convention was not only applicable in the legal space of the Contracting States. Weight had to be given to the fact that the incident which had to be investigated was, in his submission, attributable to Germany and fell within its extraterritorial jurisdiction.

(ii) Germany's jurisdiction in respect of the impugned investigation was also established through other circumstances

120. The applicant submitted that, even in the absence of a criminal investigation, a jurisdictional link for the purposes of Article 1 would be established. The facts underlying the present application fell within Germany's extraterritorial jurisdiction because Germany had exercised "control" over the victims of the airstrike. Relying on General Comment No. 36 of the Human Rights Committee (see paragraph 87 above) and on *Al-Skeini and Others* (cited above, § 137), he argued that it was decisive that Germany was able to affect the relevant rights – in the present case the right to life – of the applicant's sons, who were killed by the airstrike. No logical distinction could be made between the exercise of power, so as to be able to affect the right to life, in the context of a patrol, a check-point or an air operation. The fact that Colonel K. had decided not to deploy ground troops but to resort to an airstrike could not justify reaching a different conclusion with regard to jurisdiction to that reached in *Al-Skeini and Others* and *Jaloud* (both cited above). The airstrike was a manifestation of Germany's exercise of public powers in the region. The German troops operated with the consent and at the invitation of the Afghan Government and exercised some of the public powers normally exercised by local or

sovereign authorities. They were mandated by the United Nations Security Council to support the Afghan Transitional Authority and its successors in the maintenance of security, including through the operation of check-points, regular patrols, and security operations in the fight against the insurgency. A complete breakdown of the Afghan State order was not necessary for the establishment of a jurisdictional link on this ground.

121. Germany had also exercised effective control over the area in which the airstrike that killed the applicant's sons occurred. The German-commanded RC North comprised approximately 5,600 troops and the site of the airstrike was only seven kilometres from the base of PRT Kunduz, where around 1,500 soldiers were present at the time of the airstrike. In this regard the applicant pointed to the fact that effective control could be limited to the specific area where the incident occurred, at that time, and did not require the State to be an occupying power (relying on *Jaloud*, cited above, §§ 139 and 142, and *Issa and Others v. Turkey*, no. 31821/96, §§ 74 and 76, 16 November 2004). The proximity to the German base and the possibility of immediately deploying ground troops and obtaining close air support – which arrived at the site of the hijacked tankers within minutes – confirmed that the area where the airstrike occurred was under effective German control. A situation of active hostilities did not *per se* exclude the possibility that a State exercised, at a certain moment, effective control over an area, particularly with regard to the right to life of the people in that area. The Court had previously found that violations of the Convention committed in the context of an armed conflict fell within the jurisdiction of a Contracting State for the purposes of Article 1, including during phases of active hostilities (referring to *Hassan v. the United Kingdom* [GC], no. 29750/09, ECHR 2014).

122. The facts that gave rise to the applicant's complaint were also attributable to Germany. The applicant argued that the approach to the test of attribution as set out in *Behrami and Behrami* (cited above) had been refined in *Al-Jedda* (cited above), which introduced "effective control" as one of the prerequisites for the attribution of conduct. In that judgment, the Court also recognised that certain conduct could be attributed to more than one entity, namely the UN and the Contracting State. This concept of multiple attribution had long been recognised by the International Law Commission. While COMISAF had had operational command, Germany had retained full command over its troops (referring to *Jaloud*, cited above). Colonel K. and the German troops had not been placed "at the disposal" of any foreign power or international organisation and had not been under the "exclusive direction and control" of the United Nations Security Council, NATO, COMISAF or any other State. This was reflected in the sequence of binding orders, given by Colonel K. without involving his superiors, leading to the airstrike that killed the applicant's sons. This conduct differed

significantly from that in *Behrami and Behrami* (cited above), as did the legal framework for the conduct of the German troops in Kunduz.

2. Third-party interveners

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

123. Relying on *Behrami and Behrami* (cited above), 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. The intervening Governments argued that there were fundamental differences between the present case and that of *Güzelyurtlu and Others* (cited above). 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 Behrami* 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.

126. More specifically, the Governments of France and the United Kingdom questioned where Germany's investigative obligation derived from, given that the incident to be investigated was, in their submission, attributable to the United Nations rather than to Germany. Such a situation was different from that in *Šilih v. Slovenia* ([GC], no. 71463/01, § 159, 9 April 2009) and *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09, § 132, ECHR 2013), which had concerned investigations into acts that occurred outside the respondent State's temporal jurisdiction. The Government of the United Kingdom added that it would contradict the *Monetary Gold* principle (*Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, Judgment of 15 June 1954, I.C.J. Reports 1954, p. 19) to impose investigative obligations which would inevitably require

assessments to be made on the role of other, likely non-Contracting State, allies.

127. The Governments of France and the United Kingdom added that section I, subsection 3 of 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.

128. The Governments of France and the United Kingdom pointed out that the Rome Statute of the International Criminal Court concerned the competence of that court and dealt with individual criminal responsibility. They emphasised that individual criminal responsibility should not be confused with a State's responsibility under the Convention and concluded that the provisions of the Rome Statute could not have any bearing on the determination of a State's jurisdiction under Article 1 of the Convention.

(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* (cited above).

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 about the criminal investigation into the airstrike which had killed his two sons. In the case of *Güzelyurtlu and Others* (cited above), 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. After summarising the relevant case-law up to that point, the 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 (see, *mutatis mutandis*, *Markovic and Others*, cited above, §§ 54-55).
>
> 189. The Court would emphasise that this approach is also in line with the nature of the procedural obligation to carry out an effective investigation under Article 2, which has evolved into a separate and autonomous obligation, albeit triggered by acts in relation to the substantive aspects of that provision (see *Šilih v. Slovenia* [GC], no. 71463/01, § 159, 9 April 2009, and *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 132, ECHR 2013). 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 (see, *mutatis mutandis*, *Šilih*, § 159, in relation to the compatibility *ratione temporis*).
>
> 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, 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, according to the principles developed in

Rantsev, §§ 243-44. 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, since these features will necessarily depend on the particular circumstances of each case and may vary considerably from one case to the other."

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 (ibid., §§ 191-196). A jurisdictional link was established, first, because the authorities of the "Turkish Republic of Northern Cyprus" ("TRNC") had instituted their own criminal investigation into the murder of the applicants' relatives, which gave the "TRNC" courts criminal jurisdiction over the individuals who had committed the crimes wherever they were to be found on the whole island of Cyprus, and which accordingly engaged Turkey's responsibility under the Convention. 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 v. Cyprus and Russia* (no. 25965/04, ECHR 2010 (extracts)) 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 their domestic law provisions, a criminal investigation into the deaths of the applicant's two sons and of other civilians in connection with the airstrike near Kunduz on 4 September 2009.

135. Without calling into question the principles set out in the *Güzelyurtlu and Other*s judgment 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 had occurred outside the jurisdiction *ratione loci* of that State, not within the exercise of its extraterritorial jurisdiction, is *in itself* sufficient to establish a jurisdictional link between that State and the victim's relatives who bring proceedings before the Court (ibid., §§ 188, 191 and 196), does not apply to the factual scenario at issue in the present case. The latter indeed differs from *Güzelyurtlu and Other*s 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. In taking this approach, the Court is also mindful of the concerns raised by the respondent Government and the intervening Governments that establishing a jurisdictional link merely on the basis of the institution of an investigation may have a chilling effect on instituting investigations at the domestic level into deaths occurring in extraterritorial military operations and result in an inconsistent application of the Convention in respect of Contracting States participating in the same operation. If the mere fact of instituting a domestic criminal investigation into any death which has occurred anywhere in the world were sufficient to establish a jurisdictional link, without any additional requirements, this would excessively broaden the scope of application of the Convention.

136. However, in the *Güzelyurtlu and Others* case 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*, may 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 has occurred outside its jurisdiction (ibid., § 190). This also applies in respect of extra-territorial situations outside the legal space of the Convention (see, *mutatis mutandis*, *Markovic and Others*, cited above, §§ 54-55) as well as in respect of events occurring during the active hostilities phase of an armed conflict (*Georgia v. Russia (II)* [GC], no. 38263/08, §§ 329-332, 21 January 2021).

137. In the present case, the Court considers, firstly, that Germany was obliged under customary international humanitarian law to investigate the airstrike at issue, as it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime (see, in particular, rule 158 of the *Customary International Humanitarian Law* study by the ICRC, 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, paragraph 83 above, see also the UN Basic Principles and Guidelines, paragraph 86 above, and further guidance from international human rights bodies, paragraphs 87-89 above). 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 (see also *Georgia v. Russia (II)*, cited above, § 331).

138. The Court considers, secondly, that the Afghan authorities were, for legal reasons, prevented from instituting themselves a criminal investigation against Colonel K. and Staff Sergeant W. in respect of the alleged offence. By virtue of 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 may commit on the territory of Afghanistan (see paragraph 75 above), as is common practice for troop-contributing States in United Nations-authorised military missions. The respondent Government and third-party Governments submitted that this provision constituted a rule on immunity. In the Court's opinion, this is true insofar 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.

139. Thirdly, the German prosecution authorities were also obliged under domestic law to institute a criminal investigation, as the Government confirmed. The criminal investigation was conducted by the Federal Prosecutor General because it concerned the potential liability of Colonel K. and Staff Sergeant W., two German nationals, for, *inter alia*, a war crime as set forth in the Code of Crimes against International Law. The Federal Prosecutor General has exclusive competence to prosecute offences under that code (see paragraph 101 above), which are subject to the principle of universal jurisdiction (see paragraph 95 above) and to the principle of mandatory prosecution. Under domestic law, the German authorities could only have 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 (see paragraph 96 above). The latter two scenarios were precluded in the present case by Germany's retention of exclusive jurisdiction over its troops, under the ISAF Status of Forces Agreement, in respect of any criminal offences which these may commit on the territory of Afghanistan.

140. In this connection the Court observes that the offences punishable under the German Code of Crimes against International Law are serious in nature. The code and the related provision in the Code of Criminal Procedure were adopted against the background of Germany's ratification

of the Rome Statute of the International Criminal Court in order to enable the investigation and prosecution of these offences at the domestic level and to avoid impunity (see paragraph 94 above).

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 as essentially autonomous (see paragraph 90 above).

142. In the present case, the fact that Germany retained exclusive jurisdiction over its troops with respect to 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.

143. The Court notes that the applicant did not complain about the substantive act which gave rise to the duty to investigate. It therefore does not have to examine whether, for the purposes of Article 1 of the Convention, there is also a jurisdictional link in relation to any substantive obligation under Article 2. It emphasises, 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.

144. Accordingly, the scope of the present case is limited to the investigative acts and omissions by German military personnel in Afghanistan that were undertaken in accordance with the retention of exclusive jurisdiction under the ISAF Status of Forces Agreement over German troops in respect of any criminal or disciplinary offences which these may commit on the territory of Afghanistan, as well as to acts and omissions of the prosecution and judicial authorities in Germany. These are capable of giving rise to the responsibility of Germany under the Convention (compare *Jaloud*, cited above, §§ 154-155).

145. The Court does not overlook the restrictions on Germany's legal powers to investigate in Afghanistan, nor the fact that the deaths to be investigated occurred in the context of active hostilities. However, such circumstances do not *per se* exclude the determination that further investigatory measures, including in Afghanistan, may have been necessary, including through the use of international legal assistance and modern technology. The specific challenges to the investigation relate to the scope and content of the procedural obligation under Article 2 incumbent on the

German authorities and thus to the merits of the case (see *Güzelyurtu and Others*, cited above, § 197).

B. The Government's further objection

1. The parties' submissions

146. The Government submitted that the applicant had not exhausted all domestic remedies concerning his objections of a lack of independence – both in Afghanistan (see paragraph 158 below) and in Germany (because of pressure allegedly exerted by the Federal Ministry of Defence on the Dresden Public Prosecutor General and because of the abstract possibility for the Federal Ministry of Justice to issue binding directives to the Federal Prosecutor General) – and a lack of reasonable expedition of the investigations (see paragraphs 164-166 below). He had not raised these complaints, not even in substance, either in his constitutional complaint to the Federal Constitutional Court, or in his motion to compel public charges before the Düsseldorf Court of Appeal. His unspecified references to the general obligation to conduct effective investigations under Article 2 of the Convention did not suffice in this respect. He had not mentioned the relevant criteria in respect of these specific complaints and had not advanced any arguments. He had not even elaborated on these aspects in his factual description of the investigation in his submissions.

147. The applicant asserted that he had exhausted domestic remedies as required by Article 35 § 1 of the Convention. He had raised the complaints that he was now invoking before the Court at least in substance before the domestic courts. Both in his motion to compel public charges and in his constitutional complaint he had described in detail the course and duration of the investigation and alleged that it had suffered from several deficiencies, referring to the obligation under Article 2 of the Convention to conduct an effective investigation. The Federal Constitutional Court was in a position to rule on the complaints made by the applicant. The situation was similar to that in *Hentschel and Stark v. Germany* (no. 47274/15, 9 November 2017).

2. The Court's assessment

148. The Court reiterates that the purpose of the exhaustion rule is to afford a Contracting State the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it. It is true that under the Court's case-law it is not always necessary for the Convention to be explicitly raised in domestic proceedings, provided that the complaint is raised "at least in substance". This means that the applicant must raise legal arguments to the same or like effect on the basis of domestic law, in order to give the national courts the opportunity to

redress the alleged breach. However, as the Court's case-law bears out, to genuinely afford a Contracting State the opportunity of preventing or redressing the alleged violation requires taking into account not only the facts but also the applicant's legal arguments for the purposes of determining whether the complaint submitted to the Court has indeed been raised beforehand, in substance, before the domestic authorities. That is because "it would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument" (see, among other authorities, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 117, ECHR 2018, with further references).

149. Where the applicant complains of the lack of an effective criminal investigation under the procedural limb of Article 2 or 3 of the Convention, it is sufficient, in order to comply with Article 35 § 1 of the Convention, including with regard to legal arguments not explicitly raised at the domestic level, if the applicant has challenged the effectiveness of that investigation before the competent domestic court and, by describing the course and duration of the investigation and subsequent court proceedings in detail, referred to the relevant factual elements for that court to assess the investigation's effectiveness (compare *Hentschel and Stark*, cited above, §§ 64 and 66). In this respect, the Court reiterates that compliance with the procedural requirement of Article 2 is assessed on the basis of several essential parameters, which are inter-related and which, taken jointly rather than separately, enable the degree of effectiveness of the investigation to be assessed (see *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 225, 14 April 2015).

150. In the present case, it is not disputed that the applicant challenged the effectiveness of the investigation before the Federal Constitutional Court and that he made references to the procedural obligation under Article 2 of the Convention. It is, by contrast, in dispute between the parties whether, in the factual description of the investigation and court proceedings in his submission to the Federal Constitutional Court, he sufficiently elaborated on certain aspects which he alleged to be flaws of the investigation in his application before the Court.

151. The Court observes that the applicant described in his constitutional complaint the on-site assessment performed by the team of PRT Kunduz in the aftermath of the airstrike, the report of the German military police as well as the course of the investigations undertaken by the German prosecution authorities. He thus referred before the Federal Constitutional Court to the relevant factual elements in respect of his allegations about delays with the on-site assessment by the German military contingent in the aftermath of the airstrike, the lack of independence of the persons involved

in it, the delay in opening the formal criminal investigation, and the ineffectiveness of the preceding preliminary investigations. The Court finds that the applicant thus referred before the Federal Constitutional Court to the relevant factual elements regarding the above aspects, such as to enable that court to assess the effectiveness of the investigation. The Government's objection of non-exhaustion of domestic remedies must therefore be dismissed in respect of those aspects.

152. By contrast, the applicant's constitutional complaint did not refer to the alleged lack of independence of the investigation in Germany. The Court considers that it can be left open whether the applicant exhausted domestic remedies in respect of this specific argument, because it is in any event inadmissible as being manifestly ill-founded. The Court considers that the interaction between the Federal Ministry of Defence and the Dresden Public Prosecutor General in the context of the preliminary investigation carried out by the latter (see paragraph 30 above) was from the outset incapable of affecting the independence of the investigation, given that the Federal Prosecutor General, who had commenced a preliminary investigation on 8 September 2009 (see paragraph 30 above), had exclusive competence for the investigation and prosecution of offences under the Code of Crimes against International Law and that the Dresden Public Prosecutor General was obliged by law to transfer the investigation concerning Colonel K.'s liability for offences under that code to the Federal Prosecutor General without delay (see paragraph 101 above). There are no indications that the Federal Ministry of Defence tried to influence or interfere with the Federal Prosecutor General's investigation. Moreover, a lack of independence cannot be deduced from the abstract possibility for the Federal Ministry of Justice to issue binding directives to the Federal Prosecutor General, it being undisputed that no such directives were issued in the present case (see *Mustafa Tunç and Fecire Tunç*, cited above, § 222).

C. Conclusion

153. With the exception of the submissions in respect of the alleged lack of independence of the investigation undertaken in Germany, the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is also not inadmissible on any other grounds. The Court therefore declares it admissible.

II. MERITS

154. The applicant complained under the procedural limb of Article 2 of the Convention that the investigation into the airstrike that killed, *inter alios*, his two sons had not been effective. In addition to alleging flaws in the investigation, the applicant also complained, relying on Article 13 of the

Convention taken in conjunction with Article 2 of the Convention, that he had had no effective domestic remedy to challenge the decision of the German Federal Prosecutor General to discontinue the investigation.

155. As the essence of the applicant's complaint is that no individual was prosecuted for his sons' deaths, the Court considers it appropriate to examine the complaints solely under the procedural aspect of Article 2 of the Convention (see *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, §§ 291-292, 30 March 2016, *Hentschel and Stark*, cited above, § 45). The provision reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The parties' submissions

1. The applicant

156. The right not to be arbitrarily deprived of one's life also applied in times of armed conflict, as did the obligation to effectively investigate under the procedural limb of Article 2 of the Convention. International humanitarian law was already taken into account in Article 15 § 2 of the Convention and did not apply here. However, even if international humanitarian law had applied in the present case, the investigation still had to live up to the standards of international humanitarian law and international human rights law in terms of independence, impartiality, thoroughness, effectiveness, promptness and transparency. The normal Convention standards did not disappear even if the Convention was interpreted in the light of international humanitarian law.

157. The investigation in the present case was ineffective because (i) it had not been conducted by sufficiently independent persons; (ii) the evidence gathered was one-sided and insufficient investigative measures had been taken to establish the facts, with surrounding circumstances not investigated at all; (iii) the investigation had not been instituted promptly and had not been conducted with reasonable expedition; and (iv) the applicant as a next-of-kin had not been sufficiently involved.

(a) Effectiveness of the investigation

(i) Independence

158. The persons responsible for and carrying out the investigative steps in Afghanistan had lacked the necessary independence from those implicated in the airstrike of 4 September 2009. The members of the team which conducted the initial on-site reconnaissance eleven hours after the airstrike were direct colleagues of the suspects. As they served under Colonel K.'s command, they even stood in a hierarchical relationship to him. All investigators involved were part of the German military contingent in Afghanistan and neither team was focused on securing evidence or identifying responsibilities. The soldiers involved in the airstrike had not been separated from each other, which entailed a risk of collusion.

(ii) The evidence taken was insufficient

159. The German prosecutors had not carried out any investigatory steps in Afghanistan. The failure to visit the site of the airstrike indicated a violation of Article 2. The Federal Prosecutor General had based his decision almost exclusively on fact-finding from external sources, in particular by military personnel, which had not been compiled with the aim of identifying criminal responsibility and had not been conducted under criminal procedural law. The Federal Prosecutor General had not made use of a list of possible civilian victims handed over by UNAMA and failed to contact the relatives of the affected persons in Afghanistan, including the applicant.

160. The course of the investigation indicated that the result was pre-determined. The Federal Prosecutor General's investigation started with a rigid five-to-six week schedule, which did not leave room for supplementary investigations. According to that schedule, only one further investigative measure was to be taken, namely the interrogation of the two suspects and of two witnesses, both of whom were subordinates of Colonel K. and had been present at the command post at the time of the airstrike. These interrogations appeared to be a sheer formality. A thorough investigation with an open outcome would have allowed for further investigative measures to be taken.

161. The investigation did not fulfil its purpose of ascertaining the circumstances surrounding the events and of determining whether the force used was lawful. Considerable uncertainty remained regarding the conformity of the airstrike with international humanitarian law. The number of victims and their status as civilian or combatant was never determined, nor was the meaning of the terms "insurgent" or "Taliban" – which were broad and did not define legitimate military targets – clarified. Consequently, it was impossible to assess the expected military advantage in relation to the expected loss of civilian life, and hence whether the use of

force had been excessive. The actual circumstances should have been investigated by questioning eyewitnesses. The fact that the surviving tanker driver, the interpreter and the pilots were questioned by the parliamentary commission of inquiry showed that it would also have been reasonable and possible for the Federal Prosecutor General to do so. Further clarification could also have been obtained by having independent military experts assess the surveillance images by the aircraft and by questioning the population in the villages surrounding the site of the airstrike, including the applicant. The examination of these witnesses could have been undertaken through modern technology.

162. Nor had the Federal Prosecutor General sufficiently investigated whether there had been an imminent threat which had rendered the airstrike, and hence the use of force against the applicant's sons, "absolutely necessary" within the meaning of Article 2 § 2 of the Convention. It had not been investigated whether sufficient precautionary measures had been taken in order to avoid civilian casualties, nor whether the assumption of the absence of civilians had indeed been reasonable. Objects seized by the Afghan security forces, such as remnants of arms said to have been carried by the persons attacked, should have been obtained.

163. The reasoning on which the Federal Prosecutor General relied to discontinue the investigation could not justify the gaps in the investigation. The alleged honest belief of the suspects that they were acting lawfully was only relevant as a defence to avoid the charge of a substantive violation of Article 2, but it had to be established whether or not the airstrike was, objectively, in accordance with international humanitarian law. Criminal liability for negligent manslaughter, based on the negligence involved in arriving at the assumption that no civilians had been present at the bomb release area, would have been possible and should have been investigated further.

(iii) The investigation was not conducted with reasonable expedition

164. The investigation had not been conducted with the necessary and reasonable expedition. The mandatory battle damage assessment had not been carried out until eleven hours after the airstrike, in breach of ISAF Rules of Engagement. This had made it impossible to establish the precise circumstances and degree of damage caused by the airstrike because the site had been significantly altered in the meantime. Germany could have sent a drone to take footage to document the scene. There had also been delays in questioning the soldiers involved in the airstrike in Afghanistan.

165. The formal criminal investigation was instituted only on 12 March 2010, more than six months after the airstrike. This delay significantly undermined the probative value of the testimonies and allowed for collusion. What was decisive was not whether there had been actual foul play on part of the authorities, but whether effective precautions had been

taken to prevent collusion from happening. Not requesting Colonel K. and the other soldiers involved in the incident to return to Germany after the incident for immediate questioning caused extensive and unjustifiable delays. Many investigative measures, including taking suspects' testimonies, could have been undertaken immediately after the airstrike, including through the use of modern technology.

166. The preliminary investigation initiated right after the airstrike could not be regarded as a proper criminal investigation. Its sole purpose was to establish the existence of "initial grounds for suspicion" required for the institution of a formal criminal investigation and it did not allow for investigative measures, such as the questioning of witnesses. The length of the preliminary investigation could not justify the brevity of the formal criminal investigation.

(iv) Lack of sufficient involvement of the applicant

167. The applicant, as the next-of-kin of two victims, had not been involved in the investigations to the extent necessary to safeguard his legitimate interests. On 12 April 2010, and thus at a time when the formal investigation was still open, the applicant filed a criminal complaint concerning the airstrike and requested access to the investigation file. The Federal Prosecutor General closed the investigation on 16 April 2010 without having heard the applicant or permitting his lawyer access to the file. Access to the file was granted only on 3 September 2010, and the Federal Prosecutor General's decision to discontinue the investigation was only made available to the applicant on 13 October 2010. The applicant should have been heard, as it could not be ruled out that he possessed relevant information, notably as to the identity of those present at the bombsite.

(b) Judicial review of, and remedies against, the discontinuation decision

168. The applicant asserted that he did not have the possibility of seeking judicial review of the Federal Prosecutor General's decision to discontinue the investigation, contrary to the requirements of Article 2.

169. The scope and nature of the motion to compel public charges, as well as the high admissibility threshold, rendered it ineffective as a remedy in the present case, which concerned violations of the right to life caused by the armed forces abroad. The mechanism did not enable victims and their relatives to effectively challenge the discontinuation of an investigation in cases involving inaccessible or classified information, such as on military decision-making. It had been impossible for the applicant to prove that there were sufficient grounds for suspicion that the suspects were criminally liable, as the German prosecution authorities had not investigated the matter

thoroughly and the applicant could not fill in all the gaps. It was impossible for the applicant to address each piece of evidence in detail in his brief.

170. Nor had the constitutional complaint to the Federal Constitutional Court constituted an effective remedy to have the discontinuation decision reviewed. The Federal Constitutional Court only reviewed specific violations of constitutional law and was primarily concerned with the question whether the decision to discontinue the investigation had been arbitrary. Unlike in *Hentschel and Stark* (cited above), the Federal Constitutional Court had not assessed the investigation in detail and had failed to examine the substance of the applicant's claim under Article 2 of the Convention.

171. The flaws in the investigation had had a negative impact on the applicant's other potential remedies, including on his compensation claim. The parliamentary commission of inquiry did not meet the requirements of an effective remedy. Its findings, which did not fully clarify the circumstances and lawfulness of the airstrike, were not binding and did not address the applicant's procedural rights under Article 2.

2. The Government

172. At the outset, the Government emphasised that the German legal system had responded comprehensively to the airstrike that killed the applicant's sons. The Federal Prosecutor General had conducted an in-depth examination in order to determine whether the military personnel involved were criminally responsible. A parliamentary commission of inquiry had examined the political and factual dimensions of the events for over one and a half years. Court proceedings on compensation were still pending.

173. Turning to the criminal investigation against the military personnel involved in the airstrike, they submitted that Germany had complied with its duty to investigate. At the time of the airstrike, the situation in the Kunduz region amounted to a non-international armed conflict for the purposes of international humanitarian law, to which the common Article 3 of the Geneva Conventions and the rules of customary international humanitarian law applied. The general principle established in *Hassan* (cited above) to interpret the Convention in the light of international humanitarian law equally applied to non-international armed conflicts. Consequently, international humanitarian law provided the appropriate yardstick for determining what was required from the respondent State. The situation in the present case differed from that in *Jaloud* (cited above), as the incident at issue had occurred in the course of the conduct of hostilities. The nature and degree of scrutiny required to satisfy the minimum threshold of the investigation's effectiveness had to be interpreted in a way which took into account the specifics of the situation and the legal framework for the conduct of hostilities. The Government emphasised the special role assigned

to commanders in the conduct of investigations under international humanitarian law.

(a) Effectiveness of the investigation

174. None of the defects in the investigation which the applicant alleged existed. Even supposing that they did, the investigation still succeeded in bringing to light all relevant facts about the incident and enabled the identification of the persons responsible. The essence of the present application was not concerned with the effectiveness of the investigation and did not aim at a more in-depth clarification of the relevant facts. Rather, it was directed against the legal assessment by the Federal Prosecutor General. However, Article 2 of the Convention did not cover the review of individual prosecutorial decisions in relation to their legal correctness (referring to *Armani da Silva*, cited above, § 259).

(i) Reasonable expedition of the investigation

175. The investigation was conducted with reasonable expedition. As regards measures taken in Afghanistan, it sufficed to perform the initial post-attack reconnaissance of the bomb release area in the aftermath of the airstrike by flyover. As soon as it became known that there may have been civilian casualties, ISAF established an investigation team which travelled to Kunduz that same day, and performed reconnaissance of the bomb release area and interrogated Colonel K. as well as further German soldiers. Its report led to the appointment of the Joint Investigation Board, which submitted an extensive report on 26 October 2009. Also on the day of the airstrike, an investigation team from the German military police was deployed to Kunduz and prepared a report. The measures for post-attack reconnaissance suggested in that report were later performed by ISAF and Afghan officials. Moreover, on the day of the airstrike, the relevant bodies of the German armed forces initiated inquiries with a view to potentially opening formal disciplinary investigations.

176. The German law-enforcement agencies were informed about the airstrike on the day it occurred and took action immediately. The decision to open a formal criminal investigation was not delayed, or had not been ineffectively prepared for in the preceding preliminary investigations. Contrary to the applicant's submission, the prosecution authorities were authorised under domestic law to examine and to procure a judicial examination of witnesses in these preliminary investigations.

177. The persons responsible for the investigations took appropriate steps to reduce the risk of collusion. Both German and ISAF authorities questioned Colonel K. and further soldiers involved on 4 September 2009 and several times thereafter. The prosecution authorities received access to the documents relating to the examination of all important witnesses which

had been undertaken by the national and international bodies, such as ISAF, soon after the incident. All important evidence, such as the audio recordings of the radio communications with the American F-15 aircraft or the thermal images from their infrared cameras, was immediately secured. The records of the interviews with the suspects were available to the Federal Prosecutor General, who also interviewed them in person.

178. The order of events concerning the airstrike was established right at the outset of the investigations. There was nothing that could have been covered up by any collusive arrangements. Ordering Colonel K. or other officers potentially responsible for the incident to return to Germany for interrogations would, in fact, have impaired the investigation. An effective interview of the suspects and of the witnesses required highly specialist knowledge about the military situation and the circumstances on the ground. The ISAF investigators possessed this specialist knowledge.

(ii) Independence

179. The persons responsible for conducting the investigation were sufficiently independent from those implicated in the airstrike. At the outset, it had to be noted that responsibility for investigations of criminal offences potentially committed by German soldiers lay, in all cases and exclusively, with civilian law enforcement agencies and civilian criminal-law courts, irrespective of whether the potential offences have been committed within Germany or abroad. For historical reasons, Germany had deliberately refrained from reintroducing a separate military justice system after 1949. The responsibility of civilian law enforcement agencies and courts was an element which served to guarantee the independence of the proceedings.

180. In his assessment, the Federal Prosecutor General had relied, *inter alia*, on the independent investigations performed by ISAF, the Afghan civil government, the ICRC and UNAMA. Article 2 of the Convention did not require that the law enforcement agencies needed to obtain all evidence and make all necessary determinations by themselves. The duty to investigate could be fulfilled by having the results of parliamentary and international investigations of an incident made available to the public prosecution authorities, and a criminal investigation could be based on the results of these investigations (referring to *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 309-310, ECHR 2011 (extracts); *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, §§ 628-631, 13 April 2017; *Mustafić-Mujić and Others v. the Netherlands* (dec.), no. 49037/15, §§ 102-106, 30 August 2016). This was appropriate, in particular, in view of the multilevel nature of the military deployment in Afghanistan under the delegation of United Nations Security Council powers, which did not entail legal powers for the civilian law enforcement authorities of the troop-contributing States to pursue criminal investigations of their own on

Afghan territory (other than through international legal assistance), and also served to achieve a high level of public scrutiny.

181. The German military police had not acted on behalf of the Federal Prosecutor General and their factual findings served only as one source amongst other independent sources. The military police was subordinated to the Commander of the German ISAF contingent and presented its final report to him. It was hierarchically and functionally independent from the Commander of PRT Kunduz. Even assuming that the military police had lacked independence, this could not render the investigations as such ineffective. Their report was only one among many sources relied on by the Federal Prosecutor General and in view of their limited investigatory powers, they could only play a minor role. Moreover, in view of the legal restrictions on Germany's powers to investigate in Afghanistan, there had been no feasible alternatives to the investigations conducted by the military police. In addition, the security situation at the material time would not have allowed sending civilian prosecutors or police officers to the place of the incident in order to conduct independent investigations. It would be unrealistic and potentially counterproductive to require that investigations into alleged unlawful killings in armed conflicts always had to be investigated by civilian authorities.

(iii) Sufficiency of evidence

182. The measures taken by the investigatory teams which formed the basis for the Federal Prosecutor General's determination were conducted along the lines described in the *2019 Guidelines on investigating violations of IHL* in respect of how to carry out criminal investigations at the height of an armed conflict.

183. There was no requirement to conduct further investigations to establish the exact number of victims. The Federal Prosecutor General took all reports prepared for the purpose of other investigations into account, and after evaluating the evidence, made comprehensive determinations in this respect. He took sufficient account, for the purposes of evaluating the criminal responsibility of the suspects, of the fact that the damage ascertained after the incident may have been an indication of whether the attacker had been able to anticipate the likelihood of civilian casualties before the attack. The Federal Prosecutor General's determination that the number of people present at the time of the bomb release did not give rise to doubts that this group of people were Taliban insurgents could not have been called into question by investigating the number of victims further.

184. The Federal Prosecutor General was not required to consult military experts in order to determine whether all "reasonable and feasible precautions" had been taken. This was a question of applying the standards of international humanitarian law and he could base his assessment on the report prepared by the ISAF investigation team, which was composed of

military experts from different countries. He had legitimately determined that Colonel K. had not had any further feasible reconnaissance and precautionary measures available to him. It had been confirmed to him on seven separate occasions that the informant had identified the persons present at the location as "insurgents" and the images provided by the infrared cameras from the US F-15 aircraft, on which the persons next to the fuel tankers were visible as dots of a heat source, were consistent with the statements by the informant. It had not been required to simulate the situation in the command centre or to examine further witnesses who had not had any contact with the suspects at the material time, as this would not have been able to provide any insights capable of incriminating the suspects.

185. The applicant's plea that international humanitarian law had been applied incorrectly concerned the question of the application and interpretation of domestic law, as well as of the assessment of the existing evidence, to which the Court – by reason of the subsidiary nature of its role – may only object in the event of arbitrariness or some other cogent reason. No such cogent reason could be identified in the case at hand. The Federal Prosecutor General had proceeded on the assumption that the lawfulness of the order of the airstrike had to be assessed according to the standard of a "reasonable commander". That assessment was based on the likely consequences as they presented themselves at the time of decision-making, not the effects of the airstrike as they had become known in hindsight. This legal view was in line with established doctrines of public international law.

186. It was generally recognised that military action in armed conflict which was in compliance with international humanitarian law did not lead to criminal responsibility on the part of the participating soldiers and that compliance with international humanitarian law rather constituted an exculpatory defence, including in respect of offences under general criminal law. The interpretation that the relevant provisions of international humanitarian law determined what was "absolutely necessary" for the purposes of Article 2 § 2 of the Convention in a situation of armed conflict, was in accordance with the Court's approach in *Hassan* (cited above). Lastly, the Federal Prosecutor General had provided extensive reasoning why any potential violation of the Rules of Engagement was irrelevant for the determination of criminal responsibility. The preliminary investigation performed to determine whether or not formal disciplinary proceedings should be launched led to the result that Colonel K could not even be reproached from a disciplinary perspective.

(iv) Involvement of the applicant

187. The applicant had been involved in the investigation to the extent necessary to safeguard his legitimate interests. It was not necessary to hear him as a witness in order to ensure a reliable investigation of the circumstances. It was established that his two sons had been killed by the

airstrike. The applicant, whose statements about, *inter alia*, his presence at the place of the incident had remained vague, had no knowledge relevant for the determination as to whether the suspects ought to have anticipated the presence of civilians on the sand bank, and hence their criminal liability.

188. The applicant had been given sufficient opportunity to make statements in the investigation. Decisions made by the prosecution authorities not to bring charges were not final determinations in the sense of *res judicata* and prosecution could be reopened subsequently. The applicant had not been deprived of an opportunity to influence the investigation by the Federal Prosecutor General's discontinuation decision. The Federal Prosecutor General reviewed the applicant's evidence and written submissions and rejected the latter as ill-founded.

189. There had been no undue delay in recognising the applicant as an injured party and in granting him access to the investigation file. Following his request of 12 April 2010, the Federal Prosecutor General was obliged to give the suspects the opportunity to make submissions. As the request by the applicant's legal representative had been made on behalf of a large number of persons who claimed to have been affected, a certain amount of time was required to verify their respective status. In response to the applicant's letter of 7 July 2010, the Federal Prosecutor General confirmed, by letter of 16 July 2010, that proof of the applicant's status as an injured party had been established with respect to his younger son, but that the necessary evidence in respect of a number of other persons, on whose behalf the request had been made, was still missing. After the applicant's legal representative, by letter of 1 September 2010, had limited the scope of the request for access to the files to the applicant, the Federal Prosecutor General promptly granted access by letter of 3 September 2010.

(b) Remedy to complain about the alleged ineffectiveness of the investigation

190. It was not required that the applicant be provided with an effective judicial remedy for reviewing the Federal Prosecutor General's decision not to bring charges (referring to *Armani da Silva*, cited above, §§ 278-279). Nonetheless, the applicant did, in fact, have at his disposal two effective judicial remedies to challenge the effectiveness of the investigation and used both: (i) his motion to compel public charges before the Court of Appeal and (ii) his constitutional complaint.

191. The motion to compel public charges did, as such, entail a sufficient scope of review in the event of flagrant or particularly grave violations of the duty to investigate by the prosecution authorities. There was no indication that the Court of Appeal would not have ordered the investigations to be resumed, had the applicant's motion complied with the admissibility requirements and had the Court of Appeal found the investigations performed thus far to be deficient. The admissibility requirements applied by the Court of Appeal were not excessive,

particularly in view of the fact that the applicant had been represented by a lawyer. In accordance with the case-law of the domestic courts, the Court of Appeal had not demanded a summary of the entire content of the evidence compiled in the investigation files, but rather a presentation of the content of those pieces of evidence on which the Federal Prosecutor General had relied.

192. Moreover, the Federal Constitutional Court had reviewed the effectiveness of the investigation via the applicant's constitutional complaint. It expressly emphasised that the Federal Prosecutor General's decision not to bring charges was not only in line with the standards of the Federal Constitutional Court, but also with the requirements established by the case-law of the European Court of Human Rights. It explained why the Federal Prosecutor General had not been required to examine eyewitnesses or to take further evidence, since further investigations concerning the number and identity of the victims of the airstrike would not have concerned any aspects relevant for the assessment of the criminal liability of the suspects. The Federal Constitutional Court furthermore emphasised that the Court of Appeal's decision on the motion to compel public charges had discussed the reasons given by the Federal Prosecutor General in depth.

B. Third-party interveners

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 UN 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 may 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 may 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 may 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 airstrike that killed the applicant's two sons occurred was qualified as a non-international armed conflict for the purposes of international humanitarian law. While acknowledging that Germany had not availed itself of its right of derogation under Article 15 of the Convention, the Government submitted that international humanitarian law provided the appropriate yardstick for determining what was required from the respondent State in the circumstances, in line with the Court's approach in the *Hassan* case.

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 (see paragraphs 82 and 84-85 above) 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 in the absence of a formal derogation under Article 15 of the Convention are met (see *Hassan*, cited above, §§ 98 et seq.).

200. Reiterating that the procedural duty under Article 2 must be applied realistically (see *Al-Skeini and Others*, cited above, § 168), 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, as set out in *Al-Skeini and Others* (cited above, §§ 163-167) and restated in *Jaloud* (cited above, § 186).

201. What form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention (*Al-Skeini and Others*, cited above, § 165).

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 (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 324, ECHR 2007-II, and *Armani da Silva*, cited above, § 233). 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 (see *Armani da Silva*, cited above, § 233; *Mustafa Tunç and Fecire Tunç*, cited above, § 172; and *Al-Skeini and Others*, cited above, § 166). This is not an obligation of result, but of means (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005‑VII; *Al-Skeini and Others*, cited above, § 166; and *Mustafa Tunç and Fecire Tunç*, cited above, § 173). 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 (see *Armani da Silva*, cited above, § 233, and *Al-Skeini and Others*, cited above, § 166).

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 (see *Kolevi v. Bulgaria*, no. 1108/02, § 201, 5 November 2009, and *Armani da Silva*, cited above, § 234). 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 (see *Velcea and Mazăre v. Romania*, no. 64301/01, § 105, 1 December 2009, and *Armani da Silva*, cited above, § 234). It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 101-110, ECHR 1999-IV; *Velikova v. Bulgaria*, no. 41488/98, § 80, ECHR 2000‑VI; and *Mustafa Tunç and Fecire Tunç*, cited above, § 176).

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 (*Al-Skeini and Others*, cited above, § 164; see also *Bazorkina*

v. Russia, no. 69481/01, § 121, 27 July 2006). 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 (see *Al-Skeini and Others*, cited above, § 164).

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 (as in *Al-Skeini and Others*, cited above, § 163). This will require an adequate interrogation of the members of the armed forces *prima facie* involved in the incident (see *Aktaş v. Turkey*, no. 24351/94, § 306, ECHR 2003-V (extracts)).

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 (see *Armani da Silva*, cited above, § 232, and *Al-Skeini and Others*, cited above, § 167).

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 (see *Armani da Silva*, cited above, § 237, and *Al-Skeini and Others*, cited above, § 167).

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 (see *Armani da Silva*, cited above, § 235, and *Al-Skeini and Others*, cited above, § 167). However, the investigative materials may involve sensitive issues and disclosure cannot be regarded as an automatic requirement under Article 2 (see *Giuliani and Gaggio*, cited above, § 304; *McKerr v. the United Kingdom*, no. 28883/95, § 129, ECHR 2001-III; and *Armani da Silva*, cited above, § 236). Moreover, Article 2 does not impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation (see *Velcea and Mazăre*, cited above, § 113; *Ramsahai and Others*, cited above, § 348; and *Armani da Silva*, cited above, § 236). The outcome of the investigation must be duly brought to the

attention of the next-of-kin (see *Damayev v. Russia*, no. 36150/04, § 87, 29 May 2012).

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 inter-related 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 (see *Mustafa Tunç and Fecire Tunç*, cited above, § 225).

210. Article 2 does not entail the right to have third parties prosecuted or convicted for a criminal offence (see *Mustafić-Mujić and Others*, cited above, § 117, and *Armani da Silva*, cited above, § 238). To date, the Court has not faulted a prosecutorial decision which flowed from an investigation which was in all other respects Article 2 compliant (see *Armani da Silva*, cited above, § 259) nor required the competent domestic court to order a prosecution if that court had taken the considered view that application of the appropriate criminal legislation to the known facts would not result in a conviction (see *Mustafić-Mujić and Others*, cited above, § 123).

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 airstrike, which had been ordered by Colonel K. on 4 September 2009. It was undisputed that the fuel tankers, which the airstrike targeted, had been hijacked and remained under the control of insurgents and that there had been civilian casualties. The cause of the death of the applicant's sons, and the person(s) responsible for it, were known from the start of the investigation (compare and contrast *Jaloud*, cited above).

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 airstrike, that no civilians were present at the sand bank (see paragraphs 33-49 above). He had thus not acted with the intent to cause excessive civilian casualties, which would have been required for him to be liable under the relevant provision of the Code of Crimes against International Law. His liability under general criminal law was ruled out due to the lawfulness of the airstrike under international humanitarian law. In respect of the latter, the Federal Prosecutor General elaborated on the meaning of the terms "insurgents" and "Taliban", as employed in his decision, and on the status under international humanitarian law of the victims of the airstrike. He considered that the armed Taliban fighters who had hijacked the two fuel tankers were members of an organised armed

group that was party to the armed conflict and were thus legitimate military targets. They included those persons who had become functionally integrated into and exercised a continuous combat function within the organised armed group. All those airstrike victims who were not Taliban fighters were civilians protected under international humanitarian law, 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 (see paragraphs 42 and 44-45 above).

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 airstrike, which was crucial as regards both his liability under the Code of Crimes against International Law and the lawfulness of the airstrike under international humanitarian law, as well as the number of victims (see paragraph 36 above).

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 airstrike. The reports from on-site investigations conducted in the aftermath of the airstrike, including by the German military police, ISAF, UNAMA and the Afghan civil authorities, were available to him (see paragraph 35 above), as were the documents (such as photographic evidence) and minutes of the meetings and examinations held in the course of these investigations (compare *Giuliani and Gaggio*, cited above, § 310; *Tagayeva and Others*, cited above, §§ 628-631; *Mustafić-Mujić and Others*, cited above, §§ 102-106).

215. The Federal Prosecutor General interrogated the suspects and the other soldiers present at the command centre and found credible their testimonies that they had operated on the assumption that only insurgents and no civilians had been present at the sand bank (see paragraphs 37-39 above). 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 American F-15 aircraft and the thermal images from the latter's infrared cameras, which had been immediately secured. 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 has no reason to doubt the assessment of the Federal Prosecutor General, and that of the Federal Constitutional Court, that no additional insights as to whether Colonel K. had acted in the expectation of civilian casualties when ordering the airstrike could have been gleaned by examining further witnesses (see paragraphs 39 and 60 above). This is true with regard to the questioning of the pilots of the F-15 aircraft as well as that of persons affected by the airstrike, including the applicant. 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 on the scene at the time of the airstrike did not constitute a reason to question Colonel K.'s assumption that he was dealing exclusively with Taliban fighters (see paragraphs 40 above and 218 below).

217. Nor can the Court discern a need for the involvement of additional military experts or for the simulation of the situation at the command centre. The report of the ISAF investigation team was prepared by military experts from different countries. Relying on that report, the Federal Prosecutor General determined that all precautionary measures which had been feasible in the circumstances had been undertaken, that Colonel K., at the time of ordering the airstrike, had not had reason to suspect the presence of civilians near the fuel tankers, and that no advance warning had been required (see paragraphs 46 and 48 above).

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 respective 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 airstrike and that there were significantly more Taliban fighters than civilians among the victims (see paragraph 40 above). The Court is prepared to acknowledge that a more accurate assessment would not appear to have been possible in the circumstances, given that the airstrike occurred in an active combat zone during night time, that the bodies were removed from the scene by the local population within hours of the airstrike, 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 airstrike. In these particular circumstances, the Court takes the view that the fact that the authorities did

not establish the precise number and status of the victims of the airstrike did not amount to a deficiency capable of questioning compliance by the investigation with Convention standards.

219. In view of the foregoing, the Court finds that the facts surrounding the airstrike which killed the applicant's two sons, including the decision-making and target verification process leading up to the order of the airstrike (see *Al-Skeini and Others*, cited above, § 163), have been established in a thorough and reliable manner in order to determine the legality of the use of lethal force.

220. Insofar as the applicant complained about the lack of an effective judicial remedy to complain about the alleged ineffectiveness of the investigation, the Court reiterates that the procedural obligation in Article 2 of the Convention does not necessarily require a judicial review of investigative decisions as such (see *Armani da Silva*, cited above, §§ 278-279, with further references). The Government indicated that in any event the applicant had had at his disposal two effective judicial remedies to challenge the effectiveness of the investigation, and had used both: (i) his motion to compel public charges before the Court of Appeal and (ii) his constitutional complaint.

221. The Court observes that the Court of Appeal declared the applicant's motion to compel public charges inadmissible and that it is in dispute between the parties whether the admissibility requirements were excessive. The application of the admissibility requirements was consistent with the well-established case-law of the domestic courts in this respect (see paragraphs 53, 62 and 99 above). In any event, the Court of Appeal engaged in a thorough review of the evidence referred to by the applicant and of the decision by the Federal Prosecutor General, as also pointed out by the Federal Constitutional Court (see paragraph 61 above).

222. The latter court reviewed the effectiveness of the investigation on the applicant's constitutional complaint. It expressly emphasised that the Federal Prosecutor General's decision not to bring charges was not only in line with the standards of the Federal Constitutional Court, but also with the requirements established by the case-law of the European Court of Human Rights (see paragraphs 59-60 above). Noting that the Federal Constitutional Court is able to set aside a decision to discontinue a criminal investigation (see paragraph 100 above), the Court concludes that the applicant had at his disposal a remedy to challenge the effectiveness of the investigation (see also *Hentschel and Stark*, cited above, § 102).

(b) Promptness, reasonable expedition and independence

223. Insofar 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. Members of PRT Kunduz, who arrived on-site at

12.34 p.m. to perform the initial on-site reconnaissance, were afforded protection by some 100 members of the Afghan security forces, but nonetheless came under fire (see paragraph 27 above). This constitutes a significant difference to *Al-Skeini and Others* and *Jaloud* (both cited above), where the deaths to be investigated did not occur in the active hostilities phase of an extraterritorial armed conflict. 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 accepts, as submitted by the applicant, that it may have been possible to perform additional reconnaissance through a drone prior to the on-site visit, it is not in a position to determine whether this could possibly have led to gleaning information beyond what had already been established through the inspection by the unmanned aircraft at 8 a.m. that morning (see paragraph 24 above). 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 (see paragraphs 26-27 above). Ensuring their participation would thus have resulted in a delay, albeit one of a minor nature, illustrating the inter-relatedness of promptness and independence.

224. Reiterating that the procedural duty under Article 2 must be applied realistically (*Al-Skeini and Others*, cited above, § 168) 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 (see *Jaloud*, cited above, §§ 189-190). While the Court found in *Al-Skeini and Others* that an investigation carried out solely by the commanding officers of the soldiers alleged to be responsible, and limited to taking statements from the soldiers involved, fell short of the requirements of Article 2 (cited above, §§ 153 and 171), it 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 (see paragraphs 84 and 193 above).

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 (see paragraphs 27-28 above), given that the investigation concerned his own responsibility in connection with ordering the airstrike.

226. Yet the Court cannot conclude that this involvement of Colonel K. as such rendered the investigation ineffective (see *Mustafa Tunç and Fecire Tunç*, cited above, § 225). 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 undertook further investigative measures (compare and contrast *Al-Skeini and Others*, cited above, §§ 153 and 171). 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 airstrike, 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 American F-15 aircraft and the thermal images from the latter's infrared cameras, which had been immediately secured.

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. This equally applies in respect of such a risk allegedly stemming from Colonel K.'s involvement in certain investigative steps in Afghanistan, as it does in respect of the delay in questioning him and the other soldiers present at the command post by the Federal Prosecutor General. This marks a significant difference between the present case and those of *Jaloud* (where it remained unclear who had fired the shots which killed the applicant's son) and *Al-Skeini and Others* (where relevant circumstances of the deaths of the relatives of the first five applicants remained uncertain).

228. Insofar 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 airstrike, the chief legal officer of the armed forces informed the Potsdam public prosecutor (see paragraph 30 above). 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 airstrike. The competent German authorities thus initiated investigations into the airstrike, including with a view to establishing any criminal liability of those involved, promptly after the possibility of the deaths of civilians had become known.

229. Having regard to the powers of the prosecution authorities during the preliminary investigation (see paragraph 97 above), the investigative measures undertaken and the sustained investigative activities (see paragraph 31 above), in the Court's opinion the fact that the investigation remained at the preliminary investigation stage for about six months until the opening of the formal criminal investigation on 12 March 2010, while regrettable, did not affect the effectiveness of the investigation.

(c) Participation of the next-of-kin and public scrutiny

230. The Court observes that the applicant filed, on 12 April 2010, a criminal complaint regarding the death of his two sons and requested access to the investigation file (see paragraph 50 above). Nonetheless, the Federal Prosecutor General closed the investigation four days later, without having heard the applicant or granting his lawyer access to the file. With a view to the involvement of the applicant, as the father of two persons killed by the airstrike, in the investigation, this would, at first sight, appear problematic, noting his submission that it could not be ruled out that he possessed relevant information, notably as to the identity of those present at the bombsite.

231. However, in the circumstances of the present case, the failure to examine the applicant as a witness prior to discontinuing the investigation did not render the investigation deficient. It was not in doubt that the applicant's two sons had been killed by the airstrike which had been ordered by Colonel K. and the applicant would not have been in a position to provide additional insights relevant to the determination of Colonel K.'s criminal liability, in view of the grounds on which the Federal Prosecutor General relied. The Court also notes that counsel for the applicant did not elaborate further on the additional relevant information the applicant allegedly possessed, mirroring the Government's submission that the applicant's statements as to his presence at the bombsite remained vague. The Court of Appeal, for its part, found that the applicant had failed to offer suitable evidence, or any evidence at all, for a number of submissions incriminating the suspects, including that many civilians had been outside during the night of the airstrike (see paragraph 53 above).

232. Furthermore, the Federal Prosecutor General reviewed the submissions which the applicant made in his letters of 9 June 2010 and of 7 July 2010, and rejected them as ill-founded by letters of 16 July 2010 and 3 September 2010 (see paragraph 50 above). Had the applicant's statements contained new evidence or led to the existing evidence being viewed in a different light, this could have led to the reopening of the investigation (see paragraph 98 above). The applicant has thus not been deprived of the opportunity to influence the investigation, even though he was not heard prior to the discontinuation decision. In this respect, the Court reiterates that Article 2 does not impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation (see *Giuliani and Gaggio*, cited above, §§ 304 and 312 et seq.; *Velcea and Mazăre*, cited above, § 113; and *Ramsahai and Others*, cited above, § 348).

233. Observing that the question of access to the investigation file was adjudicated by the Federal Constitutional Court at an earlier date in a separate decision, which the applicant did not challenge (see paragraph 57 above), the Court is, in any event, unable to discern any undue restrictions

or delay as regards the applicant's access to the investigation file. Initially, the applicant's representative had requested access to the file on behalf of a large number of individuals, whose victim status required a certain amount of time to verify (see paragraph 50 above). Once the applicant's representative restricted the request to the applicant, access to the unclassified parts of the file was granted two days later. The investigative material contained sensitive information concerning a military operation in an ongoing armed conflict, and it cannot be regarded as an automatic requirement under Article 2 that a deceased victim's surviving next-of-kin be granted access to the ongoing investigation (see *Ramsahai and Others*, cited above, § 347; *Giuliani and Gaggio*, cited above, § 304; and *McKerr*, cited above, § 129).

234. Insofar as the applicant complained about the delay in the service of the discontinuation decision, the Court considers that it was reasonable that the decision of 16 April 2010 was not published or served on injured parties right away, but was redacted first, given that it contained classified military information. The key aspects of the decision were nonetheless published in a press release (see paragraph 34 above). Two days after the redacted version had been finalised, on 13 October 2010, it was served on the applicant's legal representative. Importantly, the one-month time-limit for filing a motion seeking to compel public charges started to run from the date of service of the discontinuation decision (see paragraph 99 above). Thus, the delay in serving the redacted version of the discontinuation decision did not negatively affect the applicant's ability to challenge that decision (compare and contrast *Damayev*, cited above, § 87).

235. Lastly, the Court observes that the investigation into the airstrike by the parliamentary commission of inquiry (see paragraph 69 above) ensured a high level of public scrutiny (see *Tagayeva and Others*, cited above, §§ 629-631; *Mustafić-Mujić and Others*, cited above, §§ 102-106; see also *Al-Skeini and Others*, cited above, §§ 71, 157 and 176).

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.

Done in English and in French, and notified in writing on 16 February 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Johan Callewaert	Jon Fridrik Kjølbro
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Grozev, Ranzoni and Eicke is annexed to this judgment.

J.F.K.
J.C.

JOINT PARTLY DISSENTING OPINION OF JUDGES GROZEV, RANZONI AND EICKE

I. Introduction

1. While we agree with the finding of no violation of the procedural limb of Article 2 of the Convention, in our view the application should have been declared inadmissible for lack of the required jurisdictional link (for the purposes of Article 1) in relation to the procedural obligation to investigate under Article 2.

2. As far as relevant for the present opinion, the case can be summarised as follows. In December 2001 the German Parliament authorised the deployment of German armed forces as part of a United Nations International Security Assistance Force (ISAF) in Afghanistan of which NATO subsequently assumed command. German troops primarily took over the Provincial Reconstruction Team (PRT) Kunduz, which at the time was commanded by the German Colonel K. On 3 September 2009 insurgents hijacked two fuel tankers which then became immobilised on a sand bank in the Kunduz River. In the early hours of 4 September 2009 Colonel K. ordered two United States Air Force airplanes to bomb the immobilised vehicles. The airstrike destroyed the tankers and killed, *inter alia*, the applicant's two sons. After initiating a preliminary investigation in the days after the airstrike, the German Federal Prosecutor General opened a criminal investigation, examining the actions of Colonel K. That investigation was discontinued in April 2010 owing to a lack of sufficient grounds for suspicion that the suspects had incurred criminal liability. In February 2011 the Court of Appeal dismissed a motion by the applicant to compel the bringing of public charges as inadmissible, and on 19 May 2015 the Federal Constitutional Court refused to admit a constitutional complaint against that decision.

3. Before the Strasbourg Court, the applicant complained under Article 2 of the Convention exclusively of shortcomings in the criminal investigation into the airstrike (procedural limb), but not about the killing of his two sons by the airstrike as such (substantive limb).

4. In this opinion we will first explain why, to our mind, in the context of the present case neither the mere fact of instituting domestic criminal investigations into the deaths of the applicant's sons nor the so-called "special features" which the majority relied on are capable of establishing a jurisdictional link so as to trigger the procedural obligation imposed by Article 2. Subsequently, we will assess whether the required jurisdictional link could be based on the military operations in Afghanistan *per se*.

II. Jurisdictional link as established by the majority

5. In *Güzelyurtlu and Others v. Cyprus and Turkey* ([GC], no. 36925/07, §§ 188-189 and 196, 29 January 2019) the Court established that in specific circumstances the institution of a domestic criminal investigation concerning deaths which had occurred outside the jurisdiction *ratione loci* of the State concerned could create a jurisdictional link between that State and the victim's relatives who had brought proceedings before the Court. In the present case the majority found – and we agree in this regard – that that principle did not apply to the factual scenario at issue here, namely the investigation into deaths which occurred in the context of an extraterritorial military operation conducted outside the territory of the Contracting States to the Convention within the framework of a mandate given by a resolution of the United Nations Security Council (see paragraph 135 of the judgment). Indeed, to hold otherwise would have a chilling effect on instituting investigations at the domestic level and "excessively broaden the scope of application of the Convention" (ibid.).

6. However, the majority then considered, referring again to *Güzelyurtlu and Others* (cited above, § 190), not only that "special features" might establish such a jurisdictional link so as to bring the procedural obligation imposed by Article 2 into effect, but also that this would even apply in respect of extraterritorial situations outside the legal space of the Convention (see paragraph 136 of the judgment). According to the majority, three such "special features" existed in the case at hand: (a) the fact that Germany was obliged under international law to investigate the airstrike; (b) the fact that the Afghan authorities were, for legal reasons, prevented from themselves instituting a criminal investigation; and (c) the fact that the German prosecution authorities were obliged also under domestic law to institute a criminal investigation.

7. We disagree with both (A) the extended application of "special features" to events which have taken place outside the legal space of the Convention and (B) the three "special features" as identified by the majority in the present case. In our respectful view, their approach takes away with one hand what it has given with the other by doing exactly what they expressly sought to avoid, namely to create a chilling effect (at the very least by unnecessarily duplicating obligations already existing or emerging under the Statute of the International Criminal Court and/or customary law) and to "excessively broaden the scope of application of the Convention".

(A) Unjustified extension of the "special features" approach

8. In relation to extraterritorial situations where the events in question occurred outside the legal space of the Convention, but where the applicants complained only of a violation of the procedural limb of Article 2, the

case-law of the Grand Chamber shows clearly that to date it has always first assessed whether the incident to be investigated itself fell under the State's jurisdiction within the meaning of Article 1 of the Convention and, if so, whether that incident was attributable to the State concerned (an important distinction which was most recently stressed again by the Court in its admissibility decision in *Ukraine v. Russia (re Crimea)* ([GC], nos. 20958/14 and 38334/18 §§ 264, 266 and 368, 14 January 2021)). In such situations the Court has never – at least not explicitly – applied any other test.

9. In *Al-Skeini and Others v. the United Kingdom* ([GC], no. 55721/07, ECHR 2011) the applicants did not complain of any substantive breach of the right to life under Article 2, but complained only that the respondent State had not fulfilled its procedural duty to carry out an effective investigation into the killings of the applicants' relatives in Iraq. The Court nevertheless first examined whether the killings were attributable to the armed forces of the respondent State (§§ 97-100) and secondly – joined to the merits – whether those killings fell within the respondent State's jurisdiction (§§ 130-150).

10. In *Jaloud v. the Netherlands* ([GC], no. 47708/08, ECHR 2014) the applicant likewise did not complain of any substantive breach of Article 2 but alleged that the investigation into his son's killing in Iraq by the armed forces of the respondent State had been inadequate. The Court again assessed first whether the killing fell within the State's jurisdiction (§§ 137-153) and secondly whether it was attributable to the State (§§ 154-155).

11. In *Güzelyurtlu and Others* (cited above, § 190) the Court held that, although the procedural obligation under Article 2 would 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 could justify departure from this approach. However, we would observe that the criterion of "special features" had originally been "developed" in a different context and in only two very short, almost declaratory, paragraphs in *Rantsev v. Cyprus and Russia* (no. 25965/04, §§ 243-244, ECHR 2010 (extracts)). More importantly, in *Güzelyurtlu* the establishment of a jurisdictional link for the procedural obligation imposed by Article 2 to come into effect on the basis of "special features" was clearly related to the aim of avoiding a vacuum in the system of human-rights protection in the territory of Cyprus, which falls within the legal space of the Convention (see *Güzelyurtlu and Others*, cited above, § 195). This is further reflected by the very fact that in both these cases both (Convention) States involved were respondents to the application examined by the Court and the question was *de facto* one of allocation of responsibility between them. Furthermore, in both cases this allocation of responsibility and the duty to cooperate were governed not only by the Convention but also by other multilateral (Council

of Europe) Conventions, namely, in *Rantsev*, by the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) and, in *Güzelyurtlu*, by both the European Convention on Extradition (CETS No. 24) and some of its Protocols as well as the European Convention on Mutual Assistance in Criminal Matters (CETS No. 182). None of these factors are present in this case, which is, in fact, much more comparable to the situation in *Al-Skeini* and *Jaloud*, in neither of which the Court assessed the question of "special features" or applied any other, similar, test; and that despite the fact that both cases post-date *Rantsev*.

12. Consequently, we are concerned that the majority are now stretching the detachable nature of the procedural obligation to investigate beyond breaking point, by abandoning any connection with an underlying substantive Convention obligation under Article 2. While the Court has, of course, already accepted that the procedural obligation can be seen as a distinct obligation giving rise to a finding of a separate and independent "interference", it has so far done so only in some limited and very specific contexts.

13. By contrast, the present judgment is now no longer about creating a procedural obligation to review "the lawfulness of the use of lethal force by State authorities" (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324) nor about the "obligation inherent in Article 2 which requires, *inter alia*, that the right to life be 'protected by law'" (see *Šilih v. Slovenia* [GC], no. 71463/01, § 154, 9 April 2009), both of which presuppose that the (risk of the) loss of life arose within the territorial "jurisdiction" of the Contracting State. Neither is it about the duty to cooperate with the investigation of another member State or the opening of a separate investigation by that State, following the flight of suspects into its jurisdiction, so as to avoid a legal vacuum within the "legal space of the Convention" (see *Güzelyurtlu and Others*, cited above, § 195).

14. In fact, the majority emphasised "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" (see paragraph 143 of the judgment). We agree. However, this is not the real issue, but it is rather the other way around. With the present judgment the Court has created a procedural duty to investigate a loss of life which has taken place outside the legal space of the Convention, which is expressly not "attributable" to the Contracting State, in relation to which that State has no substantive Article 2 obligation and in respect of which it does not even have jurisdiction. That is what we are concerned about. How can a Contracting State be held responsible under Article 2 for flaws in a domestic investigation if the incident that fell to be investigated could not

itself be attributed to the State in question and did not fall under the Court's jurisdiction for the purposes of Article 1 of the Convention?

15. Furthermore, the majority's approach is difficult to reconcile with the procedural requirement to conduct an investigation that is broad enough in order to determine "whether the State complied with its obligation under Article 2 to protect life" (see paragraph 205 of the judgment). On what basis is that latter, substantive, obligation under the Convention said to arise in the absence of any "jurisdiction", whether in the sense of "effective control over the area" or "State agent authority and control"? (With respect to the jurisdictional link based on the incident itself, see chapter III below.)

16. Consequently, it is also not clear to us what are the potential limits (if any) of the procedural obligation under Article 2, as established in the present judgment, in terms of the underlying act or omission causing loss of life. If neither jurisdiction nor attribution in relation to the act or omission causing the loss of life 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 (whether acknowledged or alleged) or by the acts of allies, not Parties to the Convention, such as the United States of America (noting, in passing, that, of course, the actual bombs in the present case were dropped by two United States Air Force airplanes)?

17. Another area of concern for us is that (and how) the finding of the majority that Germany has jurisdiction over the whole investigation inevitably expands the jurisdiction in such cases even further. After all, the majority in this judgment, by extending the scope of the Convention to cover "the investigative acts and omissions by German military personnel in Afghanistan" (see paragraph 144 of the judgment), expanded the *Güzelyurtlu* principles yet further into areas geographically outside the legal space of the Convention. That was achieved, as we understand it from the reference to *Jaloud* (cited above), on the basis of Germany having "State agent control" over its investigators. This conclusion does not, however, seem to us to be supported either by *Güzelyurtlu* or by *Markovic and Others v. Italy* ([GC], no. 1398/03, ECHR 2006-XIV, expressly referred to in paragraph 136. The latter case was, after all, a pure Article 6 case in which the applicants complained of a denial of access to court before the Italian courts (that is, courts within the territorial jurisdiction of Italy). The Court held there that "[i]f civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6" (ibid., § 54), and only those rights. Moreover, *Markovic* predated *Rantsev* and in no way referred to any "special features" applicable in the context of incidents that occurred outside the legal space of the Convention.

18. In sum, while it is correct that the Court has already "divided and tailored" Convention rights (see, for example, *Al-Skeini and Others*, cited above, § 137, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 74,

ECHR 2012), the majority's approach to tailoring "jurisdiction" in the present case takes this approach beyond the limits of what we can agree with.

(B) The three "special features" applied by the majority

19. Even accepting that, in principle, "special features" may establish a jurisdictional link so as to bring the procedural obligation under Article 2 into play in respect of extraterritorial acts outside the legal space of the Convention, we are unable to discern what makes the three "special features" identified and applied by the majority in the present case so "special" as to justify this yet further extension of the "jurisdiction" under Article 1. We, therefore, find ourselves unable to subscribe to the argumentation of and conclusion reached by the majority. After all, legal certainty requires, *inter alia*, that the engagement of obligations under the Convention be reasonably foreseeable for the Contracting Parties as well as those acting on their behalf or under their direction and control.

20. The first purported "special feature" consists of Germany's obligation under international law to investigate the airstrike. This obligation is largely based on customary international law as reflected in Rule 158 of the *Customary International Humanitarian Law* Study by the International Committee of the Red Cross (see paragraphs 80-84 of the judgment). As the accompanying material thereto suggests, this obligation (a) is derived in large part from and reflects the obligations and the State practice flowing from the Rome Statute of the International Criminal Court ("the Rome Statute"; see paragraphs 94-95 of the judgment), and (b) is not limited to a duty to investigate "war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects" but also includes a duty to "investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects". In relation to the former (which may also become relevant in relation to the third "special feature"), the legal obligations flowing from the Rome Statute are of course common to the overwhelming majority of the Contracting Parties to the Convention, and it is not therefore clear what makes this feature "special". In relation to the latter duty to investigate war crimes beyond those committed by the State's own armed forces and its expansion to (i) all "nationals" and (ii) all other war crimes over which the State has jurisdiction, this is clearly capable of duplicating (and possibly detracting from) the creation of the kind of universal jurisdiction in relation to war crimes envisaged (so as to avoid impunity), *inter alia*, by the Rome Statute. This is a factor further highlighted by the express emphasis on the "gravity of the offence" in paragraph 137 of the judgment.

21. If a State's acceptance of an obligation within the UN framework to conduct criminal investigations creates a jurisdictional link for the Court to

apply the Convention, then any obligation under international humanitarian law might have the same effect. If not, what is the legal rationale and what are the criteria to distinguish one obligation from the other? As the list of the international obligations potentially engaged is so broad, we are concerned that preserving "jurisdiction" as a tenable concept will become impossible or, at least, will entail a haphazard application of the concept, dependent on unclear legal considerations.

22. The second "special feature" relied on by the majority is the fact that the Afghan authorities were prevented, for legal reasons, from themselves instituting a criminal investigation as a result of the exclusive jurisdiction provision in the ISAF Status of Forces Agreement. The immunity conferred by this rule is of course also not "special" but is rather, as paragraph 138 of the judgment acknowledges, "common practice for troop-contributing States in United Nations-authorised military missions" (as well as other status of forces agreements). In any event, and certainly in the context of acts and omissions taking place in the course of armed conflict, 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 (or treatment contrary to Article 3), 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. Furthermore, it is not clear to us how there could be "situations of impunity" if the troop-contributing Council of Europe member States – because we are only concerned with them – do not exercise their domestic criminal jurisdiction. After all, for crimes of the gravity alleged here, the respondent State, like the overwhelming majority of Contracting States, is ultimately subject to the jurisdiction of the International Criminal Court ("the ICC"), if no prosecution were to take place "at home"; a jurisdiction which it is difficult to see being "ousted" by an effectively bilateral agreement between the ISAF and the Interim Administration.

23. The third "special feature" consists of the fact that the German prosecution authorities were under a domestic law obligation to institute a criminal investigation. This reason is, as the judgment expressly acknowledges (see paragraph 140), a direct consequence of Germany's ratification of the Rome Statute. As such, it is again likely to be a common feature in one form or another amongst the overwhelming majority, if not all, of the Contracting Parties to the Convention. 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" in the combination of "special features" necessary for the jurisdictional link required to trigger the procedural obligation under Article 2 of the Convention. If that were its effect, then this would also risk

(further) undermining the engagement of States Parties with the ICC; a consequence which we would consider to be highly undesirable.

24. In any event, it seems to us that the "combination" of these three "special features" which it is said is necessary to bring into play the procedural limb of Article 2 (see paragraph 142 of the judgment), is either so common amongst the (vast) majority of State Parties to the Convention as not to be "special" so as to justify creating "jurisdiction" where it would not otherwise exist or, at the very least, it has not been explained (and it is not apparent to us) what makes these features, either alone or in combination, "special" so as to warrant this yet further expansion of the extraterritorial jurisdiction of the Court.

III. Jurisdiction based on the military actions abroad

25. Since we are of the opinion that in the context of the present case neither the mere fact of instituting domestic criminal investigations into the deaths of the applicant's sons nor the application of the "special features" approach is capable of establishing a jurisdictional link in relation to the procedural obligation under Article 2 of the Convention, we need to assess whether such a jurisdictional link could have been created by the military operations in Afghanistan themselves.

26. The principles which the Court applies to the exercise of jurisdiction (within the meaning of Article 1 of the Convention) outside the territory of the Contracting States, in particular by reference to the "exceptional circumstances" of "State agent authority and control" and "effective control over an area", are summarised in *Al-Skeini* (cited above, §§ 130-139), *Jaloud* (cited above, § 139) and *Georgia v. Russia (II)* ([GC], no. 38263/08, § 81, 21 January 2021).

27. As the majority have not engaged in an assessment of this issue, we will limit ourselves to a strict adherence to the Court's case-law and the corresponding principles. Applying those principles to the present case, we come to the conclusion that the military operations in Afghanistan did not establish a jurisdictional link capable of triggering the procedural obligation under Article 2 either.

28. Firstly, as regards the concept of spatial control (that is, "effective control over an area"), it seems evident to us that Germany did not have effective control over the Kunduz region and the bomb release area. After all, the evidence is clear that, in September 2009, the situation on the ground was one of active hostilities and the number of insurgents in the area was nearly as high as the number of ISAF troops, with the latter suffering serious losses whenever engaged in battles by the insurgents.

29. Secondly, as regards the concept of personal control, that is, State agent authority and control, we observe that neither the ISAF mission nor the German troops exercised public powers in the Kunduz region or in

Afghanistan more generally. The ISAF mission was expressly focused on lending support to the Afghan civil government in building up the Afghan security forces. These latter forces were present in the Kunduz area in particular, and they in turn afforded protection to the German troops, such as for example, to the German reconnaissance unit which undertook the battle damage assessment after the airstrike.

30. Nor did Germany exercise any control over the applicant's sons within the meaning of the Court's case-law. It was explicitly stated in *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, § 75, ECHR 2001-XII) and most recently confirmed in *Georgia v Russia (II)* (cited above, § 124) that an extraterritorial airstrike, as an instantaneous act, cannot establish a jurisdictional link between the persons affected by it and the respondent State, as Article 1 of the Convention does not admit of a "cause and effect" notion of jurisdiction. The airstrike at issue in the present case was likewise a measure taken in the conduct of hostilities in an active combat zone and did not constitute use of force for the purpose of asserting authority and control over persons (compare and contrast *Jaloud*, cited above, § 152).

31. Having found that the deaths of the applicant's sons did not occur within the "jurisdiction" of Germany, it is not necessary for us to assess whether the airstrike was attributable to Germany and thus fell within the Court's competence *ratione personae*.

IV. Conclusion

32. For the reasons given above, we conclude that in the circumstances of the present case no jurisdictional link for the purposes of Article 1 in relation to the procedural obligation to investigate under Article 2 has been established, whether on the basis of the domestic investigation and the "special features" identified or on the basis of the airstrike in Afghanistan itself. We have therefore voted against declaring the application admissible.

33. However, as far as the merits are concerned, we would agree with the relevant general principles as set out in the judgment and with their application to the present case.