Germany, Germany's Duty of Protection Regarding US Drone Strikes in Yemen

The Higher Administrative Court of Münster ruled that Germany must ensure that the US comply with international law when using the Ramstein military base located on German soil. On appeal, the Federal Administrative Court in Leipzig ruled that the German government complies with its duty of protection possibly arising from basic rights with regard to US drone missions and no further steps have to be taken to comply with obligations arising from international law.

Acknowledgments

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. NORTH RHINE-WESTPHALIA HIGHER ADMINISTRATIVE COURT, JUDGMENT FROM 19/3/2019 – 4 A 1361/15

[Source: North Rhine-Westphalia Higher Administrative Court, Wording of the oral pronouncement of the judgment 4 A 1361/15, 19 March 2019, references omitted, headings added, available at: https://www.ecchr.eu/fileadmin/Juristische_Dokumente/OVG_Muenster_oral_declaration_of_judgment_19_March_2019_EN.pdf]

This translation has been prepared for the European Center for Constitutional and Human Rights (ECCHR), one of the NGOs supporting the claimants in this case (F*aisal bin Ali Jaber and others v. the Federal Republic of Germany*). This is an unofficial translation and is provided for information only. Italicized text added for clarity. The original German text of the court's oral pronouncement of the judgment can be found on the website of the Higher Administrative Court for the State of North Rhine-Westphalia [available here].

North Rhine-Westphalia Higher Administrative Court, judgment from 19/3/2019 – 4 A 1361/15 – Wording of the oral pronouncement of the judgment

[1] The plaintiffs submit that they have lost close relatives during a drone strike in the province of Hadramaut in 2012. They doubt the legality of this attack, which according to their knowledge has not been investigated by independent authorities. A lawsuit against the United States of America was rejected by a court in Columbia in February 2016 [see: https://www.cadc.uscourts.gov/internet/opinions.nsf/55ACB57812F8FC91852…]. The legality of the attack was not examined by the US court because it was considered to be a political question. Due to the primary importance of Ramstein Air Base, which is located in Germany, for ongoing US drone operations including those in Yemen, the plaintiffs, who are concerned about their safety, have taken the Federal Republic of Germany to court to prohibit the use of the Air Base for such operations by taking suitable measures. […]

[2] The respondent does not itself conduct any military drone attacks in Yemen that endanger the civilian population there. It also does not actively take part in US drone attacks and in particular did not grant permission for them. On the basis of this alone, the respondent does not through its own actions violate the right to life under which the plaintiffs as foreigners are also protected.

[3] Beyond fundamental rights to ward off violations by the state, German federal constitutional law recognizes that the fundamental right to life triggers a comprehensive positive obligation for the state to protect, more precisely to put itself protectively and supportively in front of life, which means above all to also protect it from unlawful violations by others. Under the established jurisprudence of the Federal Constitutional Court this applies also with regard to unlawful violations by other states of rights protected by German fundamental rights. […]

[4] Regarding cases with facts pertaining to foreign countries, the Federal Constitutional Court has already decided that it can be set out in the state order prescribed by the Basic Law to allow violations of international law to be asserted as subjective breaches of law regardless of whether claims of individual persons already exist by virtue of international law. That applies in any case if rules of international law – as in this case – have a close connection to individual high-ranking legally protected interests. […]

[5] Taking these standards as a starting point, the Senate [*of the Higher Administrative Court*] is convinced that the Federal Republic of Germany has a positive constitutional obligation of protection related to life and limb, which stands opposite an entitlement of the plaintiffs that has as yet not been sufficiently met. This content of this entitlement does not, however, mean that Germany must act to prohibit the use of Ramstein Air Base for drone operations. In this respect, the Senate rejected the action.

[6] The plaintiffs can merely demand from the respondent that it will assure itself, on the basis of the legal assessment by the Senate, that the general practice of US drone operations in the plaintiffs' home region in Yemen (in so far as facilities in Germany are used) is in accordance with the applicable international law. If necessary, the respondent must work towards compliance with international law by taking measures that it deems to be suitable.

In detail:

[7] The state's positive constitutional obligation of protection under article 2 paragraph 2 of the German Basic Law applies in the case of danger to the fundamental right to life also in cases with facts pertaining to foreign countries if a sufficiently close relationship to the German state exists. Such a relationship exists here that triggers for the respondent an obligation of protection that arises from the fundamental right to life because the claimants rightly fear threats to life and limb due to US drone operations which contravene international law carried out using facilities on Ramstein Air Base. The right to life is extensive and also protects against relevant, adequately specific unlawful threats to life and limb.

[8] There are weighty indications, which are known to the respondent or are in any case common knowledge, that the USA, by using technical facilities at Ramstein Air Base and its own personnel stationed there, is conducting armed drone operations in the home region of the plaintiffs in Yemen that at least in some cases violate international law. As a result, the plaintiffs' right to life is unlawfully endangered.

[9] According to official statements by the US government, the US Congress and US Military, the USA has for several years been carrying out military operations in Yemen to fight terrorism up to the most recent past. According to these sources, this involves in particular air strikes. The strikes are directed against operations, facilities and senior leaders of organizations associated with Al-Qaida. In Yemen, these are Al-Qaida in the Arabian Peninsula "AQAP" and the branch of IS in the region.

[…]

[10] The Senate is convinced that the USA conducts drone strikes, including in Yemen, using technical facilities at Ramstein Air Base and the personnel stationed there. There is currently every indication that the flow of data used to control the drones remotely is routed in real time from the USA via a satellite relay station in Ramstein that is centrally important for the operations as a necessary link between the pilots in the USA and the drones in the area of operations.

[…]

[11] Under the German Basic Law, international law also applies in Germany and is binding on authorities and courts in accordance with article 20, paragraph 3 of the Basic Law. It must also be adhered to by stationed forces when using German land. This is not disputed. According to the jurisprudence of Germany's Federal Constitutional Court, the German Federal Government has in principle no political margin of discretion that is not subject to judicial control when it comes to the purely international law-related evaluation with regard to the requirement of effective legal protection […].

[12] The question of whether and if so within what limits armed drone operations in Yemen are permitted by international law is therefore not a political question, but a legal question. This question is at issue in these proceedings because US armed drones are deployed using facilities that are located on German soil and which are of central technical importance. The question as to whether, in relation to US drone operations, Germany must protect and support the lives of the civilian population in areas of operation in Yemen depends legally on whether international law is observed in the course of these operations. In order to adjudicate on the German (joint) responsibility in this context, the law requires an assessment of the international law framework for operations that the USA carries out with substantial use of German land in Germany.

[13] Therefore, the Senate is obliged according to German constitutional law to assess the compliance with applicable international law of US drone operations in the home region of the plaintiffs in Yemen. In this purely legal examination assigned internally on the basis of the German Basic Law and within the framework of its jurisdiction, it contributes also in the international context to the adherence to international law in the fight against terrorism insofar as Germany is significantly involved.

[14] The fight against international terrorism, including in Yemen, occurs with the express approval of the United Nations Security Council. The Council has established that the situation in Yemen represents a threat to world peace and international security also because certain areas in Yemen under the control of Al-Qaida in the Arabian Peninsula are experiencing devastating humanitarian effects on the civilian population […].

[15] Within the framework of UN resolution 60/158 for protecting human rights and basic freedoms in the fight against terrorism […], which […] lays down the fundamental framework for human rights protection in the fight against terrorism, the United Nations General Assembly has generally affirmed the following things among others:

First, that any form of terrorism should be condemned unequivocally as criminal and unjustifiable and that the international community is determined to strengthen international cooperation in fighting terrorism, and,

secondly, that the UN member states must ensure that all measures taken to fight terrorism are in line with their obligations under international law, in particular with international human rights standards, international refugee law and international humanitarian law.

[…]

[16] Since it is disputed whether US drone operations within the framework of counter-terrorism measures do comply with the right to life guaranteed by international law, an examination of the legal questions that arise here by an independent court in proceedings carried out in accordance with the rule of law allows the relevant German authorities to clear up doubts around international law that arise within the framework of the good international cooperation with the United States.

[…]

[17] There are weighty indications that at least some of the armed drone operations conducted by the USA in the plaintiffs' home region in Yemen do not comply with international law and that the plaintiffs' right to life is unlawfully endangered. […]

[18] For its international law assessment, the Senate relies on the UN Charter and international treaties on international humanitarian law and on international human rights protection as interpreted by international courts. Furthermore, in relation to questions and doubt arising in the context of the interpretation of international treaties taking into consideration generally recognized customary international law, the Senate was able to make use of extensive prior work by international organizations, specifically those under the auspices of the United Nations and the International Committee of the Red Cross, which benefit from international expertise, as well as on concrete findings by UN special rapporteurs and international expert commissions. In the resulting legal assessment, the Senate has examined – on the basis of official statements from the US administration and other reliable findings, in particular those resulting from investigations initiated by the United Nations – whether armed drone operations in the home region of the plaintiffs in Yemen comply with international law. […]

This examination resulted in the following:

[19] The use of armed US drones in Yemen is currently not in general prohibited. Armed drones are not prohibited weapons under international law. The use of weapons by US forces against Al-Qaida in the Arabian Peninsula in Yemen also does not violate, regardless of whether the plaintiffs can rely on this, the state-directed prohibition of the use of force in international relations because it occurs with the consent of the lawful Yemeni government.

[20] Even if armed drone operations are in general permitted, they must not breach the requirements of international humanitarian law and international human rights law.

[21] International humanitarian law applies only in armed conflicts and, in that context, permits lethal force principally not permitted in peace time, but at the same time also sets limits on its usage. In this respect, it serves to moderate the use of force and to protect civilians' life and limb in armed conflict, i.e. to protect high-ranking individual protected interests of protected persons. International humanitarian law is thus relevant regarding the question that must be assessed as to the state's positive constitutional obligation to protect.

[22] Mere internal unrest and tension like riots, single acts of violence and other similar actions do not qualify as armed conflicts. According to a definition by the UN International Criminal Tribunal for the former Yugoslavia (ICTY) that is still recognized, an armed conflict can occur in the case of "protracted armed violence between governmental authorities and organized armed groups" within a state. According to the findings obtained under the auspices of the United Nations, there is every indication that Al-Qaida has a sufficient level of organization in the Arabian Peninsula to be party to a non-international armed conflict – particularly because the group has in recent years and on several occasions taken control of parts of the country. The armed conflict between Al-Qaida in the Arabian Peninsula on the one side and, on the other side, the Yemeni government, which had requested international support in this respect and is supported by the USA among others, has up to recent times had a level of intensity such that a non-international armed conflict is given, including in the view of the Security Council. That non-international armed conflict has not as yet ended. However, Al- Qaida in the Arabian Peninsula has been weakened to such an extent over the past year according to the latest report from the Panel of Experts that in the foreseeable future the question may arise of whether the group can be party to an armed conflict conducted with military means. Similar considerations apply in the case of the Yemeni branch of IS.

[23] According to a fundamental rule of international humanitarian law, attacks are not permitted against the civilian population as such, against civilian property, or against individual civilians in as far as and for as long as they are not directly participating in hostilities. Regarding protected civilians, under article 3 of the Fourth Geneva Convention […], attacks on life and on the person, especially killing of any kind, are prohibited in non-international armed conflicts. Due to the principle of distinction and the prohibition of attacks on civilians who are not directly involved in hostilities, a careful assessment – to the extent that this is possible in a given situation – must always be made see whether a protected civilian person is involved. Under customary international law, to protect the civilian population, in non-international conflicts attacks are prohibited where loss of human life

among the civilian population can be expected that is disproportionate to the expected specific and immediate military advantage.

[24] Attacks may generally only be directed against combatants from the armed group involved in the conflict as well as against other persons who participate directly in the hostilities. Since unlike soldiers from state armed forces, combatants from a non-state conflict party are not necessarily visibly recognizable by uniform or national emblem and typically become members of the conflict party not through a formal act, but on the basis of actual affiliation, a distinction must be made between them and civilians on the basis of actual functional aspects. Correspondingly, a person can be seen as a member of such a group if their continued or continuous function lies in the direct participation in hostilities ("continuous combat function").

[25] This understanding developed by the International Committee of the Red Cross is already laid out in the functional designation (intended for conducting armed hostilities) of non-state conflict parties as "armed forces" (Geneva Conventions Common Article 3, no. 1) and "organized armed groups" (Additional Protocol II article 1, paragraph 1). The restrictive designation, effected through the functional criterion of the continuous combat function, of the group of people whose members do not enjoy the protected status of civilians is also in line with the focus of international humanitarian law on the effective protection of the civilian population. The question of whether an activity or function amounts to direct participation in hostilities ultimately requires a case-by-case assessment that takes into account the protection of the civilian population on the one hand and military necessities on the other. Members of organized armed groups may also be attacked if they are currently not directly participating in hostilities.

[26] After evaluating all official statements from the US administration available to the Senate, these clearly indicate that the USA understands its fight against Al-Qaida, the Taliban and associated forces, which include Al-Qaida in the Arabian Peninsula and the Yemeni branch of IS, as a unified, potentially global armed conflict. They do not noticeably distinguish between different regionally separated armed conflicts involving organizationally independent regional terror groups. Such a broad understanding of the term armed conflict is not in line with the term as defined in international humanitarian law because it does not contribute to the restriction of military force, but instead is practically boundless and potentially global. […]

[…]

[27] The USA's very broad understanding of the scope of armed conflicts as well as the assumption put forward by its officials that preemptive strikes are permitted outside armed conflicts even if a potential adversary is not yet planning a specific attack give rise to doubts about whether the general operational practice for attacks, including those in Yemen, meets the requirements of the principle of distinction in international humanitarian law. By considering extensively all forces "associated" with Al-Qaida as participants in a global armed conflict, even if the time and place of a possible attack are still uncertain, it remains unclear whether direct armed attacks in Yemen are limited to those persons who hold a continuous combat function within the local Al-Qaida in the Arabian Peninsula group, in particular as members of its military branch, as well as to persons who directly participate in the hostilities. The Senate was unable to find an indication that this distinction, which is imperative in international law to protect the civilian population, is made to a sufficient degree. Reliable information on drone strikes in Yemen including from official US sources indicates instead that this process of distinguishing, required by international law, is insufficiently carried out, and not just in isolated cases. In particular, civilian supporters of the group who are not directly involved in the armed conflict, and former fighters who have definitively turned away from the group are not legitimate military targets even if they are subject to United Nations Security Council sanctions and are to be held criminally accountable for their support including non-military support.

[28] Furthermore, according to article 6 of the International Covenant on Civil and Political Rights, any arbitrary killing is prohibited in armed conflicts. According to the jurisprudence of the International Court of Justice, a killing is not arbitrary if it is directed against a legitimate military target within the context of an armed conflict and the attack avoids disproportionally high numbers of civilian victims. […] According to the jurisprudence of the European Court of Human Rights and Germany's Federal Constitutional Court, the prohibition of arbitrary killing requires that effective official investigations are conducted if persons are killed due to the use of force in particular by representatives of the state. In his final report in 2014, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism did reach the conclusion that the majority of persons killed during US drone strikes in Yemen were legitimate military targets in the internal armed conflict. Nevertheless, he also listed a series of armed attacks in Yemen carried out with the proven or possible involvement of the USA about which there exists a justified suspicion of illegality that has not been dispelled. […]

[29] The German Federal Government, according to its representatives in the oral proceedings, has no reliable information as to whether the US authorities have performed or permitted independent investigations – beyond purely internal situation evaluations – in these kinds of cases. […]

[30] Due to the general importance of the legal matter, the Senate allows an appeal to Germany's Federal Administrative Court.

B. JUDGEMENT OF 25 NOVEMBER 2020 - BVERWG 6 C 7.19

[Source: BVerwG, Judgment of 25 November 2020 - 6 C 7.19, references omitted, available at: https://www.bverwg.de/en/251120U6C7.19.0]

Please note that the official language of proceedings brought before the Federal Administrative Court of Germany, including its rulings, is German. This translation is based on an edited version of the original ruling. It is provided for the reader's convenience and information only. Please note that only the German version is authoritative. Page numbers in citations have been retained from the original and may not match the pagination in the English version of the cited text. Numbers of paragraphs that have completely been omitted in the edited version will not be shown. […]

No individual right to demand further action by the Federal Government to prevent US drone operations in Yemen using Ramstein Air Base

Headnotes

1. In principle, duties of protection arising from basic rights on the part of the German state may also exist vis-à-vis foreign nationals living abroad and if, in the event of impairments of or threats to basic rights caused by other states, there is a qualified connection to German territory, provided that, on account of the number and circumstances of breaches of international law that have already occurred, comparable acts of the other state in violation of international law can concretely be expected to also occur in the future.

2. Where actions of another state impair or threaten an interest protected under basic rights abroad, a sufficiently close connection to the German territory for duties of protection to arise from basic rights on the part of the German state only exists, if partial acts of the overall event, which have a relevant decision-making character and are therefore decisive for the legal assessment, take place in Germany.

3. When assessing the actions of other states under international law, the Federal Government has a margin of appreciation within the range of justifiable legal opinions.

4. In cases with a foreign connection, the breach of a duty of protection arising from basic rights can only be established where the Federal Government has remained completely inactive or if the measures taken are obviously completely unsuitable or inadequate.

Reasons (abridged)

[…]

39 Admittedly, at the outset the Higher Administrative Court correctly found that, under article 2 (2) first sentence GG, the German state was in principle obliged to protect foreign nationals living abroad against impairments of their life or physical integrity coming from German territory by another state in a manner contrary to international law, if there was a sufficiently close connection to the German state, which in any event proved to be the case if the other state carried out its impairing action substantially from German territory (a). […]

[…]

49 b) However, the appeal judgment violates the law that is subject to an appeal on points of law by establishing the legal proposition that a sufficiently qualified connection to the German state as set out above already exists if the relevant contribution to the creation of the source of threat for the interests protected under basic rights on German territory amounts to nothing more than a purely technical transmission process without decision-making elements. (...)

50 However, the fact that technical facilities located on German territory are involved in an overall process, the conception and implementation of which is otherwise exclusively in the hands of officials of another state working outside German territory, is not sufficient, on the basis of an evaluative assessment, to establish duties of protection arising from basic rights on the part of the German state. […] Only under the condition that the actions or events, that are decisive for the legal assessment of the impairment of or the threat to the interests protected under basic rights, take place at least partially on German territory, can the fact that the German state power is bound by basic rights not only require it - in accordance with the defensive right dimension inherent to basic rights - to refrain from its own acts of interference, but can also - in the sense of the dimension establishing a duty of protection - create positive obligations to act. Accordingly, only those actions or technical processes on German territory that have a relevant decision-making character can trigger duties of protection arising from basic rights.

51 c) […] Contrary to the opinion of the Higher Administrative Court, a duty of protection on the part of the German state can only arise from basic rights if, on account of the number and circumstances of violations of international law that have already occurred, it can concretely be expected that comparable acts of the other state in violation of international law impairing or threatening interests protected by basic rights also occur in the future.

[…]

53 […] Admittedly, duties of protection arising from basic rights are in principle aimed at having a preventive effect. However, the Higher Administrative Court's assumption that the basic rights obliged the German state power to take action based on suspicions with the aim of preventing the actions of other states where there is even the possibility of a violation of international law results in a practically unlimited responsibility of the German state for extraterritorial matters, which has no basis, neither in the constitutional text nor in the legislative history of the Basic Law.

54 In the event of violations of basic rights by other states, the duty of protection vis-à-vis foreign nationals living abroad on the part of the German state arising from basic rights can only be triggered - beyond the requirement of a sufficiently qualified connection to the German territory - if, on account of the number and circumstances of violations of international law that have already occurred, it can concretely be expected that comparable acts of the other state in violation of international law impairing or threatening interests protected by basic rights also occur in the future. It must be possible to establish a practice going beyond isolated individual cases of acts contrary to international law on the part of the other state which, by virtue of its duty to protect, the German state may have to prevent from continuing by way of intervention. Where, for example, armed operations are in principle permissible in the context of an international or non-international conflict within the meaning of international humanitarian law, it can typically only be evaluated on the basis of an overall assessment whether there are continuous or regular violations of the international humanitarian law applicable to such conflicts, in particular the prohibitions of indiscriminate attacks serving the protection of the civilian population and civilian objects (article 51 (4) second sentence of […] [Protocol I]) or of attacks with disproportionate collateral damage (article 51 (5) (b) and article 57 (2) (a) no. iii of Protocol I).

55 d) Finally, the standards applied by the Higher Administrative Court when examining whether the duty of protection on the part of the defendant did arise from basic rights, also violate the law that is subject to an appeal on points of law because the Higher Administrative Court does not recognise that the Federal Government has a margin of appreciation within the range of justifiable legal opinions when assessing the actions of other states under international law.

56 Admittedly, the Federal Constitutional Court […] held that the national effect of international law, which binds the judge […], as well as the guarantee of effective legal protection […], are in principle opposed to granting non-justiciable margins of appreciation to the executive with regard to breaches of international law […]. […] Restrictions on the judicial review of decisions of the executive were accepted in particular for the political discretion in the field of foreign affairs and in matters of defence policy […]. However, in the above-mentioned decision, the Federal Constitutional Court had emphasised the narrow limits of political discretion. For instance, unlike the specialised courts before, it has not qualified the drawing up of target lists and the non-exercise of a right to veto against the inclusion of a certain target in these lists as well as the classification of an object as a legitimate military target as political decisions which would be excluded from judicial review from the outset […].

57 […] Accordingly, even a legal opinion which, in the view of a German court, was incorrect under international law and from which the Federal Government proceeded when examining the conditions under which it may have discretion as well as the requirements to be observed in exercising its discretion when granting protection abroad in an individual case, could not in itself justify any defective exercise of such discretion. As reasoning, the Federal Constitutional Court states that the current international legal order largely lacked institutional arrangements, for instance a compulsory international jurisdiction, which could serve to establish the correctness of legal opinions in a binding manner in the event of a dispute. A state's assertion of its own legal position therefore had a much greater significance at the international level than in a national legal system, in which courts determine the law in a way that is also binding on the state. […] In view of this, it is incumbent upon the courts to exercise the utmost restraint in qualifying any incorrect legal opinion in terms of international law formed by these organs as errors of discretion. […]

[…]

59 […] Whilst such assessment is not a priori exempt from an incidental legal review by national courts; for, the principle recognised under customary international law that a state is not subject to any foreign national jurisdiction (principle of state immunity), does not prohibit judicial decision on the lawfulness of sovereign acts of other states within the context of preliminary questions […]. However, the legal positions taken by other states carry particular weight in assessments under international law. […]

60 5. The Senate cannot, without additional factual findings by the Higher Administrative Court, decide whether the duty of protection on the part of the defendant vis-à-vis claimants no. 2 and no. 3 did arise from basic rights in accordance with the law that is subject to an appeal on points of law.

61 On the one hand, this concerns the question whether the required qualified connection to German territory exists. Contrary to the opinion of the Higher Administrative Court, it is not sufficient that the data stream to control the drones used in Yemen is transmitted via fibre optic cable from the USA to Ramstein Air Base and from there via radio to the drones by means of a satellite relay station. As stated above, only those actions or technical operations on German territory can trigger a duty of protection arising from basic rights that have a relevant decision-making character. Such a case could exist here if the involvement of Ramstein Air Base in the armed drone operations of the USA in Yemen would additionally include an evaluation of information. (...) Since, in accordance with the legal starting point of the Higher Administrative Court, this was not a decisive issue, the appeal judgment does not contain any conclusive factual findings on which the Senate could base its own legal assessment on this point.

62 On the other hand, on the basis of the factual findings of the Higher Administrative Court, it is also not possible to assess whether the drone missions carried out by the USA in Yemen using Ramstein Air Base regularly violate requirements of international humanitarian law, in particular the prohibitions of indiscriminate attacks or attacks with disproportionate collateral damage. The appeal judgment does not contain sufficient factual findings on the respective attack targets and other circumstances of concrete drone missions carried out by the USA using Ramstein Air Base in the past. In particular, it lacks factual findings established by the competent court as to whether the drone attacks carried out by the USA are limited to such persons who are either organisationally integrated into AQAP or the Yemeni branch of IS as opposing parties to the conflict and fulfil a continuing combat function or to such persons who directly participate as civilians in hostilities in the context of the concrete conflict. The same applies where the distinction between combatants and civilians is made according to other criteria […].

63 The lack of factual findings on the respective attack targets and on other circumstances of the specific drone missions of the USA in Yemen is based on the legal starting point of the Higher Administrative Court […] that a duty of protection on the part of the German state arising from basic rights is not only triggered in those cases, in which the measures of another state that impair basic rights are found to be contrary to international law, but - in the sense of an extremely broadly understood precautionary principle that is not only limited to prognostic uncertainties - already when there is merely the possibility that the actions of the other state in question may prove to be contrary to international law. On the basis of its incorrect legal approach, the Higher Administrative Court essentially relies on the abstract depiction of official pronouncements by the USA, from which it gathers, among other things, that the USA considers the use of unmanned drones in the ongoing armed conflict with AQAP or ISIS to be legally permissible in principle and does not refer to as authoritative whether the targets are actually legitimate under international humanitarian law in the context of the respective armed conflict or whether a target person is organisationally integrated into a specific non-state party to the conflict. However, the basis for examining conformity of the selection of targets and the use of weapons with international law cannot be general political statements, but only the concrete circumstances under which the operations were carried out. Only in cases of doubt, for example when it is clear that civilians were also killed or injured in an attack, can it be appropriate to use such statements as a supplement in order to gain knowledge about whether it was a targeted attack or merely unintentional collateral damage.

64 In addition to official pronouncements by the US government, the US Congress and the US military, the Higher Administrative Court does also mention reports by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, reports by the UN Group of Eminent International and Regional Experts on Yemen, and reports by media and non-governmental organisations. However, the Higher Administrative Court did not form its own conviction […] as to the existence of the facts that can possibly also be inferred from these documents with regard to the circumstances of individual drone operations. Rather, it merely refers in general to the fact that there were "weighty factual indications known to the defendant or at least obvious to her" that armed drone missions carried out in the past by the USA in Yemen under the involvement of Ramstein Air Base, including the province of Hadhramaut, were not only incompatible in individual cases with the stipulations of international law and that further drone missions in violation of international law had therefore to be expected in the future. (...)

[…]

69 Contrary to the opinion of the Higher Administrative Court, the measures of the Federal Government cannot be qualified as inadequate, neither because they lacked an own legal assessment (aa), nor because the Federal Government's activities have so far been limited to carrying out consultations (bb) as well as to obtaining a legal assurance from the USA (cc). In particular, the defendant did neither have to "confront" the USA with a certain interpretation of the law (dd), nor did she have to consider further steps such as the denunciation of the international treaty basis for the use of Ramstein Air Base (ee).

70 aa) The Higher Administrative Court's starting point that the Federal Government had not formed its own opinion on the question of conformity of the drone missions at issue with international law which could serve as a basis to make an appropriate decision on its further course of action, is already incompatible with the factual findings contained in the appeal judgment. (...)

71 The assumption that there was no assessment of the permissibility of the drone missions under international law cannot be based on the fact that the Federal Government avoided any clear determination in its answers to parliamentary questions and instead referred to the long-standing and trusting co-operation with the USA and to the fact that the USA, as a state based on the rule of law, has a broadly institutionalised tradition of respecting international humanitarian law and enforcing compliance with it. As already stated above, the Federal Government must take into account the range of justifiable legal opinions when assessing the actions of other states under international law. Therefore, when fulfilling its duty of protection arising from basic rights in relation to foreign countries, it is also entitled to refrain in its public pronouncements from conclusively assessing the actions of other states under international law if the application and the content of the relevant rules of international law are disputed or are subject to change against the background of new developments in the international sphere.

72 This is the situation here. The assessment of the drone operations of the USA in Yemen under international law encounters considerable difficulties, both with regard to the content of the applicable provisions of international law as well as with regard to the investigation of the facts relevant for the decision. […] Since […] it must be assumed that the drone missions of the USA in Yemen directed against AQAP and ISIS do not breach the prohibition of the use of force under article 2 (4) of the UN Charter due to the consent given by the Yemeni government and since a non-international armed conflict currently exists between AQAP

and ISIS and the US-supported Yemeni government, the legal assessment of the drone missions in the present context of a duty of protection on the part of the German state arising from basic rights, depends on whether there are continuous violations of international humanitarian law applicable to such conflicts.

73 As also already mentioned - the prohibitions under customary international law of targeted or indiscriminate attacks on civilians and of attacks resulting in disproportionate collateral damage - are decisive here. It is beyond doubt that the prohibition of targeted and indiscriminate attacks on civilians, as set out in article 51 (4) and (5) of Protocol I, governing international armed conflicts, constitutes a general rule of international law which must also be observed in non-international armed conflicts […]. Moreover, the prohibition of attacks causing disproportionate collateral damage as established for international armed conflicts in article 51 (5) (b) and article 57 (2) (a) no. iii of Protocol I also applies in non-international armed conflicts as customary international law (...). […]

74 Unlike the application under customary international law of the prohibitions of targeted and indiscriminate attacks against civilians and of attacks causing disproportionate collateral damage in non-international armed conflicts, the question of the distinction between combatants of a non-state party to the conflict and civilians is difficult and controversial (...). It cannot necessarily be presumed that the rule set out in article 13 (3) of […] [Protocol II], whereby civilians enjoy the protection afforded under this part, unless and for such time as they take a direct part in hostilities, applies under customary international law, since, among others, the USA have not signed the Protocol (...). In any event, even then it remains to be clarified under which conditions acts can be deemed to constitute direct participation in hostilities. Finding direct participation in hostilities poses problems especially in unclear conflict situations where state organs do not have precise information on how insurgent groups are organised, which person actually belongs to these groups and on the basis of which external characteristics the persons concerned can be identified (...). Some express the opinion that e.g. communication and logistics experts are also (de facto) combatants (...). Furthermore, the question under which conditions a combatant may be killed who temporarily takes part in hostilities only to return to his role as a civilian (...) has not yet been conclusively clarified. The fact that under article 50 (1) of Protocol I the civilian status is maintained in cases of doubt, does not produce any further results, since this presumption rule cannot be proven to apply under customary international law to non-international conflicts.

75 bb) It follows from the factual findings of the Higher Administrative Court [that] the Federal Government decided in 2016 at the latest to enter into consultations with the USA addressing legal questions arising from the use of unmanned aerial vehicles. […]

76 Contrary to the opinion of the Higher Administrative Court, the ongoing conduct of consultations at various diplomatic and political levels cannot be qualified as a "completely inadequate" instrument to protect the claimants from harm caused by drone attacks that may be in violation of international law. As correctly stated by the appeal on points of law, such political consultations constitute a classic means of foreign affairs power in dealings with other states. From a constitutional law perspective, the alternative of unilateral action by the defendant is opposed by the decision of the Basic Law […] in favour of Germany's integration in the international cooperation of states […]. […] Finally, account must be taken of the fact that at the level of international law there is no equivalent to the state's monopoly on the use of force and that law enforcement is therefore necessarily tied to cooperation with other states.

77 cc) According to the factual findings in the appeal judgment, the Federal Government also obtained an assurance from the USA that unmanned aircraft for anti-terrorist missions are neither launched nor controlled from Ramstein and that the USA respects German law in its activities at Ramstein - as in Germany as a whole. Nor does obtaining such a general assurance that activities at US military premises in Germany will be carried out in accordance with applicable law constitute a "completely inadequate" means, as the Higher Administrative Court assumes. In principle, the Federal Government, in fulfilling its duty of protection arising from basic rights vis-à-vis foreign nationals living abroad, may rely on such an assurance by another state that it is acting lawfully, provided that this declaration is not based on a legal opinion that exceeds the bounds of what is justifiable or is demonstrably contrary to the facts.

78 dd) Contrary to the opinion of the Higher Administrative Court, the defendant's fulfilment of the duty of protection possibly arising from basic rights vis-à-vis the claimants no. 2 and no. 3, is also not contingent upon the Federal Government "confronting" the US side with the "German interpretation of international law" and the doubts resulting thereof as to the conformity of the drone missions in Yemen with international law.

79 […] By essentially demanding that the Federal Government publicly declare that it clearly qualifies the US drone operations in Yemen as violations of international law and the way it has communicated this legal conviction to the USA, the Higher Administrative Court fails to recognise that, according to the jurisprudence of the Federal Administrative Court, it is within the scope for action afforded to the Federal Government in foreign policy to determine the way it wishes to react to actions of other states that are unlawful or in violation of international law. […] It is not for the courts to substitute their assessment of the relationship with other states or of the possible effects of certain measures at the international level for the assessment of the organs of the Federal Republic of Germany vested with foreign affairs power […].

80 ee) The Federal Government did not have to consider further steps to fulfil its duty of protection possibly arising from basic rights vis-à-vis the claimants […].

Discussion

I. Classification of the situation and applicable law

1. *(Document A, paras [9],[14]-[16], [21]-[22], [26]-[27]; Document B, para. 72)*

1. How does the Higher Court classify the situation?
2. What criteria must be fulfilled for a situation to be classified as a NIAC? Could sporadic drone strikes by the US fulfil the intensity threshold of violence required to classify a situation as a NIAC? What is the opinion of the Higher Court? (GC I-IV, Art. 3; P II, Art. 1)
3. Would the classification be the same if the US did not have the consent of Yemen? (GC I-IV, Art. 2 and 3)
4. What is the US understanding of the scope of its fight against Al-Qaida, the Taliban and associated forces? Do you think this understanding is correct under IHL? What is the Higher Court assessment in this respect?
5. Are there any implications for the applicability of IHL if Al-Qaida, as a party to a NIAC, has been weakened to some extent? If it loses control over the territory? If it becomes disorganised?

2. *(Document A, paras [23]-[25], [27]; Document B, para. 74)*

1. How does the Higher Court distinguish between civilians and members of the Yemeni branch of IS [Islamic State]? Where does its understanding of the principle of distinction in NIAC stem from? Does the Federal Administrative Court agree? (GC I-IV, Art. 3; P II, Art. 13(3); CIHL, Rules 3 and 6)
2. Does the Higher Court consider that Common Article 3 governs the conduct of hostilities? What do you think? (GC I-IV, Art. 3)
3. What do you think about the Federal Administrative Court's finding that it cannot necessarily be presumed that the rule according to which the protection afforded to civilians ceases only for such time as they take a direct part in hostilities applies under customary international law, since, among others, the US has not signed Additional Protocol II?
4. May any member of an armed group be targeted? Even when currently not directly participating in hostilities? Or is it necessary first and foremost to determine his/her role and status within the group? According to the Higher Court? According to you?

3. *(Document A, paras [2]; [10]; Document B, para. 61)*

1. Could the presence of the Ramstein military base on German soil make Germany a party to the conflict when the base plays an essential role in the use of the US drones?
2. Would your answer to the previous question change if Germany played a more active role? If the German government was aware of and acquiesced to the drone strikes? If the drone strikes were conducted against a State as opposed to armed non-state actors? (CIHL, Rule 139)
3. Could a State become a party to a pre-existing NIAC without being directly involved in the hostilities? What do you think of the Federal Administrative Court assessment that a qualified connection to German territory would exist "if the involvement of Ramstein Air Base in the armed drone operations of the USA in Yemen would additionally include an evaluation of information"? (GC I-IV, Art. 2 and 3)
4. Would IHL apply to hypothetical attacks by Al Qaeda directed at the Ramstein military base? If so, do you think that the Ramstein military base is a lawful target? And the satellites transmitting data for drone attacks? (P I, Art. 52(2); CIHL, Rule 8)

II. The legality of drone strikes

4. *(Document A, para. [18]; Document B, paras 62-65)*Which sources did the Higher Court rely on to assess the legality of the armed drone operations conducted by the US? What was the point of criticism raised by the Federal Administrative Court with regards to the conlusiveness of the factual findings?

5. *(Document A, paras [26]-[27]; Document B, paras 63-64)*According to the Higher Court, does the general operational practice for attacks in Yemen meet the requirements of the principle of distinction? What are the arguments presented? Does the Federal Court agree? Do you agree? Why/why not? (P I, Arts 48, 51(2) and 52(2); P II, Art. 13(2); CIHL, Rule 1)

III. Duty to protect

6. *(Document A, paras [3]-[6]; Document B, paras 1-2, 39)*

1. Under IHRL, does Germany have to respect the right to life of the Yemeni victims of the US drone strike? Do they fall under German jurisdiction? Why/why not?
2. Does IHL provide a subjective right for drone strike victims to bring a claim before courts? How can violations of international law be asserted as subjective breaches of law before the German courts?

7. *(Document B, paras 57-59)* Does the Federal Administrative Court consider targeting decisions excluded from judicial review? For what reasons should restraint be exercised? Does IHL deal with this question? (GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; CIHL, Rule 158)

8. *(Document A, para. [7]; Document B, paras 49-54, 61-63)*

1. To what extent are States required to ensure respect for IHL? By its own armed forces? By civilians? By foreign armed forces? (GC I-IV, Art. 1; P I, Art. 1(1); CIHL, Rule 139)
2. According to the Federal Administrative Court, which conditions must be fulfilled so that the duty of protection may arise for Germany *vis-à-vis* foreign nationals living abroad when violations of human rights are being committed by other states?
3. When does the Higher Court find a sufficient connection to Germany? Does the Federal Administrative Court agree? Which example does it provide?

9. *(Document B, paras 3, 55, 59, 71, 77 and 79)*Is it inherent in the international legal order that one State has to respect differing interpretations of IHL by another State when ensuring respect of IHL as long as such interpretations remain within the range of justifiable legal opinions? (GC I-IV, Art. 1; P I, Art. 1(1); CIHL, Rule 139)

10. *(Document B, paras 75-80)*

1. Does the Federal Administrative Court consider the “existing practice of diplomatic and political consultations with the USA” adequate to address the question of the conformity of the drone strikes with international law? Is the Government required to consider further steps?
2. Can you think of alternative ways how a State could be reminded of its obligations under IHL? By other States? By international organisations?