[Unofficial translation of the Federal Republic of Germany's appeal of the Administrative Court of Cologne's decision in case 3 K 5625/14, in which the plaintiffs were three Yemeni citizens: Faisal bin Ali Jaber, Ahmed Saeed bin Ali Jaber, and Khaled Mohmed bin Ali Jaber]

Higher Administrative Court North Rhine-Westphalia, 4 A 1361/15

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Senate:	4th Senate
Decision type:	Judgment
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Previous instance: Administrative Court Cologne, 3 K 5625/14

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Yemen
EUCOM (United States European Command)
Parliamentary Committee of Inquiry
Constitutional dispute
Legal standing / Power of action
Interest in legal protection / in bringing proceedings
International jurisdiction
Right to life
International / Foreign issue
Foreign affairs
Defensive claim (Abwehranspruch)
Duty to protect
Right to self-defense

Self-defense
Preventive self-defense
Webster's formula
International treaty law
Interpretation of treaties
Customary international law
Security Council
United Nations
jus ad bellum
jus in bello
International humanitarian law
International Committee of the Red Cross
Human rights guarantees
Non-international armed conflict
Non-governmental party to an armed conflict
Organization
Intensity
Territory
Geographic restriction
Civilian population
Principle of distinction
Combatant
Fighter
Collateral damage
Continuous combat function
Scope for decision-making
Direct participation in hostilities

Guiding principles:

1. Sufficient, but also necessary for the applicability of the fundamental rights of the Basic Law to contexts with a foreign component, is the existence of a sufficiently close link/connection to the German state, which can also be considered when foreigners are affected abroad.

2. The general permission (authorization) vis-à-vis foreign armed forces to use a German property for military purposes does not have the quality of an encroachment on a fundamental right, neither in terms of its effect nor its objective.

3. German state authority can also be subject to an obligation/duty to protect under Article 2.2, sentence 1 of the Basic Law ("right to life") towards foreigners if their fundamental rights are

impaired or endangered in a manner contrary to international law by another state emanating from German state territory.

4. With regard to the assessment of the respective facts of the case under international law, the executive branch – according to Article 20(3) and Article 19(4) of the Basic Law – does not, in principle, have any non-justifiable scope for decision-making.

5. A right to preventive or “pre-emptive" self-defense even in situations where there is no immediate danger (“imminent threat”), but instead “uncertainty prevails over the time and place of the enemy attack,” finds no basis in current international law.

6. The existence of a non-international armed conflict in the terms of international humanitarian law must be determined based on two cumulative criteria: the intensity of hostilities and the degree of organization of the parties to the conflict.

7. International humanitarian law does not recognize non-international, potentially worldwide armed conflicts. Furthermore, it does not recognize a so-called “war against international terrorism.”

8. According to international treaty law and customary international law of non-international armed conflicts, it is necessary to distinguish between civilians and combatants, as well as civilian objects and military objects.

9. Non-state combatants that are party to a conflict are members of a combatant group if their continued or permanent function involves direct participation in hostilities (“continuous combat function”).

10. The assumption of a global war against terrorism and of a right to preventive self-defense, even in situations of uncertainty about the time and place of a possible attack, even where a non-international armed conflict actually exists, harbor a considerable structural risk of violations of the principle of distinction and the fundamental ban on direct attacks on civilians.

11. In the event of an armed conflict, the provisions of international law on the protection of human rights shall apply in addition to the specific provisions of international humanitarian law.

12. The prohibition of arbitrary killings under international law requires effective official investigations into circumstances where persons are killed through the use of force, in particular, by representatives of a state.

13. Within the framework of the constitutional duty to protect, it is for the Federal Government to decide which specific protective measures it intends to adopt, also taking into account state policies on foreign and defense interests.

Operative provisions of the judgment:

The Higher Administrative Court for the State of North Rhine-Westphalia,
On behalf of the people
Judgement

Announced: 19/03/2019

4 A 1361/15
First instance: 3 K 5625/14 Cologne

In the administrative dispute

regarding
the prevention/ban of the use of Ramstein Air Base for armed US drone operations in Yemen.

Regarding the hearing on 14 March 2019,
the Fourth Chamber
adjudicated

On the appeal of the plaintiffs, the judgment of the Administrative Court of Cologne of 27 May 2015 is hereby amended.

It is ordered that the defendant take appropriate measures to ensure that the use of the Ramstein Air Base by the United States of America for unmanned aerial vehicles from which missiles are fired to kill persons in the territory of the Republic of Yemen, Hadramaut Province, particularly in the district of Al-Qutn, in the locality of L., where the second and third plaintiffs reside, is in accordance with international law, and that the defendant, if necessary, work towards compliance by the United States of America.

The remainder of the action is dismissed.

It is ordered that the plaintiffs and the defendant each bear half of the costs of the proceedings at both instances.

The decision on costs shall be provisionally enforceable. [The respective enforcement debtor may prevent enforcement by providing security or by depositing a sum equivalent to 110% of the amount enforceable on the grounds of the judgment, unless the respective enforcement creditor provides security equivalent to 110% of the amount to be enforced before the enforcement.]

Appeal (on points of law) is admitted/granted.

Findings

Facts:

The plaintiffs seek from the defendant the prohibition of armed operations of unmanned aerial vehicles, commonly known as drones, in Yemen, which, according to the plaintiffs' submission, are carried out by US armed forces using facilities at the Ramstein Air Base. Alternatively, they seek an order declaring the unlawfulness of the failure to adopt appropriate preventive measures.

The Ramstein Air Base, a military airfield in Rhineland-Palatinate, is being used by the US armed forces. The authority for its use arises from the Treaty of 23 October 1954 (Federal Law Gazette (BGBl) 1955 II p. 253) on the Residence of Foreign Armed Forces in the Federal Republic of Germany (Residence Treaty/Agreement), of the NATO Status of Forces Agreement of 19 June 1951 (NTS, Federal Law Gazette (BGBl) 1961 II p. 1190) and the Supplementary Agreement to the NATO Status of Forces Agreement of 3 August 1959 (Federal Law Gazette (BGBl) 1961 II p. 1183, 1218).

The plaintiffs are Yemeni nationals. The second and third plaintiffs reside in Yemen in the village of L. in Hadramaut Province. The first plaintiff, who originally resided in the Yemeni capital Sanaa, is currently living in Canada and Qatar. According to his submission, he intends to return to Yemen, where his wife and children reside in L., as soon as possible.

In support of their action/claim, the plaintiffs submitted/argued that for years there had been violent clashes in Yemen between, inter alia, the Government and the group “al-Qaida in the Arabian Peninsula” (hereinafter “AQAP”), the regional branch/offshoot of al-Qaida. In this conflict, the Yemeni Government is supported by the US Government, which, in this context, has been carrying out air strikes with drones for the purpose of targeted killings since 2002, and intensified air strikes since 2009. Background to the USA’s involvement/participation in the fight against AQAP in Yemen is the “Global War on Terror” proclaimed by former US President George W. Bush. Since 2012, so-called “signature strikes” have also been carried out, in which persons become the target of an attack solely based on a certain pattern of behavior or certain external circumstances.

The drone strikes, which have already killed or injured numerous innocent bystanders, often also took place in the Hadramaut region because AQAP was particularly strong there. The plaintiffs are therefore in constant danger and fear for their lives. The fear of drone attacks traumatizes an entire generation. In an attack on 29 August 2012, their close relatives X. B. i. B1. K., a police officer by profession, and T. B2. bin B1. K., a Muslim cleric, died. T. B2. bin B1. K. had denounced al-Qaida’s actions in the mosque the previous Friday. He was then approached by al-Qaida members and invited to a meeting for discussion. When he appeared at the meeting, accompanied by his cousin, the drone attack occurred, in which all of the people present were killed by rocket fire. A particular threat to the plaintiffs also arises from the fact that, as men of military age, they could become the target of future signature strikes. The tribe to which they belong shows patterns of behavior in the context of family celebrations and other social occasions that could trigger a signature strike (e.g. carrying weapons, ritualized shots in the air, etc.).

The drone deployments are based on a complex division of actions between different people at different locations around the world. The analysis and selection of possible targets in Yemen prior to an operation is carried out in the US, e.g. at the headquarters of the United States Central Command (CENTCOM) in Tampa, Florida. The US president is responsible for the binding determination of the targeted persons in attacks. The respective mission is then carried out by a team in the US. The team consists of the pilot, who controls the drone and fires missiles, the sensor operator,

who operates the on-board cameras and evaluates the images, and the mission coordinator, who maintains contact with the participating units and secret service staff. A Distributed Ground System (DGS) connects the teams to analysts who monitor the mission using the drone's on-board cameras and compare the images with intelligence findings. A DGS (DGS-4) is accommodated at Ramstein Air Base, within the Air and Space Operations Center there. Drones deployed in Yemen are typically launched from Djibouti. The data flow/stream for the control system is transmitted via fiber-optic cable from the US to Ramstein Air Base, and subsequently to the drones via a satellite relay station. In the same way, on a return channel, data is transmitted from the drones to the US. Due to the earth's curvature, directly controlling the drones from the US without the Ramstein satellite relay station would not be possible.

In 2010, the US informed the defendant about the construction of the satellite relay station. Moreover, the defendant is aware of the links and connections described. However, the defendant has claimed publicly, and particularly in response to parliamentary questions, that it had no knowledge of these details and has referred ongoing questions to the US Government. However, due to the extensive media coverage surrounding the issue, the defendant cannot plead/invoke ignorance.

The plaintiffs have argued that their action is admissible and well-founded as a general performance suit for intervention by the defendant against the use of the Ramstein Air Base by the US Government, which they consider to be contrary to international law. They argue they should be/are entitled to a right to protection against the defendant, who, pursuant to Article 2(2) para. 1, in conjunction with Article 1(1) para. 2, of the Basic Law, is obliged to protect fundamental rights, namely the right to life and physical integrity, also with respect to/against interferences by foreign states. The concerns arise from a fear of being injured or killed in drone attacks performed by the USA in Yemen. In addition, there is a continuous psychological burden due to a persistent fear of death caused by the permanent threat of possible drone attacks. Even as foreigners living abroad, they are holders of the fundamental right of everyone under Article 2(2) para. 1 of the Basic Law, consequently holding a right/claim for protection against the defendant. The binding effect of fundamental rights exists irrespective of where German state power is exercised and where its effects occur.

A reference to German national territory results from the location of Ramstein Air Base and its function as a necessary link for data transfer between the USA and Yemeni airspace. By establishing and maintaining the legal prerequisites under Stationing Law for the use of German territory by US troops, the defendant is contributing to the threat/endangerment to fundamental rights. The satellite relay station could only be established with its consent. The station is operated using frequencies for satellite communications allocated by the German authorities. The defendant's duty to protect also results from Article 2(2), para. 1 in conjunction with Article 25 of the Basic Law. The drone attacks violate the right to life under customary international law. In the absence of an armed conflict, international humanitarian law, which under certain circumstances may permit the killing of innocent people, does not apply. Although the US Government considers itself to be in a geographically unlimited conflict with al-Qaida, the prevailing view, however, is that armed conflicts must be geographically limited in terms of international law. Furthermore, the groups targeted by the US Government lack a sufficient degree of organization to achieve the status of parties to an armed conflict. It is generally known that al-Qaida and AQAP are organized in a decentralized manner and do not have traditional command structures. At the very least, the US is not itself a party to an armed conflict in Yemen. Moreover, even when international humanitarian law is applied, the majority of drone attacks are in any case contrary to international law, particularly because the US unlawfully extends the scope/remit of legitimate targets. The violation of international law gives rise to an obligation on the part of the defendant under both constitutional and international law to prevent drone attacks being carried out from its territory. Its responsibility under the Basic Law is not excluded by the fact that the USA acts autonomously. For it has decisive influence on essential conditions of the threat to fundamental rights that is to be averted, namely on the use of facilities located in Germany to participate in the drone attacks in Yemen.

By virtue of its duty to protect, the defendant is required to ensure that attacks involving the Ramstein Air Base are prevented. It must either use instruments under Stationing Law in order to make the stationed forces comply with German Law, as provided by Article II para. 1 NATO Status of Forces Agreement (NTS) and Article 53(1) para. 2 Supplementary Agreement to the NATO Status of Forces Agreement (ZA-NTS), or, if these instruments are not sufficient, to submit applications for revision of the NATO

Status of Forces Agreement or the Supplementary Agreement to the NATO Status of Forces Agreement or to withdraw from them in order to be able to exert a corresponding influence on the USA. It is also possible to withdraw the frequencies allocated to US troops for the use of the satellite relay station. The defendant has diplomatic means at its disposal, irrespective of Stationing Law. Political exchange with the USA alone would not fulfil the fundamental duty to protect.

Relief sought by the plaintiffs:

The plaintiffs have requested that the defendant be ordered to prevent the United States of America from using the Ramstein Air Base, in particular the satellite relay station, for operations with unmanned aerial vehicles from which rockets are launched to kill persons in the territory of the Republic of Yemen (Hadramaut region), especially in the district of Al-Qutn, in the locality of L., at the residences of the second and third plaintiffs, by appropriate measures, in particular by: initiating consultations with a view to settling disagreements as to the application of Articles 53 and 60 of the Supplementary Agreement to the NATO Status of Forces Agreement; applying diplomatic means; initiating dispute settlement procedures according to the NATO Status of Forces Agreement and the Supplementary Agreement thereto; withdrawing the allocation of radio frequencies for radio communications of the satellite relay station at Ramstein Air Base; terminating the usage agreement for Ramstein Air Base; initiating the revision of the Supplementary Agreement to the NATO Status of Forces Agreement; and initiating the revision of the NATO Status of Forces Agreement.

Alternatively, the plaintiffs have requested that the court declare that the failure to take appropriate measures, in particular of the type described above, to prevent the United States of America from using Ramstein Air Base and the satellite relay station for operations with unmanned aerial vehicles from which rockets are fired to kill persons in the territory of the Republic of Yemen (Hadramaut region), in particular in the aforementioned places, is unlawful.

Relief sought by the defendant:

The defendant has requested to dismiss the action.

It takes the view that the action is inadmissible. The plaintiffs lack the need for legal protection because they are seeking diplomatic protection on the merits, which, as non-nationals, they cannot claim from the defendant. In any case, they are not entitled to sue. The defendant has no reliable knowledge that Ramstein Air Base is being used for armed drone operations in Yemen. The German state authority's responsibility for fundamental rights, with regard to necessary cooperation with foreign authorities, is limited to the fulfilment of protective measures within the scope of existing possibilities of influence. Particularly in the foreign policy area concerned here, the executive branch has a wide scope for assessment, evaluation, and shaping the fulfilment of duties of protection. The parties concerned could only demand protective measures that are not completely unsuitable or completely inadequate.

The defendant is in continuous dialogue with the US Government, which has declared that Germany is not the launching point for armed drone missions, that such missions are neither controlled nor commanded from Germany, and that any action by the USA on German soil complies with applicable law. This factual situation, in itself, excludes a duty to protect in the sense of the plaintiffs' action.

However, even if the satellite relay station in Ramstein is assumed to be used for drone missions, such a duty does not exist. Such use is an independent sovereign act of a foreign state without any relevance to fundamental rights in relation to German state authority. The US uses the air base and the satellite relay station without the cooperation or involvement of the defendant on the basis of the stationing provisions of the NATO Status of Forces Agreement and of the Supplementary Agreement thereto, which do not provide for any possibilities to control by German authorities, as would be necessary to satisfy the plaintiffs' action. The relay station was built by the US armed forces under the so-called troop-building procedure and was thus legally sound without German approval. According to Stationing Law, it is not permissible to control the communications data of the US troops.

Nor is it the defendant's task to act as a world prosecutor's office vis-à-vis other sovereign states and to punish alleged violations of the law outside its own territory. The US and Yemen are solely responsible for US drone missions in Yemen and the consequences of these missions for Yemeni nationals. Nothing else results from Article 25 of the Basic Law. The provision does not establish any obligation on the part of the defendant to act as the worldwide guardian of international law.

Only alternatively, did the defendant claim that the admissibility of the drone missions should be assessed under international humanitarian law. In Yemen, there exists a non-international armed conflict between the US-backed Yemeni Government and AQAP. The conformity of armed drone operations with international law is thus a question to be assessed according to the specific circumstances of each individual case. Particularly relevant are the context of the respective operation, its objectives, the external framework conditions, and the level of knowledge of those persons responsible when deciding on it. The blanket assumption on which the plaintiffs' action is based, namely that all drone operations are contrary to international law, is untenable. The plaintiffs have not shown that they were individually and specifically faced with a threat to life and limb from drone attacks contrary to international law. The danger of being harmed by a military attack in the armed conflict in Yemen, even as a civilian, exists equally for all Yemenis. This does not result in the plaintiffs being particularly affected in their own right to the extent needed to warrant bringing an action. It should, alternatively, also be pointed out that the use of the Ramstein Air Base for drone missions in Yemen does not establish any responsibility under international law on the part of the defendant for possible violations of international law by the US, by virtue of which it would be obliged to make further efforts beyond the already close relationship with the US Government. A responsibility under international law for acts of assistance presupposes positive knowledge of the supporting state and purposefulness of the assistance provided. Both are missing.

Decision by the Administrative Court (first instance):

The Administrative Court dismissed the action/complaint, although it found the action to be admissible in its main claim. The plaintiffs are entitled to bring an action in an

analogous application of Section 42(2) of the Code of Administrative Court Procedure (VwGO) because it does not appear to be excluded from the outset that the defendant violates a fundamental duty to protect under Article 2(2) sentence 1 of the Basic Law and a corresponding right of the plaintiffs to protection. This is not precluded by the fact that the plaintiffs are foreigners living abroad. The fundamental rights outlined in the Basic Law also oblige the German state authority with regard to the basic right to life guarantee situated abroad, insofar as there is a sufficiently precise connection to its own sovereign activity, which is a question of the merits of the action. The plaintiffs asserted a sufficiently precise endangerment of the fundamental right to life. The Hadramaut region in which they reside or regularly stay is the focus of ongoing US drone missions. In any case, the precarious situation in Yemen does not allow for any reliable findings that there will be no further drone missions in the future that could endanger the lives of the plaintiffs.

However, in its main claim, the action is unfounded on the merits. Even if, on the basis of the plaintiff's argument concerning the use of Ramstein Air Base for US drone missions in Yemen, a territorial link appropriate for triggering the defendant's fundamental duty to protect is assumed in favor of the plaintiffs, there is no obligation on the part of the Federal Government to act in the sense of the plaintiffs' main claim. Its previous actions have satisfied the minimum requirements for the fulfilment of its obligations to protect fundamental rights.

The respective competent state authority has a wide scope of discretion to decide on how it intends to pursue the goal of protection required by constitutional law. In this regard, courts are limited to a plausibility check ("Evidenzkontrolle"). The duty to protect is only violated if the means chosen for protection are not even remotely suitable or – in comparison with other available means and taking into account the interests affected by them – if the probability of protection of the good by fundamental rights is then significantly lower and no longer acceptable. The executive branch's scope of action is further expanded if – as in the present case – the protection of fundamental rights against foreign infringements, and thus foreign policy matters, are at stake. Furthermore, foreign nationals living abroad are not entitled to diplomatic protection by the defendant, which can be taken into account in the context of the discretionary decision to the effect that a foreign national without any relationship to

the German State has a further mitigated right to protection. To the extent that protective measures taken do not achieve their objective, this does not give rise to any entitlement to more far-reaching measures, since it is also left to the assessment of the foreign authority as to what extent it considers other measures to be suitable and appropriate. Finally, a foreign force's considerable scope of action is also expressed in the fact that the Federal Government's assessments under international law on which any action vis-à-vis other states is based – in view of the only rudimentarily developed possibility for the binding clarification of legal disputes in the international legal order – can only be examined by domestic courts for justifiability. If the Federal Government, on the basis of the existing facts, comes to the legally justifiable conclusion that a violation of international law by the foreign state cannot be established, protective measures can be limited to consensual channels of intervention.

On this basis, the plaintiffs are not entitled to the action which they seek. The Federal Government's assessment being that the admissibility of US drone missions in Yemen under public international law, based on international humanitarian law, is justifiable. The predominant opinion favors the existence of a non-international armed conflict between a coalition led by Saudi Arabia, supporting the elected Yemeni Government, and the Houthi rebels and AQAP. It also appears reasonable to assume, as obtained by the defendant, that the US is supporting the Yemeni Government in this conflict by using drones against AQAP. Furthermore, it is not legally objectionable, as the defendant holds, that according to the information available, the drone missions do not violate international humanitarian law because they are not indiscriminately directed against the civilian population and disproportionate collateral damage is not considered acceptable. There are no indications that this is handled differently for either general or individual drone missions.

The conduct of a case-by-case examination of the US-American practice of drone warfare is, in fact, impossible for the Federal Government. On the basis of its justifiable view under international law, the defendant has not remained completely inactive, but instead has urged the US Government, in consultations and through inquiries, that Ramstein Air Base be used in accordance with German law and international law, which has been promised by the US side. This approach to the issue is not manifestly

unsuitable, even when compared to the measures requested by the plaintiffs. According to current Stationing Law, the defendant may not launch a specific intervention merely against the allegedly illegal part of the use of the satellite relay station. The plaintiffs are not entitled that the defendant should work towards a revision of the NATO Status of Forces Agreement, which is, in any case, unpromising from a political point of view. The corresponding power of initiative lies exclusively with the Federal Government. In view of an otherwise threatening serious impairment of German foreign and defense policy interests, the plaintiffs are not entitled to claim the termination of the residence contract or the NATO Status of Forces Agreement. Since, according to media reports, the US is planning to set up a similar satellite relay station in Italy, the termination of the NATO Status of Forces Agreement cannot be considered a suitable measure for achieving the desired goal in the long term.

The auxiliary motion is inadmissible due to the principle of subsidiarity of the declaratory action ("Feststellungsklage"), pursuant to Section 43(2) para. 1 of the Code of Administrative Court Procedure (VwGO).

Arguments of appeal as put forward by the plaintiffs:

In support of their appeal, which was allowed by the Administrative Court, the plaintiffs argue that the Administrative Court was not allowed to retreat to the mere control of plausibility or arbitrariness. It applied an incorrect standard regarding the executive branch's compliance with its obligations to protect fundamental rights by considering only completely unsuitable or completely inadequate protective measures to be contrary to fundamental rights. The applicants claim that the defendant owes adequate and effective protection. This also results from the case law of the European Court of Human Rights, which is used to support this interpretation. The given international context ("Auslandsbezug") does not relativize the duty to protect, but merely changes the variety of methods used in its implementation.

The less – as here – fundamental foreign and defense policy decisions are discussed, the more easily the facts of the case can be ascertained, and the more concretely

fundamental rights are impaired, the less judicial control can be withdrawn, especially when it comes to the right to life. Regarding issues of international law, the defendant had no scope for assessment beyond the control of the courts. The US drone missions in Yemen, which continue also in the Hadramaut region and have apparently even been expanded in quantitative terms, are contrary to international law. The US may not invoke its right to self-defense for this purpose. There are no signs of such an agreement between the US and the Yemeni Government, especially after the latter's fall/overthrow at the beginning of 2015. In any case, an armed conflict within the framework of international humanitarian law does not exist between the US and AQAP.

According to its own statements, the US is actively engaging its own troops in Yemen in order to lead coalition forces in the fight against AQAP. However, these troops were not involved in hostilities. Attacks by AQAP on US armed forces, institutions, citizens, or even the territory of the US, have not been recorded for years. Even if international humanitarian law was applicable, the use of drones is not consistent with it, particularly because the strikes have caused a disproportionate number of civilian casualties. The defendant's fundamental responsibility for the dangers deriving from the drone missions threatening the plaintiffs stems from a territorial and legal link between the defendant and the protection sought by the plaintiffs. That link is established by the location of the Ramstein Air Base on German soil, the use of radio frequencies allocated by the defendant for the control of the drones, and a contractual obligation on the part of the defendant to an alliance agreement with the United States of America which, pursuant to Article 53(1) para. 2 of the Supplementary Agreement to the NATO Status of Forces Agreement (ZA-NTS), is subject to compliance with German law. The defendant is aware that the Air and Space Operations Center at Ramstein Air Base functions as a control center for drone missions. A former drone pilot heard as a witness by the so-called NSA Parliamentary Investigation Committee of the 18th German Bundestag confirmed the integration of the satellite relay station at the Ramstein Air Base in drone missions in Yemen, among other places, and that video recordings for further drone missions are being evaluated in Germany.

In the DGS-4 in Ramstein, a so-called DART (Distributed Common Ground System Analysis and Reporting Team) stationed there evaluates and enhances data beyond

the mere transmission of data, and thus, contributes to the final decision-making and, hence, is directly involved in the military actions. The defendant's duty to protect also exists under rules of international law, as reflected in the Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission (ILC) of the United Nations. Even if the defendant is not aiding or assisting in an international offence committed by the US in the sense of Article 16 of the ILC Articles, since the right to life concerns core international law, there is an obligation to act pursuant to Article 48(1) lit. (b)(2) of the ILC Articles. So far, the defendant has not fulfilled its duty to protect. It has unsuccessfully invoked ignorance of the actual circumstances of the use of the facilities in Ramstein and individual drone missions.

By virtue of its duty to protect, it [the defendant] is obliged to provide information. The dialogue with the US, which it claimed to be unspecified, was neither effective nor appropriate for the protection of the life and health of the plaintiffs. It is not sufficient to remind the US in general consultations about the observance of the law when using Ramstein Air Base. It is necessary to confront the US with the applicable legal situation regarding the illegality of the drone war and the dangers it entails for the life and health of innocent persons, in particular the plaintiffs. It is necessary to intensify efforts to protect the plaintiffs and, in so doing, to escalate to a certain extent the instruments available to the defendant, inter alia, under Stationing Law, up to a complete or partial suspension of the stationing agreements pursuant to Article 60(1) of the Vienna Convention on the Law of Treaties (VCLT) (Federal Gazette (BGBl) 1985 II p. 926). A specification of what is to be regarded as an appropriate and effective protective measure is also apparent from Article 30 of the ILC Articles. Accordingly, the defendant could urge the US to put an end to and refrain from future actions contrary to international law and demand corresponding guarantees and assurances from the American side.

Relief sought in appeal:

The plaintiffs claim that the Court should order the defendant, setting aside the judgment under appeal, to prevent the United States of America from using Ramstein Air Base for missions with unmanned aerial vehicles from which rockets are fired to kill persons in the territory of the Republic of Yemen, Hadramaut Province, particularly in the district of Al-Qutn, in the locality of L., where the second and third plaintiffs reside, through appropriate measures, in particular by: initiating consultations to settle disagreements as to the application of Articles 53 and 60 of the Supplementary Agreement to the NATO Status of Forces Agreement; initiating dispute settlement procedures under the NATO Status of Forces Agreement and the Supplementary Agreement thereto; withdrawing the allocated radio frequencies for radio communications at the satellite relay station at Ramstein Air Base; terminating the user agreements for Ramstein Air Base; initiating the revision of the Supplementary Agreement to the NATO Status of Forces Agreement; and initiating the revision of the NATO Status of Forces Agreement by the use of diplomatic means; or

Alternatively,

declaring, while revoking the judgment under appeal, that the United States of America's failure to take appropriate measures, particularly of the kind referred to above, to prevent the use of Ramstein Air Base, in particular the satellite relay station, for missions with unmanned aerial vehicles from which rockets are fired to kill persons, in the territory of the Republic of Yemen, Hadramaut Province, in particular in the places referred to above, is unlawful.

The defendant claims that the Court should dismiss the appeal.

In support of its arguments, the appellant further elaborates and supplements its arguments of first instance:

"The applicants are not entitled to bring proceedings. Their submissions did not give rise to the possibility of a breach of an obligation to protect under Article 2(2) of the Basic Law because they did not claim to be directly affected by measures of the German public authority. The defendant is not involved in the US' drone missions in Yemen and had no influence or control over them. There is no direct link/connection

between the allocation of use of Ramstein Air Base to the US and the plaintiffs' goal for legal protection, namely preventing possible effects of US operations carried out in Yemen with the consent of the Yemeni Government. Contrary to the view of the Administrative Court, a territorial reference capable of triggering an obligation to protect cannot simply be assumed. The plaintiffs also failed to substantiate their assertion of a possible breach of the duty to protect because their argument, that they could become the victim of a drone attack as so-called collateral damage, was not sufficient, given the admissibility of civil losses under certain conditions under international humanitarian law. The legality of drone missions cannot be assessed in general, but only on a case-by-case basis. The defendant neither has at its disposal the detailed information on the operation required for this purpose, nor could or did it have to obtain it. The impossibility of further clarification comes to the detriment of the plaintiffs. In any event, they are not entitled to the desired general prohibition of any drone operation, regardless of its legality. Moreover, the plaintiffs lack the need for legal protection due to the fact that they are not pursuing an interest worthy of legal protection in the Federal Republic of Germany. Seeking legal protection in the US would have been more logical, irrespective of its prospects of success. Moreover, the legal protection sought cannot improve the plaintiffs' legal position and is therefore useless. Neither in the Stationing Law nor in international humanitarian law are there any provisions protecting third parties that would be in the plaintiffs' favor. There being no means for pursuing individual legal protection under international humanitarian law against possible collateral damage of future acts of war is binding both in accordance with Article 25 of the Basic Law and by virtue of the relevant Acts of Consent ("Zustimmungsgesetze"), which, in conjunction with the principle of an international-law-friendly interpretation of German procedural law that presides over the provisions of the Code of Administrative Procedure, is binding within the state. Finally, the measures sought by the plaintiffs threaten to damage German foreign policies, particularly the long-standing practice of "Transatlantic Bargain" or "Transatlantic Bond" as applicable under the NATO Status of Forces Agreement, which could then not be continued. Under this agreement, the European NATO states support the US in return for security guarantees in operations carried out in fulfilling international obligations or on their own responsibility, which are beneficial also for the security of the European NATO partners.

In any event, the action is unfounded in its merits. With regard to the disputed drone missions, there is no legal link/relationship between the defendant and the plaintiffs within which the defendant can exercise German state power over the plaintiffs by acting or omitting while being bound by fundamental rights pursuant to Article 1(3) of the Basic Law. In cases involving foreign spheres (“mit Auslandsberührung”), an obligation to protect under Article 2(2) of the Basic Law presupposes a factual link to the German State that results in a responsibility of German state bodies. Such a link is missing here. An omission by the defendant resulting from the transfer of real-estate property on its territory, which is neutral in terms of fundamental rights, does not lead to the foreign state’s sovereign acts towards foreigners abroad, but “flowing through” the territory, transforming into acts of German state power. In any event, an obligation to protect pursuant to Article 2(1) of the ECHR cannot be considered either because the plaintiffs are not subject to the jurisdiction of the defendant’s authority within the meaning of Article 1 of the ECHR and the relevant case law of the European Court of Human Rights.

The same applies under Article 6(1) in conjunction with Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) of 19 December 1966.

Moreover, the content of the duty to protect under Article 2(2) of the Basic Law is first and foremost to protect life from unlawful interferences by third parties. The disputed drone missions, however, are generally permissible under international humanitarian law. They are legitimized both by the US’ right to self-defense pursuant to Article 51 of the Charter of the United Nations (UN Charter) and by consent of the Yemeni Government, which is increasingly regaining effective control over the national territory. In this respect, the missions are part of an ongoing armed conflict with AQAP, whereby it can remain unsettled as to whether they are attributable to the conflict between the USA and al-Qaida, together with affiliated organizations including AQAP; to the conflict between the Yemeni Government and AQAP; or to both conflicts. Moreover, the alleged effects of the use of drones on the plaintiffs are not causally or imputably related to any conduct on the part of the defendant. Even if one wanted to see this differently, it does not result in the defendants’ own responsibility under international law according to principles of customary international law, as reflected in Article 16 of the ILC Articles.

The defendant already has no knowledge of circumstances from which a violation of international law through the use of drones could result. In addition, the necessary finality of the defendant's behavior with regard to the US' alleged unlawful conduct was lacking, because the use of the satellite relay station at Ramstein Air Base is part of the reciprocal support of the US-American security guarantees within the implementation of the framework of the NATO Status of Forces Agreement. Even if the defendant were to assume state responsibility, it would only exist in relation to other states, without entitling the plaintiffs to breach the threshold of a favorable legal reflex. Irrespective of the aforementioned points, the defendant undertook what was required to fulfil a duty to protect with regard to possible fundamental rights violations by foreign states by ensuring, in consultations and through inquiries, that the US used the Ramstein Air Base only in a manner consistent with German and international law.

In view of the wide scope, particularly in foreign policy matters, to which the executive branch is also entitled in fulfilling its obligations to protect fundamental rights, the plaintiffs have no claims to the measures they have requested. These measures each relate to external action by the Federal Government within the legal framework of international law. In this respect, it can be considered a constitutional dispute due to the fact that the petition for action essentially concerns the question of the scope of the duties connected with the constitutional powers derived directly from the constitution and, hence, the interpretation and application of the relevant constitutional provisions. Furthermore, the fact that the provisions of the NATO Status of Forces Agreement and the Supplementary Agreement thereto, to which the applicants refer, have no connection to general legal relations, do not, therefore, affect or shape the plaintiffs' rights. Outside the scope of application of the NATO Status of Forces Agreement and the Supplementary Agreement thereto, however, it applies, in accordance with a general rule of international law, that the foreign armed forces stationed in the territory of the Federal Republic of Germany with the consent of the Federal Republic of Germany are sovereign regarding their behavior and, thus, beyond Germany's jurisdiction.

The applicants reply that their principal claim is not aimed at any particular action by the defendant, but rather, in recognizing a discretionary power on the part of the defendant, at more effective measures than those which it has taken so far. The first plaintiff previously applied for legal protection before US courts, unsuccessfully. His action to establish the illegality of the drone attack on 29 August 2012 was dismissed as inadmissible on the grounds that the executive branch's decision on drone missions abroad was not justiciable on account of it being a "political question."

On 30 November 2016, the Minister of State at the German Federal Foreign Office, N.S., declared during a question and answer session at the German Bundestag that, on 26 August 2016, a meeting had taken place at the Federal Foreign Office with representatives of the US Embassy, about which the Political Director of the Federal Foreign Office had already informed the representatives of the Foreign Affairs Committee. During the interview, the US side had once again confirmed that unmanned aerial vehicles were neither taking off nor being controlled from Ramstein. The Minister of State continued:

> [The US side] also stated that the global communication channels used by the US to support unmanned aerial vehicles include telecommunications hubs in Germany, from which the signals are transmitted. Unmanned aircraft missions are flown from different locations, using various relay circuits, some of which also operate in Ramstein. It also announced that in 2015, a device to improve the existing telecommunications equipment had been completed in Ramstein, and informed us that Ramstein is supporting a number of other tasks, including planning, monitoring, and evaluating assigned air operations.

In response to this new information, the Minister of State said that the Federal Foreign Office had held high-level talks in Washington in September 2016. It also committed to remaining in contact with the American side for this purpose (Parliamentary Plenary Protocol 18/205, p. 20452 f.). In a further question and answer session on 14 December 2016, the Minister of State at the Federal Foreign Office, Dr. N1.C., declared that in the discussion on 26 August 2016, the US representatives had not provided any further information on the type of assigned air operations for which the Ramstein Air Force Base plays a supporting role. They had not specified whether the planning, monitoring, and evaluating of assigned air operations also includes drone missions, or which area or system was entrusted with these tasks in Ramstein. The

establishment of a “Distributed Common Ground System” analysis center is not known to the German Federal Government (Parliamentary Plenary Protocol 18/208, p. 20808 f.). Minister of State S. declared on 12 January 2017, in response to written questions by a member of the German Bundestag, that the Federal Government has no indication that attacks were planned, monitored, or evaluated from Ramstein. The US Government’s promise that unmanned aerial vehicle operations were not to be launched or controlled from Germany, and that all decisions on such operations would be taken exclusively by the US Government in Washington, continues to apply (BT-Drs. 18/10827, p. 7 f.). In response to a parliamentary question on the contents of the discussion with US representatives on 26 August 2016, the Federal Government announced on 25 January 2017 that it had provided the German Bundestag with comprehensive information on its state of knowledge on this issue within the briefing for representatives of the Bundestag, as well as through the State Ministers S. and Dr. C. It does not have any further information at its disposal. It remains in close exchange with its US partners regarding the role of Ramstein Air Base in the deployment of drones (Bundestag matter No. 18/11023, p. 4 f.). Due to its long-standing and trusting cooperation with the US, the German Federal Government has no reason to doubt the US’ assurance that activities in US military properties in Germany have been carried out in accordance with the applicable law (loc. cit., p. 7).

In the report of the 1st Committee of Inquiry of the 18th German Bundestag (so-called NSA Inquiry Committee) of 23 June 2017, it is stated that the then-Political Director of the Federal Foreign Office declared to the Committee that the Federal Government had further questions on this subject, and had also communicated these questions to the US side (Bundestag matter No. 18/12850, p. 1177).

With regard to a relay station in Ramstein, the report states that on 29 April 2010, the department in the German Federal Ministry of Defence responsible for armed forces infrastructure was informed by the US guest forces that they intended to erect a “UAS SATCOM relay facility on the Air Force Base property in Ramstein” (loc. cit., p. 1167) in the so-called “troop-building procedure” pursuant to Article 27 of the General Contracts for the Construction of Air Force Base Facilities (“Auftragbautengrundsätze”, ABG) of 1975 (Federal Law Gazette (BGBl) 1982 II, p. 893). Thereupon, the Regional Finance Directorate (Oberfinanzdirektion) Koblenz,

which is responsible pursuant to Article 30(2) of the 1975 General Tax Law, declared on 7 June 2010 that it had no objections to the application of the troop-building procedure. In a letter dated 18 November 2011, the US Army Corps of Engineers, Europe District, again informed the Federal Ministry of Defence about the planned construction of “UAS SATCOM relay site areas and installations” (loc. cit., p. 1168 et seq.):

> This operation will create a unique control center for the deployment of Predator, REAPER and GLOBAL HAWK aircraft to support Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF). This project also includes an SCI-facility (Security Sensitive/Secret Information) and access to all documents will be appropriately controlled and restricted in accordance with U.S. Safety standards for SCIF according to the need-to-know principle. This project also has a very high priority and its particular importance requires accelerated planning and implementation.

The notification was accompanied by a brief description of the building and sketches of the site plan. The following information on the planned usage of the site was provided in the building specification (loc. cit., p. 1173 f.):

> It provides premises for the operational, administrative and maintenance functions of a squadron, as well as an enclosed space for emergency vehicles (trucks). Included are construction site works, including 12 UAS SATCOM relay platforms and/or foundations each with supply facilities and buried empty conduit connections to the main facilities, together with suitable distributions and connections [...].

According to the construction documents, the relay station consists of twelve parabolic antennas for satellite communication, which are connected to a central communication device via underground 12-strand single-mode fiber cables, which, in turn, are connected to the Defense Information Systems Network (DSNI) (loc. cit., p. 1169).

On 15 December 2011, the German Federal Ministry of Defence declared that it had no objections to the project proposed by the US armed forces using the troop-building procedure (loc. cit., p. 1169).

With regard to the term “Distributed Ground System” (DGS), the Committee’s report, referring to a note from the German Federal Foreign Office in 2013, states, among other things, that this is a locally flexible technical facility in which the video feed of a drone is visually displayed and evaluated by so-called screeners. A report by the

German defense attaché in the USA in July 2013, which was based, among other things, on conversations with drone pilots, is quoted as saying that “the DCGS (Distributed Common Ground Systems) [...] is responsible for processing, evaluating and distributing the data”. Citing this report and the testimony of a former US Air Force member who was heard as a witness by the Investigative Committee, the committee’s report states that there are five Distributed Ground Systems worldwide, including one at Ramstein Air Base (loc. cit., p. 1111 f., 1172 f.). With regard to a “possible involvement in US combat drones missions,” the committee report states, among other things, that according to the testimony of the witness, the relay station in Ramstein is the technical element that enables the US Air Force to control drones operating in the Middle East via satellite from the USA. The witness testified that Ramstein was involved in all US drone missions worldwide. Without the relay station, worldwide drone missions would not be practically possible, according to the witness. The relay station was also regarded by the US armed forces, in a project statement of February 2010, as essential for the implementation of worldwide drone missions (loc. cit., p. 1169 ff.). The witness stated that, as a member of the US Air Force, he had completed a total of over 6,000 flying hours in the course of numerous drones missions in Pakistan, Afghanistan, Somalia, Iraq, and Yemen, in which 1,626 persons had been killed (loc. cit., p. 1111).

In a response on 18 July 2013, published as Bundestag printed matter 17/14401, the German Federal Government stated in relation to the unique control center mentioned by the US guest forces in their letter of 18 November 2011, that the Federal Republic of Germany assumed that this was outside the Federal Republic of Germany, since the building specification merely specifies the construction of a station for the transmission of data via satellites (SATCOM relay).

In the explanatory statement of the military construction project TYFR073143 “UAS SATCOM RELAY PADS AND FACILITY” for installation and localization at the Ramstein Air Base in February 2010 it says:

> Unmanned Aerial Systems (UAS) require an adequate-sized and configured facility, to ensure maximum mission effectiveness during weapons engagement and reconnaissance missions in support of the war-fighters. The construction of a Satellite Antenna Relay facility and

> compound is required in order to support remote controlled aircraft command links, connecting CONUS-based ground control stations/mission control elements with UAS aircraft in the AOR. Therefore completion of this project will satisfy the long-term SATCOM Relay requirements for Predator, Reaper and Global Hawk, eliminating current temporary set-ups. […]
>
> Predator (MQ-1), Reaper (MQ-9) and Global Hawk (RQ-4) aircraft will use this site to conduct operations within EUCOM, AFRICOM and CENTCOM Areas of Responsibility (AOR) in support of Overseas Contingency Operations. Because of multi-theater-wide operations, the respective SATCOM Relay Station must be located at Ramstein Air Base to provide the most current information to the war-fighting commander at any time demanded. Currently, Ramstein lacks adequate facilities to conduct squadron level operations for the vital UAS mission. Additionally, the nature of the operation requires a site location near an existing intelligence facility on Ramstein Air Base in order to prepare and provide adequate data to the demanding battle-staff agencies.
>
> […] Without these facilities, the AFRICOM and CENTCOM AOR, UAS weapon strikes cannot be supported and necessary intelligence information cannot be obtained. Therefore, lack of this UAS Relay Site could result in significant degradation of operational capability and have a serious impact on ongoing and future missions.
>
> […] This project is not eligible for NATO funding, since NATO will acquire its own system and therefore this project exceeds current NATO Standard Criteria. […] A preliminary analysis of reasonable options was done and indicated that only one option meets operational requirements. Therefore, an economic analysis was not performed. […]
>
> This facility can be used by other components on an “as available” basis; however, the scope of the project is based on Air Force requirements.

On 24 May 2018, in its answer to a request by members of parliament and the parliamentary group DIE LINKE in the German Bundestag (request: BT-Drs. 19/2078; answer: BT-Drs. 19/2318), the German Federal Government also declared that, according to its own examination under international law, the Federal Government participated in:

> regular, trusting exchanges with its US partners on political, military, and legal issues affecting US armed forces in Germany. This includes activities at the US Air Force base in Ramstein, as well as in Germany on the whole. The Federal Government has no reason to believe that it will be denied information on all essential questions concerning the role of the US Air Force base in Ramstein in the deployment of unmanned aerial vehicles (UAVs). This applies, in particular, to the question of the communication infrastructure available at the site and the tasks assumed there. In addition,

> the assurance of the USA that unmanned aerial vehicles for anti-terrorist missions will neither be launched nor controlled by Ramstein continues to apply. The statement of the USA to “respect German law in its activities in Ramstein – as in Germany on the whole – is also valid” (BT-Drs. 19/2318, p. 4).

The Federal Government replied to the question concerning what investigations it had carried out or what measures it had taken in order to find out whether the transfer of the Ramstein Air Force Base constituted aiding and abetting an offence under international law, or was itself an offence under international law:

> Pursuant to Article II of the NATO Status of Forces Agreement and Article 53 paragraph I of the Supplementary Agreement to the NATO Status of Forces Agreement, the United States of America must respect German law when carrying out its activities in the properties entrusted to it. There is no reason to assume that the surrender of the Ramstein Air Force Base could be aiding and abetting an offence under international law, or itself even be an offence under international law.

In addition, the Federal Government pointed out that it had comprehensively informed the Bundestag several times of its state of knowledge on the topic presented in the question (Bundestag printed matter 19/2318, p. 4). It also referred to this answer when answering the further questions related to which of its own examinations under international law it had undertaken in this regard, or on which elaborations it had relied in this regard, and on the basis of which individual cases it had undertaken legal evaluations in this regard (loc. cit., p. 5).

The written request by a member of the German Bundestag reads:

> What consequences does the Federal Government [forsee] (especially with regard to the US base at Ramstein) from Amnesty International’s demand [...] that the Federal Government ensure that “Germany does not help with unlawful U.S. drone attacks”, and what does the Federal Government say about the nature and time at which it [...] called upon the US Government not to contribute to such drone attacks from Ramstein or elsewhere on German soil, but rather to inform the Federal Government of details of such local contributions?

This was answered by the Minister of State at the German Federal Foreign Office O. B3. on 8 June 2018 (Bundestag printed matter 19/2766, p. 45). With regard to the Federal Government’s position, he referred to its response to a minor inquiry on the international regulation of armed or armable drones in Bundestag printed matter

19/1988 of 4 May 2018 and its response to Bundestag printed matter 19/2318 of 24 May 2018, as well as to the Federal Government's regular, trusting exchange with its US partners on political, military, and legal issues affecting US forces in Germany. The Federal Government relies on the US statement that it will respect German law in its activities in Germany."

Reference is made to the content of the court file for further details of the facts and dispute.

Grounds for decision:

The admissible appeal is partially justified with regards to its principal motion to the extent evident from the operative part (see A.). The auxiliary motion is inadmissible (see B.).

A.

I. In their principal motion, the plaintiffs seek that the defendant take appropriate measures to prevent the use of the Ramstein Air Base by the United States for armed drone missions in Yemen, Hadramaut Province, and in particular at the residential addresses of plaintiffs No. 2 and No. 3. The list of concrete specific measures that the plaintiffs highlight as being "in particular" need of being taken by the defendant, is contained in the first-instance petition and in the appeal. This list is obviously only of an exemplary nature, according to the plaintiffs' entire submission. Contrary to the defendant's submissions, the plaintiffs do not (also) seek an order that the defendant carry out these concrete measures. They also expressly stated this in the appeal proceedings, and stated that the main claim was not aimed at a specific action, but at more effective measures than those which had been taken so far, while recognizing that the defendant had taken a selective approach.

II. The principal motion is admissible.

1. The international jurisdiction of German courts for the action brought against the Federal Republic of Germany is beyond question.

2. Pursuant to Section 40(1) para. 1 of the Code of Administrative Court Procedure (VwGO), administrative recourse is open to the plaintiffs for their claims. The motion deals with a non-constitutional dispute.

This question is for the Chamber to consider. Section 17a(5) of the Courts Constituting Act (GVG), according to which a court that decides on an appellate remedy against a decision in the proceeding shall not examine whether the recourse taken was admissible, but only refers to the delimitation of the responsibilities of the various (specialized) jurisdictions, not to their relationship to constitutional jurisdiction, which is reserved for decisions in constitutional dispute.

> See OVG Berlin-Bbg, judgment of 26 September 2011 – OVG 3a B 5.11 –, LKV 2011, 566 = juris, marginal 23, m. w. N.; Sodan, in: Sodan/Ziekow (ed.), VwGO, 5th edition 2018, § 40 marginal 183a.

To the extent that the defendant contends that this is a constitutional dispute with regard to the specific measures enumerated by the plaintiffs, this is an unconvincing argument. It asserts without success that the measures each relate to external action by the German Federal Government within the legal framework of international law. In essence, the plaintiffs were concerned with the question of the scope of the duties directly derived from the Constitution and connected with the constitutional powers of the state organs, and, thus, the interpretation and application of the constitutional norms relevant to them.

Whether a dispute is of a constitutional nature depends on whether the motion asserted is rooted in a legal relationship that is decisively shaped by constitutional law.

> See BVerwG, judgment of 24 January 2007 – 3 A 2.05 –, BVerwGE 128, 99 = juris, marginal 15.

However, whether this is precluded here by the mere fact that the plaintiffs are private individuals, it is self-evident that a constitutional dispute requires “double constitutional immediacy” and thus presupposes that constitutional bodies, parts thereof or

otherwise directly involved in constitutional life, participate in the dispute and rely on rights and obligations that arise directly from the constitution.

cf. Reimer, in: BeckOK VwGO, Stand: 1 January 2018, § 40 Rn. 97 f.; Rennert, in: Eyermann/Rennert, VwGO, 15th Edition 2019, § 40 Rn. 21, Sodan, in: Sodan/Ziekow (Ed.), VwGO, 5th Edition 2018, § 40 Rn. 189 ff., in each case with w. N.

In any case, a constitutional dispute does not already exist if – as here – the assessment of a legal relationship between the state and a private individual depends not inconsiderably on constitutional aspects, i.e. if a legal relationship is directly influenced by fundamental rights and other constitutional principles and is ultimately borne by them.

> See BVerwG, judgment of 11 July 1985 – 7 C 64.83 –, NJW 1985, 2344 = juris, marginal 8; see also BVerfG, resolution of 14 October 1987 – 2 BvR 64/87 –, NVwZ 1988, 817 = juris, marginal 16 ff.

For this reason, litigation between citizens and the state, including litigation in which constitutional norms, in particular fundamental rights norms, are decisive in the dispute, should in principle be brought before the administrative courts and not before the constitutional courts.

> BVerwG, judgment of 3 November 1988 – 7 C 115.86 –, BVerwGE 80, 355 = juris, marginal 13.

It is the same here. The fact that the plaintiffs' claim is rooted in fundamental rights cannot justify the constitutional nature of the dispute any more than can the fact that the petition is directed towards the granting of protection vis-à-vis another state and, thus, towards external action by the defendant.

> See BVerwG, judgments of 24 February 1981 – 7 C 60.79 –, BVerwGE 62, 11 = juris, recitals 12 et seq., 31 et seq., and of 14 December 1994 – 11 C 18.93 –, BVerwGE 97, 203 = juris, recital 14; Sodan, in: Sodan/Ziekow (ed.), VwGO, 5th edition 2018, § 40 recital 221.

(3) The action is admissible as a general performance suit and is also admissible in all other respects.

(a) The plaintiffs shall specifically be entitled to bring an action.

The provision of Section 42(2) of the Code of Administrative Court Procedure (VwGO), which provides for a plaintiff's right to bring actions as a precondition for a substantive judgment in rescission and enforcement actions, applies *mutatis mutandis* to the general performance suit as an expression of the general structural principle of individual legal protection, which is characteristic of administrative legal protection.

> See BVerwG, judgments of 5 September 2013 – 7 C 21.12 –, BVerwGE 147, 312 = juris, marginal 18, and of 5 April 2016 – 1 C 3.15 –, BVerwGE 154, 328 = juris, marginal 16.

According to this provision, the action is admissible only if the applicant claims that his rights have been infringed by the conduct of the public authorities at issue. That is the case where, according to the actual pleading, it appears possible that the plaintiff's own subjective rights may have been infringed. This possibility does not exist only if the asserted rights clearly and unambiguously do not exist from any point of view or cannot be entitled to the plaintiff, i.e. an infringement of subjective rights of the plaintiff cannot be considered.

> See BVerfG, decision of 9 January 1991 – 1 BvR 207/87 –, BVerfGE 83, 182 = juris, recitals 44, 48 f.; BVerwG, judgments of 7 May 1996 – 1 C 10.95 –, BVerwGE 101, 157 = juris, recital 83, 182 = juris, recital 44, 48 f. 22, of 28 February 1997 – 1 C 29.95 –, BVerwGE 104, 115 = juris, marginal 18, and of 10 July 2001 – 1 C 35.00 –, BVerwGE 114, 356 = juris, marginal 15.

The plaintiffs are therefore entitled to bring an action. On the basis of their factual arguments, it cannot be established that they are manifestly and clearly not entitled to the alleged claim against the defendant.

The plaintiffs No. 2 and No. 3 live in Yemen in the province of Hadramaut. The first plaintiff intends to return to his family living there as soon as possible. They have provided numerous reports, in particular from English-speaking media and non-governmental organizations, that the US has, for years, been carrying out armed drone missions in Yemen to kill people, in particular members of the terrorist group "al-Qaida in the Arabian Peninsula" (AQAP), who have killed or injured many people in the past, including many uninvolved persons. The reports also show that the province of Hadramaut, in particular, has often been the scene of such drone operations.

According to the plaintiffs, two of their relatives were killed in a drone attack in August 2012, and the attack did not target their relatives, but AQAP members. The plaintiffs' statements regarding this attack are consistent with information contained in a report by Human Rights Watch.

> See Human Rights Watch, Between a Drone and Al-Qaeda. The Civilian Cost of US Targeted Killings in Yemen, October 2013, p. 61 ff., https://www.hrw.org/report/2013/10/22/between-drone-and-al-qaeda/civilian-cost-us-targeted-killings-yemen.

The plaintiffs have also argued, particularly citing media reports, that the US drone missions in Yemen have been conducted using facilities at Ramstein Air Base. The Air Base, specifically a satellite relay station operated there by the US, functions as a necessary link for the remote control of drones in real time in the exchange of data between the drones in Yemeni airspace and the drone pilots in the US. In addition, US personnel stationed at the Air Base are involved in the evaluation and enrichment of mission data.

On the basis of this possibly correct factual claim, substantive accuracy of which is not a question of standing, but of the merits of the motion,

> See BVerwG, resolution of 21 July 2014 – 3 B 70.13 –, NVwZ 2014, 1675 = juris, marginal 18 f.

it does not appear excluded *a priori* that the plaintiffs are entitled to the asserted claim against the defendant to stop the use of the Ramstein Air Base for armed drone missions in Yemen, Hadramaut Province.

Such a claim may possibly result from the fundamental right to life and physical integrity pursuant to Article 2(2) para. 1 of the Basic Law, which, as a so-called "fundamental right of everyone", also applies to non-German nationals, such as the plaintiffs. It is not limited to the classical function of a defensive right against interventions by the German public authority, which is bound by fundamental rights in accordance with Article 1(3) of the Basic Law, but also imposes on the state the duty to protect and promote the life, physical integrity, and health of the individual, and to protect them from unlawful interventions by third parties if the holders of fundamental rights cannot themselves ensure their integrity.

> Established case law of the BVerfG, cf. only BVerfG, Chamber decision of 15 March 2018 – 2 BvR 1371/13 –, NVwZ 2018, 1224 = juris, para. 31, m. w. N.

The state's duty to protect corresponds to an analogous right to protection by the holder of the fundamental rights.

> See BVerfG, decisions of 29 October 1987 – 2 BvR 624/83 and others –, BVerfGE 77, 170 = juris, marginal 101, and of 30 November 1988 – 1 BvR 1301/84 –, BVerfGE 79, 174 = juris, marginal 81; Chamber decision of 27 April 1995 – 1 BvR 729/93 –, NJW 1995, 2343 = juris, marginal 4.

By virtue of its obligation to protect fundamental rights, the German State may also be obliged to protect German nationals and their interests vis-à-vis foreign states. The Federal Constitutional Court has therefore considered an obligation to protect to exist if the legal positions of German citizens abroad have been impaired, or if measures taken by a foreign sovereign have negatively impacted Germans or taken effect within Germany.

> See BVerfG, Chamber decision of 4 September 2008 – 2 BvR 1720/03 –, BVerfGK 14, 192 = juris, marginal 35 f., m. w. N.

However, even if – as here – it is a matter involving the impairment of a fundamental right that threatens a fundamental right holder who is not a German national, by a foreign sovereign authority abroad, the German state's obligation to protect the fundamental right cannot be excluded from the outset under the circumstances given here.

In this respect, the question raised as to the fundamental rights obligation of the German public authorities pursuant to Article 1(3) of the Basic Law in cases with an international dimension cannot be answered negatively in the present case, simply because the plaintiffs are foreigners living abroad. To the extent that this group of persons is fundamentally denied the right to fundamental rights,

> See Isensee, in: Isensee/Kirchhof (Ed.), Handbuch des Staatsrechts, Vol. V, 1992, § 115 Rn. 87 et seq.

or, at most, in the event that the persons concerned are subject to German authority, for example, because they are in a territory controlled by the German State within the framework of a military conflict or have been taken prisoner in Germany,

> See Nettesheim, in: Maunz/Dürig, GG, as at: August 2018, Art. 59 marginal 230.

the Chamber is unable to follow the reasons convincingly presented by the Administrative Court (see Judgement Impression, p. 9, penultimate paragraph, to page 10, second paragraph) with regard to the objective order of values of the Basic Law, which is essentially shaped by fundamental rights. The views described are also not in line with the case law of the Federal Constitutional Court, which, in any case, assumes the applicability of fundamental rights in cases in which foreigners abroad are affected by the effects of the exercise of German sovereignty.

> See BVerfG, Chamber Decisions of 13 August 2013 – 2 BvR 2660/06, 2 BvR 487/07 –, EuGRZ 2013, 563 = juris, recitals 40, 63 (Varvarin Bridge), and of 19 May 2015 – 2 BvR 987/11 –, NJW 2015, 3500 = juris, recital 26 (Kunduz).

Sufficient, but also necessary for the applicability of the Basic Law's fundamental rights to situations abroad or with an international connection, is the existence of a sufficiently close connection/link to the German state, which can be justified, in particular, by the German nationality of the holder of the fundamental right or by his stay in Germany, but which can also be considered if foreigners abroad are affected.

> See Badura, in: Merten/Papier (Ed.), Handbuch der Grundrechte, Vol. II, 2006, § 47 Rn. 4, 8, 21 ff; Jarass, in: Jarass/Pieroth, GG, 15th edition 2018, Art. 1 Rn. 44; Kahl, in: Bonner Kommentar zum Grundgesetz, as of August 2018, Art. 1 para. 3 marginal 210, 229 et seq.; Ruffert, in: Isensee/Kirchhof (ed.), Handbuch des Staatsrechts, vol. X, 3rd edition 2012, § 206 marginal 34.

For the purpose of determining this reference and, thus, the geographical and material scope of the fundamental rights, it is important that the Basic Law is not content with merely establishing the internal order of the German State, but also determines its relationship to the community of states in general terms. In this respect, it is based on the need for demarcation and coordination with other states and legal systems. On the one hand, the extent of the responsibility of the German state and of German state

organs must be considered in the scope of fundamental rights obligations. On the other hand, constitutional law must be coordinated with international law. This does not, in principle, preclude the application of fundamental rights in the case of situations involving foreign remuneration. Rather, their scope must be determined from the Basic Law itself, taking into account Article 25 of the Basic Law. Depending on the relevant constitutional norms, modifications and differentiations may be permissible or necessary.

> See BVerfG, judgment of 14 July 1999 – 1 BvR 2226/94 and others –, BVerfGE 100, 313 = juris, marginal 176, m. w. N.

Whether the plaintiffs can successfully invoke Article 2(2) para. 1 of the Basic Law and demand protection from the defendant on this basis is a question of the merits of the motion. With regard, in particular, to the spatial location of the Ramstein Air Base on German territory and the controversial question of the conformity under international law of the US drone missions in Yemen, which may have been carried out using facilities on the Air Base, to which all the parties are involved, a right to protection under fundamental law by the plaintiffs does not appear to be ruled out from the outset. The plaintiffs can therefore not be denied the right to bring an action. It does not correspond to the purpose of this requirement for a substantive judgment to clarify seriously disputed questions about the existence of a subjective right, on whose answer the success of the action may depend, in advance, in the context of the admissibility test.

> See BVerwG, judgments of 26 November 2003 – 9 C 6.02 –, BVerwGE 119, 245 = juris, marginal 29, and of 24 June 2004 – 4 C 11.03 –, BVerwGE 121, 152 = juris, marginal 20.

(b) The applicants also have the necessary legal interest in bringing proceedings.

The legal system, when it grants a substantive right, also, as a general rule, recognizes the interest of the person who considers himself to be the holder of that right in the judicial enforcement of that right. Accordingly, the legal interest in bringing a general performance suit brought by the alleged holder of the alleged right is absent only if there are special circumstances which invalidate that connection and render the subjective or objective interest in bringing the dispute invalid.

> See BVerwG, judgment of 17 January 1989 – 9 C 44.87 –, BVerwGE 81, 164 = juris, marginal 9; resolution of 25 October 2016 – 5 P 8.15 –, NZA-RR 2017, 108 = juris, marginal 10.

Contrary to the legal opinion of the defendant, the plaintiffs cannot be denied an interest in the legal protection that they are seeking by referring to a greater “proximity” of legal protection in the USA. The legal protection guarantee of Article 19(4) para. 1 of the Basic Law guarantees the plaintiffs the right to effective control by a German court as to whether they are entitled to the asserted claim against the defendant. Moreover, the enforcement of such a claim is also only possible before German courts. According to customary international law, sovereign acts of the defendant are, in principle, not subject to the national jurisdiction of foreign states.

> See BVerfG, Chamber decision of 17 March 2014 – 2 BvR 736/13 –, NJW 2014, 1723 = juris, marginal 19 f., m. w. N.

The defendant argues unsuccessfully that the use of the German jurisdiction is a mere “auxiliary construction” of the plaintiffs, which “does not enable them to annul the conditions of admissibility for an action seeking to achieve their proper objective of legal protection.” The fact that the plaintiffs are ultimately (“actually”) concerned with averting armed US drone deployments in the Yemeni province of Hadramaut and the potential damage that may result from them, and are thus ultimately (“actually”) seeking to prevent certain US conduct, does not call into question their interest in legal protection in the action brought against the defendant.

In particular, they cannot be referred to US courts simply because this would be a way to achieve the objective of the action more quickly or more simply.

The absence of the need for legal protection in such cases,

> See BVerwG, judgments of 25.6.1992 - 5 C 37.88 -, BVerwGE 90, 245 = juris, para. 11, and of 11.7.2018 - 1 C 18.17 -, NVwZ 2018, 1875 = juris, para. 24.

is not apparent. On the contrary: An action brought by the plaintiff in the USA seeking a declaration that the drone attack on 29 August 2012 was unlawful, was dismissed on the grounds that the executive branch’s decision on drone deployments abroad was not justiciable as a “political question.”

See District Court for the District of Columbia, Civil Action No.15-0840 (ESH), bin B1. K. et al. v. USA et al., Memorandum Opinion by Judge Ellen S. Huvelle of 22 February 2016, https://ecf.dcd.uscourts.gov/cgi-bin/Opinions.pl?2016 (last accessed 15 March 2019).

The interest in legal protection cannot be denied to the plaintiffs either from the point of view that the requested administrative court decision would be useless. A decision is useless only if it is manifestly of no legal or factual benefit to the person seeking it. The uselessness must therefore be unequivocal. In case of doubt, the interest in legal protection must be affirmed.

See BVerwG, judgment of 29 April 2004 – 3 C 25.03 –, BVerwGE 121, 1 = juris, marginal 19.

Accordingly, the plaintiffs have an interest in the sought decision worthy of legal protection. They argue that US drone operations in Yemen are carried out using facilities at Ramstein Air Base. Without the use of those facilities, the operations would not be possible in their present form. It does not, therefore, appear manifestly precluded that the defendant's request for an order that the use of the Air Base in question be prohibited by appropriate measures is advantageous to the applicants. It may result in a cessation or reduction in the number of US drones deployed in Yemen, thereby mitigating the plaintiffs' risk of being harmed by a drone attack. The "auxiliary construction" chosen by the plaintiffs and described as such by the defendant can therefore be quite helpful for the plaintiffs. Whether, as the defendant asserts in this connection, there are no provisions in the law on the stationing of troops or in international humanitarian law that give rise to claims and protect third parties in favor of the plaintiffs, is irrelevant as far as the legal protection interest is concerned. Whether the claimants are entitled to the asserted claim is a question of the merits of the action.

III. The action is also partially justified regarding its principal motion.

The plaintiffs have a right to life and physical integrity, based on their fundamental right to life and physical integrity, pursuant to Art. 2(2) of the Basic Law, that the defendant should take appropriate measures to ensure that the use of Ramstein Air Base by the USA for armed drone missions in Yemen, Hadramaut Province, is only used in accordance with international law and in accordance with the further grounds of the

judgment, and that the defendant should, if necessary, work towards ensuring that the US comply with international law in accordance with the further grounds of the judgment in the case of such use of Ramstein Air Base. Admittedly, this claim does not already arise from the defensive dimension of the fundamental right under Article 2(2) para. 1 of the Basic Law (see 1.). However, the defendant has a corresponding constitutional duty to protect the plaintiffs (see 2.). A further claim asserted by the plaintiffs against the defendant to prevent such use of the Ramstein Air Base by the USA follows neither from Article 2(2) para. 1 of the Basic Law (cf. 3.) nor from Article 25 of the Basic Law (cf. 4.).

1) The petition for action finds no basis in a constitutional defense claim of the plaintiffs under Article 2(2) para. 1 of the Basic Law. The armed drone missions, the prevention of which the plaintiffs demand, do not involve any encroachments on fundamental rights attributable to the defendants to the detriment of the plaintiffs.

In this respect, the actual submission of the plaintiffs regarding US drone deployments in Yemen involving the Ramstein Air Base can be regarded as true and, moreover, it can be assumed that the deployments at least lead to a relevant endangerment of fundamental rights for the plaintiffs. Even then, any impairment of the fundamental right to protection caused by possible drone missions in violation of international law cannot be attributed to the defendant as consequences of its own actions.

(a) The direct cause of the damage to life and limb feared by the plaintiffs are armed attacks carried out by the USA in Yemen using drones. As a starting point for an encroachment by the defendant on fundamental rights in this respect, the alleged involvement of technical equipment and personnel at Ramstein Air Base in the implementation of the missions, in particular the control of drones, cannot be taken as a basis. According to the plaintiffs' own submissions, only members of the US armed forces or US intelligence services are involved. There are no other indications that German officials are involved.

> See also BVerwG, judgment of 5 April 2016 – 1 C 3.15 –, BVerwGE 154, 328 = juris, marginal 19.

(b) It is also neither submitted nor otherwise apparent that the defendant would have agreed to the use of Ramstein Air Base for unlawful drone operations. The general permission granted by the German side to the US for military use of the properties in Ramstein, which are the subject of the dispute, does not justify attributing the consequences of such drone deployments to the defendant as indirect encroachments on fundamental rights.

However, fundamental rights as rights of defense also protect against indirect and factual impairments if the objectives and effects of the causal state action are tantamount to a classic intervention – directly and purposefully brought about by imperative legal acts.

> See BVerfG, judgment of 17 March 2004 – 1 BvR 1266/00 –, BVerfGE 110, 177 = juris, recital 35, decisions of 24 May 2005 – 1 BvR 1072/01 –, BVerfGE 113, 63 = juris, recital 52, of 11 July 2006 – 1 BvL 4/00 –, BVerfGE 116, 202 = juris, marginal 82, and of 21 March 2018 – 1 BvF 1/13 –, NJW 2018, 2109 = juris, marginal 28; Chamber decision of 152018 – 2 BvR 1371/13 –, NVwZ 2018, 1224 = juris, marginal 29.

This is the case with the general permission of the military use of the properties in Ramstein, which the defendant granted to the USA by the relevant international agreements, namely the Treaty of 23 October 1954 on the Residence of Foreign Armed Forces in the Federal Republic of Germany (Law concerning the Treaty of 23 October 1954 on the Residence of Foreign Armed Forces in the Federal Republic of Germany of 24 March 1955 [Federal Law Gazette 1955 II p. 253]); the Agreement between the Parties to the North Atlantic Treaty on the Legal Status of their Forces (NATO Status of Forces Agreement) of 19 June 1951; and the Supplementary Agreement thereto of 3 August 1959 (Act on the NATO Status of Forces Agreement and the Supplementary Agreements of 18 August 1961 [Federal Law Gazette 1961 II p. 1183], as last amended by Order of 31 August 2015 [Federal Law Gazette I p. 1474]),

> cf. BVerwG, judgment of 5 April 2016 – 1 C 3.15 –, BVerwGE 154, 328 = juris, para. 19; see also Wiss. Dienste des Deutschen Bundestags, Sachstand, “Ausübung militärischer Gewalt durch ausländische Staaten von Militärbasen in Deutschland”, 3 March 2014, WD 2 – 3000 – 034/14, p. 5 f.

with regard to the consequences of any US drone operations in Yemen contrary to international law. In this respect, the general permission for use does not have the same quality in terms of its effect or in terms of its objective.

The consequences of conduct by the sovereign authority bound by the Basic Law are not to be attributed to the authority if it does not have control over the occurrence of these consequences. In principle, its responsibility ends when a process, in its essential course, is arranged by a foreign state according to its will, independent of that of the Federal Republic of Germany. If the German State is prevented, for legal or factual reasons, from exerting influence over the course of events by controlling the circumstances which appear to be decisive, the result of this course of events cannot constitutionally be attributed to it as a result of its own conduct.

> See BVerfG, Decisions of 16 December 1980 – 2 BvR 419/80 –, BVerfGE 55, 349 = juris, marginal 29 f., of 25 March 1981 – 2 BvR 1258/79 –, BVerfGE 57, 9 = juris, marginal 43, of 16 December 1983 – 2 BvR 1160/83 et al. –, BVerfGE 66, 39 = juris, marginal 49 f., BVerfGE 55, 349 = juris, marginal 29 f., of 25 March 1981 – 2 BvR 1258/79 –, BVerfGE 66, 39 = juris, marginal 49 f., and of 15 December 2015 – 2 BvR 2735/14 –, BVerfGE 140, 317 = juris, para. 62; Chamber decision of 15 March 2018 – 2 BvR 1371/13 –, NVwZ 2018, 1224 = juris, para. 29, m. w. N.

This is the case with the threats to life and physical integrity feared by the plaintiffs as a result of armed US drone missions, the most effective causes of which are autonomous decisions and actions by the USA. The determination of the goal and the time, as well as the execution, of the deployments are beyond the influence of the defendant. They are in the hands exclusively of the USA, which thus decides on the essential conditions of a possible impairment of property rights without the decisive involvement of the defendant.

The general permission granted by the defendant to the USA to use the properties in Ramstein for military purposes does not justify an attribution of the dangers feared by the plaintiffs due to the use of drones contrary to international law, not least because these dangers are neither intended nor accepted in an approving manner as a result of the permission for use.

> See also BVerwG, judgment of 5 April 2016 – 1 C 3.15 –, BVerwGE 154, 328 = juris, marginal 19, 22.

If the impairment of fundamental rights protected by the Basic Law depends on the behavior of other persons or is based on a complex course of events, the affirmation of an intervention presupposes that the state at least accepts this as a foreseeable consequence of it.

> See BVerfG, Chamber decision of 15.3.2018 – 2 BvR 1371/13 –, NVwZ 2018, 1224 = juris, para. 29.

A condoning acceptance of impairments of fundamental rights by armed drone deployments of the USA in violation of international law is – in connection with the general permission for use of the Ramstein Air Base – out of the question, because such deployments were not yet foreseeable at the time the permission was granted by the aforementioned international agreements. Various sources unanimously report that the USA has only been using armed drones for targeted killings since the early 2000s.

> See Amnesty International, Deadly Assistance. The Role of European States in US Drone Strikes, 2018, p. 3; Schaller, SWP-Studie „Humanitäres Völkerrecht und nichtstaatliche Akteure", 2007, p. 26; U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Ben Emmerson: Interim Report on the use of remotely piloted aircraft in counter-terrorism operations, 2013, UN Doc. A/68/389, p. 6 ff.; www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx; Wikipedia, Artikel „Gezielte Tötungen", http://de.wikipedia.org (last accessed 22 February 2019).

According to a construction description of the US Air Force from February 2010, which may be found in the case file, Ramstein did not have the facilities to carry out squadron operations for drone missions even at that time. According to a letter from the US Army Corps of Engineers, Europe District, dated 18 November 2011 to the Federal Ministry of Defence, a permanently installed satellite relay system was still in the planning stage when it was written.

Moreover, from the outset, the permission of military use by the aforementioned treaties includes only those uses which are lawful under German law. The ones in Article 53(1) para. 1 of the Supplementary Agreement to the NATO Status of Forces Agreement (ZA-NTS) is limited by para. 2 of the provision to the extent that German

law applies to the use of such properties, unless otherwise provided for in this Agreement and in other international agreements, and unless the organization, internal functioning, and command of the force and its civilian entourage, as well as other internal matters which have no foreseeable effects on the rights of third parties or on surrounding communities and the general public, are concerned. Besides, Article II para. 1 of the NATO Status of Forces Agreement (NTS) provides that the foreign troops and their civilian entourage have the duty to respect the law of the Federal Republic of Germany as host state. In the present context, the legal provisions to be observed by foreign troops also include, in particular, the prohibition of a war of aggression pursuant to Article 26 of the Basic Law, as well as provisions of international law on the use of military force, if and to the extent that they form part of domestic law in accordance with the more detailed provisions of Article 25 of the Basic Law or Article 59(2) of the Basic Law.

> See BVerwG, judgment of 5 April 2016 – 1 C 3.15 –, BVerwGE 154, 328 = juris, marginal 20.

(c) Drone attacks carried out by the USA in Yemen using Ramstein Air Base and the resulting dangers for the plaintiffs cannot be attributed to the defendant as a violation of fundamental rights because it [the defendant] was informed by the USA of the planned construction of a satellite relay station in Ramstein to carry out drone missions abroad and declared to the US side that there were no objections to the project.

According to the final report of the 1st Investigation Committee of the 18th German Bundestag (so-called NSA Investigation/Inquiry Committee) of 23 June 2017 (BT-Drs. 18/12850), the Federal Ministry of Defence was informed by the US Guest Forces on 29 April 2017 (BT-Drs. 18/12850) that they intended to set up a “UAS SATCOM relay facility on the Air Force Base in Ramstein” within the so-called troop-building procedure, pursuant to Article 27 of the 1975 Contract Building Principles (Auftragsbautengrundsätze, AGB; Federal Law Gazette BGBl 1982 II, p. 893) (BT-Drs. 18/12850, p. 1167). In a letter dated 18 November 2011, the US Army again informed the Federal Ministry of Defence about the planned construction of “UAS SATCOM relay sites and installations” and stated:

> This operation will create a unique control center for the deployment of Predator, REAPER and GLOBAL HAWK to support Operation Iraqi Freedom

> (OIF) and Operation Enduring Freedom (OEF). This project also includes an SCI facility (Security Sensitive/Secret Information) and access to all documents will be appropriately controlled and restricted, in accordance with US security standards for SCIFs based on the need-to-know principle. This project also has a very high priority and its particular importance requires accelerated planning and implementation. (quote from BT-Drs. 18/12850, p. 1168 f.)

On 15 December 2011, the Federal Ministry of Defence declared to the US side that it had no objections to the proposed troop-building procedure project (loc. cit., p. 1169). These findings of the Committee of Inquiry are confirmed by the administrative proceedings submitted in extracts by the defendant at the hearing.

The mentioned “Predator”, “Reaper” and “Global Hawk” are type designations of remote-controlled unmanned aerial vehicles – drones – in the inventory of the US Armed Forces. The Global Hawk system is used for reconnaissance and surveillance purposes. “Predator” and “Reaper” drones are also used as carrier systems for armed attacks with missiles and bombs.

> See Final Report of the 1st Committee of Inquiry of the 18th German Bundestag (so-called NSA Investigation/Inquiry Committee; in German: Abschlussbericht des 1. Untersuchungsausschusses des 18. Deutschen Bundestages), BT-Drs. 18/12850, p. 1114 f.; UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Ben Emmerson: Interim Report on the use of remotely piloted aircraft in counter-terrorism operations, 2013, UN Doc. A/68/389, S. 6 f., www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx; Wikipedia, Article “General Atomics MQ-1” and “Northrop Grumman RQ-4”, http://de.wikipedia.org (last accessed on 22 February 2019).

“Operation Iraqi Freedom” was the name given to the military intervention in Iraq launched by an international coalition led by the USA in 2003. “Operation Enduring Freedom” was launched by the USA in response to the terrorist attacks in New York and Washington on 11 September 2001. The long-term objective of the operation was to eliminate terrorist command and training facilities; to combat, capture and bring to justice terrorists; and to permanently deter third parties from supporting terrorist activities. In addition to the armed struggle against the Taliban in Afghanistan, the operations, some of which also involved German Armed Forces, also included other armed sub-operations, such as in the Horn of Africa and the Philippines.

> See www.einsatz.bundeswehr.de: Completed Operations/Fight against International Terrorism – OEF (Operation ENDURING FREEDOM; Wikipedia, article “Operation Enduring Freedom”, http://de.wikipedia.org; “Operation Enduring Freedom”, http://en.wikipedia.org (last accessed 14 January 2019).

According to this, since 2011, the defendant has been aware of plans by the US guest forces to set up a satellite relay station in Ramstein to also carry out armed drone missions abroad. The technical possibilities for controlling unmanned aerial vehicles via relay stations are known to the Federal Government.

> Cf. answer of the Federal Government of 20 May 2015 to question 9 in the Request (Kleine Anfrage) of Members of Parliament and the parliamentary group DIE LINKE in the German Bundestag, BT-Drs. 18/4944, p. 3.

The knowledge of the technical possibilities and the planned construction of a relay station for drone control in Ramstein, as well as the declaration of the Federal Ministry of Defence to the US side that there were no objections to the realization of the planned project in the troop-building procedure, do not justify a fundamental right attribution of the drone missions at issue here and their possible effects on the plaintiffs as a violation by the defendant, irrespective of whether such drone missions are actually carried out in the manner described by the plaintiffs, in particular, by using a satellite relay station on the Ramstein Air Base that has been erected in the meantime.

Because, even then, it remains the case that the defendant has no decisive influence on the essential course of events, because the planning and execution of drone missions are exclusively controlled by the USA. This exclusive control of the operational events is the most effective and, therefore, essential cause of the impairments of their interests, protected by fundamental rights, feared by the plaintiffs.

This also applies because the declaration made by the Federal Ministry of Defence that it had no objections to the project regarding the troop-building procedure was not a legally necessary prerequisite for the realization of the project by the USA.

The construction of the relay station and the related declaration of the Federal Ministry of Defence are based on Article 49(3) of the Supplementary Agreement to the NATO Status of Forces Agreement (ZA-NTS) and Article 27 of the 1975 Principles of Contract Construction (ABG). Article 49(3) of the ZA-NTS allows for a deviation from the

procedure laid down in Article 49(2) of the ZA-NTS, according to which construction measures are carried out by the German authorities responsible for federal construction projects in accordance with the applicable German legal and administrative provisions and special administrative agreements, when covering the needs of the stationed armed forces for construction works. Article 49(3) of the ZA-NTS regulates the so-called troop-building procedure and stipulates, among other things, that:

> the authorities of a force and a civilian entourage in accordance with special administrative agreements [...] in consultation with the German authorities [...].
>
> (b) construction works requiring special safety measures [...].
>
> with their own resources or by direct allocation to contractors.

Article 27 of the 1975 Principles of Contract Construction, an administrative agreement pursuant to Article 49 of the ZA-NTS between Germany and the USA, provides, inter alia, for the following:

> 27.1 In consultation with the German authorities, the armed forces may construct new buildings or carry out conversions and extensions by their own forces or by direct allocation to contractors. This applies to: [...] 27.1.2 Construction measures of a secret nature requiring special security measures; [...] 27.1.4 Construction measures in which, for example, special communications or weapons systems of the armed forces are installed or used.

Accordingly, the implementation of the above-mentioned projects requires only the establishment of agreement with the German side (see the procedure governed by Article 30 et seq. of the 1975 ABG) and therefore not necessarily an agreement between the two sides.

> Cf. for other requirements of conduct BVerfG, resolution of 19 November 2014 – 2 BvL 2/13 –, BVerfGE 138, 1 = juris, marginal 87, m. w. N.; BVerwG, resolution of 12 December 2005 – 6 P 7.05 –, NVwZ-RR 2006, 337 = juris, marginal 23, and judgment of 11 August 2016 – 7 A 1.15 –, BVerwGE 156, 20 = juris, marginal 148.

A (constitutive) agreement, as required by Article 49(3) para. 1 lit. d) and e) of the ZA-NTS for certain other construction measures, consent, or an approval by German

authorities, which could possibly be considered as a determining act of cooperation, are not required in this respect.

> See in general BVerfG, resolution of 29 October 1987 – 2 BvR 624/83 et al. –, BVerfGE 77, 170 = juris, recitals 81 et seq.; on the authorization of the use of German airspace by foreign aircraft involved in a military operation contrary to international law, BVerwG, judgments of 21 October 1987 – 2 BvR 624/83 et al.6.2005 – 2 WD 12.04 –, BVerwGE 127, 302 = juris, marginal 259, and of 24 July 2008 – 4 A 3001.07 –, BVerwGE 131, 316 = juris, marginal 86 et seq.

Furthermore, the establishment of an understanding regarding the construction of a satellite relay station in the knowledge of its general suitability and purpose for carrying out armed drone operations abroad does not constitute a general approval or acceptance of any drone operations, irrespective of concrete operating conditions and circumstances. This applies, in particular, to any deployments contrary to international law. This is because the statement in question by the Federal Ministry of Defence is embedded in the legal framework drawn up by the agreements on stationing. As already stated, this obliges the foreign armed forces to respect German law and, thus, in accordance with Articles 25 and 59(2) of the Basic Law, to comply with provisions of international law for the use of military force. Compliance with this obligation is a self-evident prerequisite of the Ministry's declaration in question.

d) Nor is there any other indication to suggest that the Federal Government or other agencies of the defendant may have made statements or taken measures that would indicate a legally significant form of consent to the use of US military bases in Germany for the drone missions in question.

(2) The plaintiffs have a right under Article 2(2) para. 1 of the Basic Law to protection by the defendant from imminent harm to their lives and physical integrity as a result of armed US drone missions in the Yemeni province of Hadramaut, insofar as such missions are carried out using the Ramstein Air Base and violate international law requirements closely related to the objects of protection under Article 2(2) para. 1 of the Basic Law [see a)]. The defendant has, so far, only inadequately fulfilled this duty to protect [see b)].

a) A duty to protect under Article 2(2) para. 1 of the Basic Law also applies to German state power vis-à-vis foreigners if their fundamental rights protected under the German Basic Law are impaired by another state from Germany in a manner contrary to international law [see aa)]. This obligation to protect is already triggered when such impairments are sufficiently likely to occur [see bb)]. Thus, it applies here with regard to the plaintiffs' legitimate fear for life and limb due to US drone deployments in the Yemeni province of Hadramaut using facilities and staff located at Ramstein Air Base in violation of provisions of international humanitarian law for the protection of civilians in armed conflicts and in violation of the human right to life [see cc)].

aa) Pursuant to Article 2(2) para. 1 of the Basic Law, the German State is obliged to protect foreigners living abroad from the fact that their life or their physical integrity is adversely affected by another State using German territory in a manner contrary to international law. This applies moreover with regard to such international law provisions that have a close connection to the objects of protection under Article 2(2) para. 1 of the Basic Law.

(1) The fundamental right to life triggers a comprehensive obligation on the part of the state to protect and promote life, i.e. above all to protect it from unlawful interference by others.

> See BVerfG, judgment of 25 February 1975 – 1 BvF 1/74 –, BVerfGE 39, 1 = juris, recital 153.

The purpose of the obligation to protect fundamental rights is for the state to protect the holder of the fundamental right against the infringing or endangering effects of third parties who are not bound by fundamental rights – private individuals and other states. The Federal Constitutional Court, therefore, has considered an obligation to protect to exist if the legal positions of German citizens abroad were impaired, or if measures were taken by a foreign sovereign against Germans or took effect in Germany.

> See BVerfG, Chamber decision of 4 September 2008 – 2 BvR 1720/03 –, BVerfGK 14, 192 = juris, marginal 36, m. w. N.

However, it does not regard these groups of cases to be exhaustive. Even if – as in the present case – a fundamental right of a non-German citizen is impaired by a foreign

sovereign abroad, the German State's duty to protect fundamental rights is not excluded from the outset. In general terms, the decisive factor for the applicability of the fundamental rights of the Basic Law to situations abroad or with an international dimension and, thus, for the possibility of a fundamental right to protection relating to a foreign country, is the existence of a sufficiently close relationship to the German state. This can be based, in particular, on the German nationality of the holder of the fundamental right or his residence in Germany, but can also be considered if foreigners abroad are affected.

> See Badura, in: Merten/Papier (Ed.), Handbuch der Grundrechte, Vol. II, 2006, § 47 Rn. 4, 8, 21 ff; Jarass, in: Jarass/Pieroth, GG, 15th edition 2018, Art. 1 Rn. 44; Kahl, in: Bonner Kommentar zum Grundgesetz, as of August 2018, Art. 1 para. 3 marginal 210, 229 et seq.; Ruffert, in: Isensee/Kirchhof (ed.), Handbuch des Staatsrechts, vol. X, 3rd edition 2012, § 206 marginal 34.

For the purpose of determining this reference and, thus, the geographical and material scope of the fundamental rights, it is important that the Basic Law is not content with merely establishing the internal order of the German State, but also determines its relationship to the community of states in general terms. In this respect, it is based on the need for demarcation and coordination with other states and legal systems. On the one hand, the extent of the responsibility of German state organs must be taken into account in the scope of fundamental rights obligations. On the other hand, constitutional law must be coordinated with international law. This does not, in principle, preclude the application of fundamental rights in situations involving foreign elements. Rather, their scope must be determined from the Basic Law itself, taking into account Article 25 of the Basic Law. Modifications and differentiations may be permitted or required, depending on the relevant constitutional norms.

> See BVerfG, judgment of 14 July 1999 – 1 BvR 2226/94 and others –, BVerfGE 100, 313 = juris, marginal 176, m. w. N.

A fundamental right, for example, can, according to its nature, presuppose a certain relationship to the order of life within the scope of the constitution, so that unrestricted enforcement in wholly or predominantly foreign matters would fail to make sense in terms of the protection of the fundamental right. The extent to which this is the case cannot be determined in general terms. Rather, by interpreting the corresponding

constitutional provision, it must be determined whether it is intended to apply to any conceivable use of sovereign authority within the Federal Republic of Germany in terms of wording, meaning, and purpose, or whether it permits or demands differentiation in facts with more or less intensive foreign relations.

> See BVerfG, resolution of 4 May 1971 – 1 BvR 636/68 –, BVerfGE 31, 58 = juris, marginal 46.

In the case of the granting of protection abroad or against another state, the fact that the German public authorities may only have limited influence on the circumstances on which an impairment of the fundamental right to protection or the use of the fundamental right in each case depends, does not lead to the assumption that a fundamental right to protection is already fundamentally excluded. Rather, legal and actual limits to options for action can only be of significance in determining the scope of the duty to protect.

> See BVerfG, judgment of 10 January 1995 – 1 BvF 1/90 and others –, BVerfGE 92, 26 = juris, marginal 75 f.; see also BVerfG, decision of 8 October 1996 – 1 BvL 15/91 –, BVerfGE 95, 39 = juris, marginal 20 ff.

If – as here – a holder of a fundamental right seeks protection from the Federal Republic of Germany against the infringing or endangering effects of another state that is not bound by a fundamental right, because he considers the relevant measures of the other state to be contrary to international law, the territorial and factual scope of the binding character of the fundamental right of the German state authority must also be determined with regard to the statements of the Basic Law concerning international law and Germany's place within the international cooperation of states.

In this respect, it is significant, on the one hand, that the state system established by the Basic Law may require that violations of international law can be asserted as subjective violations of rights, irrespective of whether claims by individuals already exist by virtue of international law. In any case, this principle applies to constellations in which international law regulations are closely related to individual, high-ranking legal interests.

> See BVerfG, decision of 26 October 2004 – 2 BvR 955/00 and others –, BVerfGE 112, 1 = juris, recital 81.

On the other hand, the state is obliged by the Basic Law to guarantee the integrity of the fundamental principles of international law on its territory and, in the event of international law violations, to bring about a situation closer to international law, in accordance with its responsibility and within the scope of its possibilities for action.

> See BVerfG, resolution of 26 October 2004 – 2 BvR 955/00 and others –, BVerfGE 112, 1 = juris, recital 91.

According to Article 20(3) of the Basic Law, the German state organs are bound by international law, which claims domestic validity as international treaty law according to Article 59(2) para. 1 of the Basic Law, and with its general rules, in particular, as customary international law according to Article 25 para. 1 of the Basic Law. The Basic Law classifies the state constituted by it as being part of a system of international law that preserves freedom and peace, because it seeks to harmonize its own system of freedom and peace with an international legal order that not only concerns the coexistence of states, but strives to be the basis of the legitimacy of every state order.

The Basic Law highlights certain institutions and legal sources of international cooperation and international law (Article 23(1), Article 24, Article 25, Article 26 and Article 59(2) of the Basic Law). In this respect, the Basic Law facilitates the development of international law with the participation of the Federal State and ensures the effectiveness of the resulting international law. The Basic Law indirectly places state organs at the service of the enforcement of international law, thereby reducing the risk of non-compliance with international law. Under German constitutional law, however, such a direct constitutional obligation cannot be assumed to apply, without consideration, to any provision of international law, but only to the extent that it corresponds to the concept of the Basic Law as laid down in Articles 23 to 26 of the Basic Law and in Articles 1(2) and 16(2) para. 2 of the Basic Law.

> See BVerfG, decision of 26 October 2004 – 2 BvR 955/00 and others –, BVerfGE 112, 1 = juris, recitals 92 ff., m. w. N.

This obligation to respect international law, which arises from the Basic Law's international-law-friendliness, has three elements: First, the German state authorities are obliged to comply with the international law norms binding the Federal Republic of

Germany and to refrain from violations as far as possible. Second, the legislature has a duty to ensure that violations of international law committed by its own state organs can be corrected. Thirdly, under certain conditions, the German state organs may also be obliged to enforce international law in their own sphere of responsibility if other states violate it.

> See BVerfG, decision of 26 October 2004 – 2 BvR 955/00 and others –, BVerfGE 112, 1 = juris, recitals 90 and 95; Chamber decision of 15 March 2018 – 2 BvR 1371/13 –, NVwZ 2018, 1224 = juris, recital 34.

This outwardly-directed obligation can, however, come into conflict with the equally constitutionally-desired international cooperation between states and other subjects of international law, especially if an infringement can only be brought to an end by means of cooperation. In this case, this expression of the duty to respect can only be substantiated in interaction and balance with Germany's other international obligations.

> See BVerfG, decision of 26 October 2004 – 2 BvR 955/00 and others –, BVerfGE 112, 1 = juris, recital 98.

The determination of the scope of subjective legal positions founded on fundamental rights with regard to international law must be carried out within the system of the Basic Law, in particular, also with regard to Article 25 of the Basic Law. Whatever the limits of an assertion of general rules of international law under Article 25 of the Basic Law may be determined in detail, their subjectivation under this provision presupposes in any case that the general rule of international law in question has a close relationship to individual high-ranking legal interests, as is the case, for example, in international law on expropriation. Moreover, the person concerned must be the bearer of the individual high-ranking legal interests to which the respective general rule of international law has a close connection and must, therefore, be included in their scope of protection.

> See BVerfG, Chamber decision of 15 March 2018 – 2 BvR 1371/13 –, NVwZ 2018, 1224 = juris, recital 36, 40, with reference to BVerfG, decision of 26 October 2004 – 2 BvR 955/00 and others –, BVerfGE 112, 1 = juris, recital 81.

(2) On the basis of the foregoing, the German State is, in accordance with Article 2(2) para. 1 of the Basic Law, generally obliged to protect foreigners living abroad from the fact that their life or their physical integrity are adversely affected by another state using German territory in a manner contrary to international law. This applies moreover with regard to such international law provisions that have a close connection to the objects of protection under Article 2(2) para. 1 of the Basic Law.

The state's obligation to protect must be taken all the more seriously the higher the rank of the legal interest in question within the value order of the Basic Law. Life and physical integrity are the most important legal assets. Impairments of the fundamental right to protection of life are generally irreversible. This also applies to impairments of physical integrity in many cases. As the vital basis of human dignity and prerequisite for all other fundamental rights within the value system of the Basic Law, the fundamental right to life represents a maximum value.

> See BVerfG, judgments of 25 February 1975 – 1 BvF 1/74 and others –, BVerfGE 39, 1 = juris, recital 153, and of 15 February 2006 – 1 BvR 357/05 –, BVerfGE 115, 118 = juris, recital 117, m. w. N.

Nor is it a fundamental right which, by its nature, presupposes a certain relationship to the order of life within the area of application of the Basic Law, so that enforcement in wholly or predominantly foreign matters would fail to make sense of the protection of fundamental rights. At the international level, it is rather part of the elementary human rights standard that is binding for all states as customary international law.

> See Herdegen, in: Maunz/Dürig, GG, November 2018, Art. 25 marginal 62; Wollenschläger, in: Dreier (ed.), GG, vol. II, 3rd edition 2015, Art. 25 marginal 41, each with marginal 41. N.

Impairments of the objects of protection under Article 2(2) para. 1 of the Basic Law caused by acts of another state and occurring abroad have a close connection to the German state if the other state carries out its impairing act – the "encroachment on fundamental rights" – essentially from the German territory and, thus, from the original area of competence and responsibility of the German state authority. In this area of responsibility, the German state organs – irrespective of Germany's own responsibility under international law according to the customary principles of state responsibility as

laid down in Article 16 of the ILC Articles – are obliged to enforce international law if the action in question of the other state is inconsistent with it. This corresponds to the commitment of the German people to inviolable and inalienable human rights as the basis of every human community, and peace and justice in the world, as laid down in Article 1(2) of the Basic Law. A possible tension between such an obligation and the foreign and defense policy interests of the Federal Republic of Germany, as well as the international cooperation between the states, which is also desired by the Basic Law, does not fundamentally stand in the way of such an obligation. It shall, where appropriate, be taken into account when determining the scope of the obligation by balancing conflicting interests with a view to achieving practical concordance.

In any case, the duty to protect exists with regard to violations of such international legal norms that have a close connection to the objects of protection under Article 2(2) para. 1 of the Basic Law. In the present context, this includes the prohibition of arbitrary killings, which applies as international treaty law pursuant to Art. 6(1) para. 3 of the International Covenant on Civil and Political Rights of 19 December 1966 – ICCPR – (BGBl 1973 II p. 1553) to the Federal Republic of Germany, as well as to the USA and Yemen, which are all parties to the Covenant. This also includes the prohibition of targeted or indiscriminate attacks on civilians and the underlying principle of discrimination in armed conflicts under international humanitarian law,

> cf. also BVerwG, judgment of 5 April 2016 – 1 C 3.15 –, BVerwGE 154, 328 = juris, para. 45 f.; Herdegen, in: Maunz/Dürig, GG, as in: November 2018, Art. 25 para. 91,

which are components – further details of which are given below [cf. (2)(a)(cc)] – of the international treaty law applicable here, as well as of customary international law. Whether the prohibition of violence under Article 2(4) of the Charter of the United Nations (BGBl 1973 II p. 430) – UN Charter – which is, at the same time, part of customary international law [(cf. more on this below (2)(a)(aa)], is also one of the provisions of international law with a close connection to the objects of protection of Article 2(2) para. 1 of the Basic Law,

> Cf. with regard to Article 25 para. 2 clause 2 GG denying a sufficient individual reference to the prohibition of violence: BVerfG, Chamber decision of 15 March 2018 – 2 BvR 1371/13 –, NVwZ 2018, 1224 = juris, recitals 36 f.; leaving open:

> BVerwG, judgment of 5 April 2016 – 1 C 3.15 –, BVerwGE 154, 328 = juris, recital 46, each with ww. N.

can remain open, as there is no question here of a violation of the prohibition of violence, because the US drones in Yemen, which are the subject of this dispute, are deployed with the consent of the Yemeni Government [see below (2)(b)(aa)].

bb) The duty to protect is not only triggered when a future impairment of the objects of protection under Article 2(2) para. 1 of the Basic Law is certain due to the actions of another state in Germany and the illegality of such actions under international law. The respective holder of a fundamental right may also claim protection against the threat of harm to life and physical integrity contrary to international law.

The purpose of the obligation to protect fundamental rights is for the state to protect the holder of the fundamental rights against the infringing or endangering effects of third parties who are not bound by fundamental rights – private individuals and other states.

> BVerfG, Chamber decision of 4 September 2008 – 2 BvR 1720/03 –, BVerfGK 14, 192 = juris, marginal 36, m. w. N.

It also requires protective measures with regard to hazards to life or health posed by third parties. The degree of probability of a loss occurring, which is decisive for the existence of a significant risk under fundamental rights, depends, in particular, on the nature, proximity, and extent of possible dangers; the nature and rank of the constitutionally protected legal interest; and the irreversibility of violations.

> See BVerfG, decisions of 8 August 1978 – 2 BvL 8/77 –, BVerfGE 49, 89 = juris, marginal 117, and of 14 January 1981 – 1 BvR 612/72 –, BVerfGE 56, 54 = juris, marginal 59 f. Chamber decision of 29 July 2009 – 1 BvR 1606/08 –, NVwZ 2009, 1494 = juris, para. 10; Schulze-Fielitz, in: Dreier (Hrsg.), GG, Bd. I, 3rd edition 2013, Art. 2 para. 2 Rn. 43, m. w. N.

cc) There are important factual indications, known to the defendant or at least obvious, that the USA is using technical equipment at Ramstein Air Base and its own staff stationed there to carry out armed drone missions in Yemen [see (1)] that at least partly violate international law [see (2)]. For the plaintiffs, this gives rise to a

considerable danger, under constitutional law, of their life or physical integrity being harmed by a drone attack in violation of international law [see (3)].

(1) (a) According to official announcements by the US Government, the US Congress, and the US military, the USA has been carrying out military operations to combat terrorism in Yemen for years. These have been, in particular, airstrikes. The attacks have been directed against operations, facilities, and senior leaders of AQAP.

> See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 2 et seq., p. 18, http://www.hsdl.org/?abstract&did=798033; Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 11 December 2017, www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-2/; Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2018, p. 2, 6, www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force; U.S. Congress, Joint Resolution Directing the removal of United States Armed Forces from hostilities in the Republic of Yemen that have not been authorized by Congress, H. J. Res. 37, p. 6, https://congress.gov/bill/116th-congress/house-joint-resolution/37; Report on the Activities of the Committee on Armed Services for the 115th Congress, H. Rept. 115-1100, p. 41, 43, 109, www.congress.gov/congressional-report/115th-congress/house-report/1100/1?s=1&r=39 (last accessed 22 February 2019).

Moreover, in October 2017, the US Armed Forces also carried out air attacks for the first time on "ISIS targets," i.e. targets assigned to the group of the so-called Islamic State in Yemen.

> See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2018, p. 2, www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force; U.S. CENTCOM, Press Release NR-352-17 dated 16 October 2017, www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1344652/us-forces-conduct-strike-against-isis-training-camps-in-yemen (last accessed 22 February 2019).

The attacks have continued into the recent past. For 2018, the US Central Command (CENTCOM) reports a total of 36 air attacks against AQAP and ISIS in Yemen, including in the Hadramout governorate.

Cf. CENTCOM, Press Release dated 7 January 2019, www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1725188/centcom-counterterrorism-strikes-in-yemen-2018-rollup (last accessed 22 February 2019).

According to CENTCOM, a member of al-Qaida was killed in a "precision strike" in the Yemeni province of Marib on 1 January 2019. The man who was killed was the mastermind of a suicide attack on the warship USS Cole in Aden in October 2000.

Cf. CENTCOM, statement of 7 January 2019, http://www.centcom.mil/MEDIA/STATEMENTS/Statements-View/Article/1725215/uscentcom-confirms-the-death-of-jamal-al-badawi (last accessed 22 February 2019).

According to media reports, it was an air raid.

See http://www.n-tv.de/politik/USA-wollen-Al-Kaida-Terroristen-getoetet-haben-article20798864.html; www.spiegel.de/politik/ausland/donald-trump-bestaetigt-tod-von-al-qaida-terrorist-jamal-al-badawi-a-1246673.html; https://eu.usatoday.com/story/news/world/2019/01/07/jamal-al-badawi-killed/2499956002 (last accessed 22 February 2019).

The USA sees both itself and the Yemeni Government, with whose consent the actions took place, as in an ongoing armed conflict with AQAP or ISIS.

See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 11 f. 18, http://www.hsdl.org/?abstract&did=798033; Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2018, p. 6, http://www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force (last accessed 22 February 2019).

In the context of such a conflict, the use of technologically advanced weapon systems, including unmanned so-called drones, is also legally permissible in principle.

See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 20, http://www.hsdl.org/?abstract&did=798033 (last accessed 22 February 2019).

Drone strikes to combat al-Qaida and related organizations like AQAP in Yemen, among others, as well as the relevant legal framework, were already the subject of a hearing in the US Senate in 2013.

> See U.S. Congress Senate Committee on Armed Services. The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force, Hearing, 16 May 2013, p. 2, p. 19 et seq., http://www.armed-services.senate.gov/imo/media/doc/13-43 - 5-16-13.pdf (last accessed 22 February 2019).

In a speech on 23 May 2013, the then-US President declared that the USA had taken action against al-Qaida and related forces in the form of targeted killings ("lethal, targeted action") and had also deployed unmanned drones. He also justified targeted drone strikes in Yemen as legal and moderate self-defense against a real threat from radicalized individuals in the United States, and in support of the security forces trying to regain the territory of AQAP. At the same time, he presented his Presidential Policy Guidance of 22 May 2013, according to which targeted killings against identified high-caliber terrorists only took place if it was almost certain that the person being attacked was actually a legitimate target and was at the scene of the attack. Apart from exceptional circumstances, targeted attacks would only take place if it was almost certain that "non-combatants" would not be injured or killed.

> See Obama, Remarks by the President at the National Defense University, Washington, D.C., 23 May 2013, https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university; Presidential Policy Guidance (PPG), 22 May 2013, https://fas.org/irp/offdocs/ppd/ppg-procedures.pdf (last accessed 23 March 2019).

In addition, US armed drone missions (also) in Yemen are the subject of numerous reports submitted by the plaintiffs, as well as other reports, particularly from the media and non-governmental organizations.

> See, with numerous details, The Bureau of Investigative Journalism, Drone Wars: The full data, https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data; also Counter Extremism Project, Report: Al-Qaeda in the Arabian Peninsula (AQAP), pp. 2 ff., 13 ff., http://www.counterextremism.com/threat/al-qaeda-arabian-peninsula-aqap (last accessed 28 February 2019).

In 2013 and 2014, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms in the Fight against Terrorism reported the first US drone attack in Yemen as occurring in 2002, and further confirmed or suspected US drone attacks, including civilian casualties, since 2009, with an increase in the number of attacks since his interim report in 2013.

> See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Ben Emmerson: Interim Report on the use of remotely piloted aircraft in counter-terrorism operations, 2013, UN Doc. A/68/389, p. 9, 15; Report 2014, UN Doc. A/HRC/25/59, pp. 7, 14 ff., http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx (last accessed 22 February 2019).

Since 2017, the UN Commission of Experts for Yemen has also reported on "US air and drone strikes" in Yemen.

> See Panel of Experts on Yemen, Final Report, 27 January 2017, UN Doc. S/2018/193, Annex 29, p. 108; Final Report, 26 January 2018, UN Doc. S/2018/594, para. 68 f., 75; Final Report, 25 January 2019, UN Doc. S/2019/83, para. 68 f., 73 f., http://www.un.org/securitycouncil/sanctions/2140/panel-of-experts/work-and-mandate/reports (last accessed 25 February 2019).

(b) The Court is of the opinion that the United States is (also) conducting drone missions in Yemen using technical facilities at Ramstein Air Base with its own personnel stationed there. In particular, the Chamber has gained the full conviction that – according to the plaintiffs' submission – the data stream for the remote control of the drones is routed in real time from the USA via a satellite relay station in Ramstein, which, in this respect, acts as a necessary link between the pilots in the USA and the drones operating in the field in Yemen.

As already mentioned, the defendant was informed by the US side about the planned construction of a satellite relay station in Ramstein to control weapons-grade drones abroad in April 2010 and then again in November 2011. The defendant does not deny that such a relay station has meanwhile been erected and put into operation. A journalist reported the completion date for the project as the end of 2013.

> See Scahill, in: The Intercept, 17 April 2015, https://theintercept.com/2015/04/17/ramstein, Translation into German:

Luftpost. Friedenspolitische Mitteilungen aus der US-Militärregion Kaiserslautern/Ramstein, LP 085/15 – 24 April 2015, p. 2, http://www.luftpost-kl.de/luftpost-archiv/LP_13/LP08515_230415.pdf (last accessed 25 February 2019).

Representatives of the US Embassy informed the German Federal Foreign Office in 2016 about the involvement of Ramstein Air Base in signal transmissions during missions of unmanned aerial vehicles and explained, “that in the year 2015 a device to improve the already existing telecommunications equipment had been completed in Ramstein.”

See Statement by the Minister of State at the Federal Foreign Office N.S. in the German Bundestag in Question and Answer Session on 30 November 2016, BT Plenary Protocol 18/205, p. 20453.

The facility can be seen on aerial photographs available on the internet.

See Google Maps, https://goo.gl/maps/XpD39nzapB32 (last accessed 19 March 2019).

With freely accessible software, aerial photographs from the years 2010, 2015, and 2017 can be viewed, which provide a rough overview of the development process of the facility. On the picture from 2010, the facility is not yet present. The picture from 2015 shows the facility. The picture from 2017 documents a state of expansion compared to the previous picture.

See Google Earth, software available at http://www.google.com/intl/de_ALL/earth/versions (link and images last accessed in March 2019).

Ramstein’s central role in controlling armed drones in the Near and Middle East and on the African continent in real time from the USA was already the subject of investigative media reports some time ago. With reference, in particular, to secret US documents which had become public, it was reported that the signals for the control of drones from control centers at military bases in the USA ran via a transatlantic fiber-optic cable to the satellite relay station in Ramstein. From there, the signals would be transmitted via satellites to the drones in the area of operations. In the same way, the data stream – including video recordings recorded by the drone – would flow back to the control center in the USA. Without Ramstein, the drone missions in their present form would not be possible.

See Scahill, in: The Intercept, 17 April 2015, https://theintercept.com/2015/04/17/ramstein, Translation into German: Luftpost. Friedenspolitische Mitteilungen aus der US-Militärregion Kaiserslautern/Ramstein, LP 085/15 – 24 April 2015, http://www.luftpost-kl.de/luftpost-archiv/LP_13/LP08515_230415.pdf; Der Spiegel, M. Bartsch et al: Der Krieg via Ramstein ("The war via Ramstein"), 17 April 2015, http://www.spiegel.de/politik/deutschland/ramstein-air-base-us-drohneneinsaetze-aus-deutschland-gesteuert-a-1029264-druck.html; see also Süddeutsche Zeitung, Ch. Fuchs et al: US armed forces control drones from Germany, 30 May 2013, http://www.sueddeutsche.de/politik/luftangriffe-in-afrika-us-streitkraefte-steuern-drohnen-von-deutschland-aus-1.1684414 (each last accessed 25 February 2019).

As far as can be seen, the USA has never denied the factual correctness of these publicly discussed reports. Statements made by representatives of the US Embassy in the Federal Republic of Germany, about which the then-Minister of State at the Federal Foreign Office, Michael Roth, informed the German Bundestag in a question and answer session on 30 November 2016, rather suggest that the reports correspond to the facts in essential respects. The Minister of State stated that the USA had once again confirmed that unmanned aerial vehicles were neither launched nor piloted from Ramstein – although no contrary claims had been made in public reporting or in the parliamentary debate. Moreover, the Minister of State continued, the US side said:

> that the global communication channels of the USA for supporting unmanned aerial vehicles would also include telecommunications presence points in Germany, from which the signals would be forwarded. Unmanned aircraft missions would be flown from different locations, using various relay circuits, some of which would also operate at Ramstein. They also stated that, in Ramstein, a device to improve the existing telecommunications equipment had been completed in 2015 (see BT Plenary Protocol 18/205, p. 20452 et seq.).

The factual correctness of the quoted media reports is further supported by the statements of a former US Air Force member who was heard as a witness by the NSA Investigative Committee of the 18th German Bundestag and who, according to his own statements, was involved in numerous armed drone deployments, including in Yemen, as a member of a drone control team. The witness testified that the relay station in Ramstein was the technical element that enabled the US Air Force to control drones operating in the Middle East via satellite from the USA. Ramstein is involved in all worldwide drone missions conducted by the USA. All data ran through the relay station in Ramstein, because there was a direct fiber optic cable connection to the

Pentagon. On 17 April 2015, a schematic representation of the fiber-optic cable connection between the USA and Ramstein and the satellite connections between Ramstein and the drones was published by the internet magazine “The Intercept.” The witness explained that this is “probably one of the most accurate things I have seen on this topic in my life.” He also gave the assessment that, without the relay station in Ramstein, worldwide drone missions would not be possible (see BT-Drs. 18/12850, p. 1111 f., 1169 ff.).

The relay station in Ramstein is also confirmed as having an essential role in the implementation of worldwide drone missions, in a project statement of the US Armed Forces from February 2010, which was submitted to the Chamber and is correctly quoted by the NSA Investigative Committee in its final report (see BT-Drs. 18/12850, p. 1170) as follows:

> Without these facilities, the aircraft will not be able to perform their essential UAS missions within the EUCOM, AFRICOM and CENTCOM AOR, UAS weapon strikes cannot be supported and necessary intelligence information cannot be obtained.

The justification of the project states – in its German translation – also:

> Unmanned Aircraft Systems (UAS) require a suitably sized and configured facility to ensure the maximum effectiveness of a mission in the use of weapons and reconnaissance missions in support of combat aircraft. The construction of a satellite antenna relay station and a base is required for the connection to control remote-controlled aircraft; they connect CONUS-based, ground-based control stations/mission control elements to UAS aircraft in the AOR. The completion of this project will therefore meet SATCOM’s long-term relay requirements for Predator, Reaper and Global Hawk, eliminating the need for current, time-limited circuits. […]
>
> Predator (MQ-1), Reaper (MQ-9) and Global Hawk (RQ-4) aircraft will use this site to conduct operations within EUCOM, AFRICOM and CENTCOM Areas of Responsibilities (AOR) to support Overseas Contingency Operations. Due to the multi-area nature of operations, the SATCOM relay station in question must be located at Ramstein Air Base so that the warring commander always has the most up-to-date information available. [...] In addition, the nature of the operations requires a location close to an existing intelligence facility at Ramstein Air Base. […]
>
> The absence of this UAS relay station could significantly reduce operational capabilities and have serious implications for current and future missions.

> [...] A preliminary analysis of appropriate options was carried out, which showed that only one option meets the operational requirements.

The areas of responsibility mentioned therein also address Yemen from a geographical point of view. CENTCOM, the US Central Command, is the regional command of the US Armed Forces responsible for the Middle East, Egypt, and Central Asia, including Yemen.

> See U.S. Central Command, Area of Responsibility, http://www.centcom.mil/AREA-OF-RESPONSIBILITY (last accessed 5 March 2019).

The NSA Committee of Inquiry came to the following conclusion, which the representatives of the defendants stated at the hearing that they felt bound by:

> As a result, it can be considered certain, after the committee has taken evidence, that the US Air Force Base Ramstein with its relay station, which serves the transmission of data and control signals for US drones as well as data obtained by US drones, plays an essential role for the deployment of US drones – regardless of whether they operate armed or unarmed, e.g. for reconnaissance purposes, and also regardless of whether armed drones actually use weapons in individual cases. (see 18/12850, p. 1354)

In addition – without this being of decisive importance – there are important factual indications based on the above project description that the integration of Ramstein Air Base into armed drone missions (also) in Yemen is not limited to the mere forwarding of data via the satellite relay station, but includes an evaluation of information.

The final report of the NSA Investigative Committee, citing a July 2003 report by the German defense attaché in the USA, based on discussions with drone pilots and information from the US Air Force and the testimony of the former US Air Force member heard by the Investigative Committee as a witness, states that Ramstein Air Base is home to one of five Distributed Ground Systems (DGS) worldwide. This is a locally flexible technical facility in which the video feed of a drone is visually displayed and evaluated by so-called screeners (see BT-Drs. 1111 f., 1172 f.). The screeners, according to the witness, are:

> passive observers, in so far as they have no direct influence on what is happening on the screen, unless they say that the people there have weapons, or they confirm something that is going on. But otherwise, they are not involved in the decision-making process at all. They're just passing on the information. They're distributing the video feed. So when someone walks down the street with a rifle, it's the screeners who tell the client, "These guys have rifles." And the client is the one who decides whether it is permissible to shoot at these people or not. (loc. cit., p. 1113)

The fact that the Ramstein Air Base plays such a role, which goes beyond the mere forwarding of data streams and also includes the evaluation of video recordings, is also indicated by information from representatives of the US Embassy, about which the then-Minister of State at the Federal Foreign Office informed the German Bundestag in a question and answer session on 30 November 2016. Following the information given verbatim above, on the information provided by embassy representatives on the use of unmanned aerial vehicles in Ramstein with telecommunications relays, the Minister of State said that the US side has:

> also stated that Ramstein supports a number of other tasks, including the planning, monitoring and evaluation of assigned air operations. (see BT Plenary Protocol 18/205, p. 20453)

It is true that US representatives may not have provided the Federal Government with more detailed information on the nature of the allocated air operations, either in the relevant discussion at the Federal Foreign Office or in any other context and, in particular, may not have specified whether the planning, monitoring, and evaluation of allocated air operations also included drone missions.

> See, in this sense, Minister of State Dr. N1.C. at Question and Answer Session of the German Bundestag on 14 December 2016, BT Plenary Protocol 18/208, p. 20808 f.

However, it is not true that, as the defendant argues, the assessment expressed by the Federal Government in April 2014, in a reply to a parliamentary request (see BT-Drs. 18/1214, p. 5), is that the Distributed Ground System is a data distribution system, but with which,

> "no data is evaluated, only forwarded or made available to users"

in line with what the US Embassy representatives announced in 2016. They did not comment on the function of the DGS. In terms of the role of Ramstein Air Base in general, they have just explained that this includes, among other things, the evaluation of assigned air operations.

This and the findings of the NSA Investigative Committee on the general functionality of a DGS and the stationing of a DGS at Ramstein Air Base, as well as the testimony of the former US Air Force member heard by the Committee as a witness, at least suggest that in Ramstein, in the context of drone missions – according to the planning originally laid down in the project description as having no alternative – information from intelligence agencies is used and video recordings provided by the drones are evaluated.

In addition, in the aforementioned letter from the US Army Corps of Engineers, Europe District, to the Federal Ministry of Defense dated 18 November 2011, the US Army Corps of Engineers, Europe District, stated that, with the construction of "UAS SATCOM relays, installation areas and facilities," "a unique control center for the use of the Predator, Reaper and Global Hawk" would be created. This also points to a role of the Ramstein Air Base in connection with drone missions that goes beyond the mere forwarding of data and includes the evaluation and enrichment of mission information. This assumption is substantiated – as stated – by the project description of the satellite relay station of February 2010 quoted in extracts by the NSA Investigative Committee and available to the Chamber.

The defendant's objection that the report of the German defense attaché in the USA quoted by the NSA Investigative Committee refers "to the Air Force Distributed Common Ground System (AF DCGS) as the military communications capability of the US Air Force, not to the individual DGS at the current total of 27 AF DCGS sites" does not justify any other assessment. The findings of the Investigative Committee and the underlying testimony of the witness refer specifically to the DGS in Ramstein and its staff. It is also not true that "individual DGS are present at the current 27 AF DCGS locations." According to the Investigative Committee report, there are only five DGSs worldwide, including the one in Ramstein (see BT-Drs. 18/12850, p. 1112). This is

consistent with the information in the US Air Force Fact Sheet cited by the defendant, according to which “five active duty DGS sites (DGS-1 through 5)” exist.

> See Fact Sheet “Air Force Distributed Common Ground System,” http://www.af.mil/About-Us/Fact-Sheets/Display/Article/104525/air-force-distributed-common-ground-system (last accessed 26 February 2019).

(2) There are important indications that at least some of the armed drone operations by the USA in the home province of the plaintiffs in Yemen do not comply with the relevant international law. With regard to the assessment of the respective facts under international law, the executive branch has no non-justiciable scope for assessment due to Article 20(3) of the Basic Law and Article 19(4) of the Basic Law [more on this below b) bb) (1)].

(a) The rules of international law for the use of armed force between states [“jus ad bellum,” in addition (aa)] and – [in addition (bb)] – international humanitarian law [“jus in bello”, in addition (cc)] and international human rights guarantees [in addition dd)] are of importance for the assessment under international law of the drone missions at issue here.

(aa) According to Article 2(4) of the UN Charter, any threat or use of military force against another state is, in principle, contrary to international law. This strict prohibition on the use of force is, at the same time, part of customary international law.

> See ICJ, Decision of 27 June 1986: “Military and Paramilitary Activities in and against Nicaragua”, ICJ Reports 1986, p. 14 (p. 97 ff. recitals 183 ff.); BVerfG, judgment of 22 November 2001 – 2 BvE 6/99 –, BVerfGE 104, 151 = juris, marginal 169; BVerwG, judgment of 21 June 2005 – 2 WD 12.04 –, BVerwGE 127, 302 = juris, marginal 114, 199.

The prohibition on the use of force applies in the international relations of states. Purely domestic situations, such as armed conflicts between the government and insurgents, are not covered. The prohibition on the use of force is not violated if a state, with the consent of the government of another state, intervenes by military force in an internal conflict existing in that other state.

> See ICJ, Decisions of 27.6.1986: “Military and Paramilitary Activities in and against Nicaragua”, ICJ Reports 1986, p. 14 (p. 126 marginal 246), and of 19

December 2005: “Armed Activities on the Territory of the Congo”, ICJ Reports 2005, p. 168 (p. 198 et seq. marginal 51 et seq.), pp. 210 ff. recitals 98 ff.); Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions - Philip Alston, 2010, U.N. Doc. A/HRC/14/24/Add.6, marginal 35 et seq.; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 13 September 2013, U.N. Doc. A/68/382, p. 17 f., no. 80 ff.; Scientific Services of the German Bundestag, elaboration: “International Legal Foundations for Drone Missions Taking into Account the Legal Supervision of Germany, the USA, and Israel”, 2014, WD 2 - 3000 - 002/14, p. 7; Heintschel von Heinegg, in: Ipsen, International Law, 7. edition 2018, § 55 Rn. 34 f., § 56 Rn. 41 et seq.; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, 791 (797 et seq.), https://doi.org/10.1017/S0020589316000385 (last accessed 27 February 2019).

Under the UN Charter, military force may only be used in exceptional cases against the will of the state concerned, and only if a justification under international law permits this in individual cases. The UN Charter only provides for two such justifications. On the one hand, the UN Security Council can decide to apply military measures after a formal declaration of a threat or a breach of peace or an act of aggression in accordance with Article 39 of the UN Charter, and either implement these measures on its own responsibility (Articles 42 and 43 of the UN Charter) or authorize individual states (Article 48 of the UN Charter) or a regional system of collective security (Article 53 of the UN Charter). The use of military force is also permitted if a state, alone or in cooperation with its allies, is entitled to exercise the right to self-defense in accordance with Article 51 of the UN Charter. A state which – for whatever reason – disregards the prohibition on the use of force under international law in the UN Charter without such a justification and resorts to military force acts contrary to international law. It commits military aggression.

See BVerwG, judgment of 21 June 2005 – 2 WD 12.04 –, BVerwGE 127, 302 = juris, Rn. 200 ff.; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, 791 (797), https://doi.org/10.1017/S0020589316000385 (last accessed 27 February 2019).

According to its wording, Article 51 of the UN Charter grants only “in the event of armed attack” (in the English version, which in this respect does not differ from the other four treaty languages equally relevant under Article 111 of the UN Charter: “if an armed attack occurs”) the inherent right to individual or collective self-defense, until the UN

Security Council has taken the measures necessary to maintain international peace and security. Even if there are many questions about the scope and limits of this right to self-defense, it intervenes only “in the event of” an “armed attack”.

> See BVerwG, judgment of 21 June 2005 – 2 WD 12.04 –, BVerwGE 127, 302 = juris, marginal 209.

If an attack emanates from non-state actors, the right to self-defense justifies the use of force against another state if the actions of the non-state actors can be attributed to that other state.

> See ICJ, judgment of 27 June 1986: “Military and Paramilitary Activities in and against Nicaragua”, ICJ Reports 1986, p. 14 (p. 103 para. 195); Opinion of 9 July 2004: “Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory”, ICJ Reports 2004, p. 136 (p. 194 para. 139).

However, according to Article 31(3)(b) of the Vienna Convention on the Law of Treaties (Federal Law Gazette 1985 II p. 926) – VCLT– this corresponds to a later practice, to be taken into account in the interpretation of international treaties, and thus also the UN Charter, that states may also be entitled to the right to self-defense against attacks by non-state actors whose conduct is not attributable to another state. The starting point of this development is marked by UN Security Council Resolutions 1368 of 12 September 2001 and 1373 of 28 September 2001, issued on the occasion of the terrorist attacks on the USA on 11 September 2001, which explicitly recognized and confirmed the “natural right to individual and collective self-defense in accordance with the Charter.” In addition, in view of the terrorist attacks of 11 September 2001, the member states of NATO determined an alliance incident pursuant to Article 5 of the North Atlantic Treaty (BGBl 1955 II p. 289) and, thus, an armed attack.

> See NATO press release no. 124 of 12 September 2001, http://www.nato.int/docu/pr/2001/p01-124e.htm (last accessed 6 March 2019).

The Organization for Security and Co-operation in Europe (OSCE) and the Organization of American States (OAS) also recognized the right to self-defense in relation to the attacks of 11 September 2001.

> See OSCE Permanent Council, Statement of 11 October 2001, documented at http://avalon.law.yale.edu/sept11/osce_001.asp; OAS Resolution “Terrorist Threat to the Americas” of 21 September 2001, documented at

http://avalon.law.yale.edu/sept11/oas_0921a.asp (last accessed 6 March 2019).

No objections were subsequently raised to the United Nations Security Council against the statement that the conditions for the exercise of the right of self-defense were met as a result of the attack of 11 September 2001.

See Repertoire of the Practice of the Security Council, 2000–2003, p. 1004 ff., http://www.un.org/en/sc/repertoire/2000-2003/00-03_11.pdf - page=92 (last accessed on 7 March 2019).

Since then, states have claimed the right to individual or collective self-defense against armed attacks by non-state actors in a number of other cases.

See the list by Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, 791 (803 f.), https://doi.org/10.1017/S0020589316000385 (last accessed 27 February 2019); Repertoire of the Practice of the Security Council, 2014–2015, p. 350 ff., Repertoire of the Practice of the Security Council, 2016–2017, p. 116 ff., https://www.un.org/securitycouncil/content/repertoire/actions - rel9 (last accessed 7 March 2019).

This also applies to the participation of German armed forces in the fight against the Islamic State in Syria and Iraq.

See the Federal Government's request for the Bundestag's approval of the deployment of the armed forces on 1 December 2015, BT-Drs. 18/6866, p. 1 et seq.

In view of this broad practice in the community of states, it can be assumed that the right to self-defense is no longer limited to armed attacks by states, but can also be applied to non-state attackers.

See Heintschel von Heinegg, in: Ipsen, Völkerrecht, 7th edition 2018, § 56 marginal 24,; Herdegen, international law, 12th edition 2013, § 34 marginal 16; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, 791 (803), https://doi.org/10.1017/S0020589316000385 (last accessed 27 February 2019).

However, the general limits to the right to self-defense must always be maintained. In particular, the use of force to be averted must be sufficiently severe to allow an armed attack to be assumed.

> See ICJ, judgments of 27 June 1986: “Military and Paramilitary Activities in and against Nicaragua”, ICJ Reports 1986, p. 14 (p. 101 para. 191, p. 103 f. para. 195), and of 6 November 2003: “Case concerning Oil Platforms”, ICJ Reports 2003, p. 161 (p. 186 f. para. 51, p. 191 f. para. 64); Herdegen, International Law, 12th edition 2013, § 34 para. 12, 17; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (800 ff.), https://doi.org/10.1017/S0020589316000385 (last accessed 27 February 2019).

In exercising its right to self-defense, a state may take only such measures as are necessary to effectively counter an armed attack and which are proportionate to the nature and gravity of the attack.

> See ICJ, Decisions of 27 June 1986: “Military and Paramilitary Activities in and against Nicaragua”, ICJ Reports 1986, p. 14 (p. 103 para. 194), of 6 November 2003: “Case concerning Oil Platforms”, ICJ Reports 2003, p. 161 (p. 196 para. 74), and of 19 December 2005: “Armed Activities on the Territory of the Congo”, ICJ Reports 2005, p. 168 (p. 223 para. 147); Heintschel von Heinegg, in: Ipsen, International Law, 7th edition 2018, § 56 para. 31.

In order to prevent armed attacks by non-state actors, the use of extraterritorial force is only necessary if the state from whose territory the attack originates is unable or unwilling to stop the attack. Even then, in principle, only measures directed against the non-state aggressor are permitted, but not those against organs or institutions of the other state.

> See Heintschel von Heinegg, in: Ipsen, International Law, 7th Edition 2018, § 56 para. 26, 34; Herdegen, International Law, 12th Edition 2013, § 34 para. 16; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (804), https://doi.org/10.1017/S0020589316000385 (last accessed 27 February 2019). See in this sense also the Federal Government’s request for the Bundestag’s approval of the deployment of the armed forces of 1 December 2015, BT-Drs. 18/6866, p. 2.

Actions that are inadmissible because they are not necessary are, for example, purely retaliatory measures that are not suitable for defense against a continuing armed attack or measures that are taken only after an attack has ended.

> See Heintschel von Heinegg, in: Ipsen, International Law, 7th Edition 2018, § 56 para. 33, 35.

According to Article 51 of the UN Charter, the right to self-defense applies – only – "in the event" ("if ... occurs") that an armed attack occurs and, thus, is time-limited. A case of an armed attack is undoubtedly one in which the attack has already begun and has not yet ended. It is disputed to what extent a right to – "anticipatory," "preventive" or "pre-emptive" – self-defense against future attacks exists.

The governments of individual states have repeatedly made use of so-called preventive self-defense, with reference to Article 51 of the UN Charter or customary international law. It has been argued that, in view of the level of development achieved and the destructive power of modern weapons, as well as the short advance warning times, it was not appropriate for states to have to wait for the threat of devastation from the enemy's first use of weapons before taking military action themselves. However, this has remained controversial. Notwithstanding this, individual governments have, of course, repeatedly claimed such a right for themselves and others. This view of the law also corresponds to an opinion widely held in international literature. However, a general recognition relevant under customary law has not yet been found. To this day, such military operations have regularly met with opposition.

> See BVerwG, judgment of 21 June 2005 – 2 WD 12.04 –, BVerwGE 127, 302 = juris, recital 211; Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions – Philip Alston, 2010, U.N. Doc. A/HRC/14/24/Add.6, marginal 45; Murswiek, NJW 2003, 1014 (1016).

Even those voices in favor of a right to preventive self-defense stress that this right can only exist within narrow limits. A preventive, or more aptly, anticipatory, use of military force is based on the so-called Webster formula, which goes back to an exchange of diplomatic notes from 1841–42 between the then-US Secretary of State Daniel Webster and the British representative Lord Ashburton after the so-called Caroline incident,

> See the documentation of the Exchange of Notes at http://avalon.law.yale.edu/19th_century/br-1842d.asp (last accessed 5 March 2019).

in which preventive self-defense was considered admissible only in a dangerous situation that is "instant, overwhelming and leaves no choice of means and no moment for deliberation."

> See BVerwG, judgment of 21 June 2005 – 2 WD 12.04 –, BVerwGE 127, 302 = juris, recital 212; Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions – Philip Alston, 2010, U.N. Doc. A/HRC/14/24/Add.6, marginal 45; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (802), https://doi.org/10.1017/S0020589316000385 (last accessed 27 February 2019); Murswiek, NJW 2003, 1014 (1016 f.).

An additional right to preventive or "pre-emptive" self-defense, even in situations in which there is no immediate danger ("imminent threat") in the sense described above, but "uncertainty prevails over the time and place of the enemy attack," has been claimed by the USA, among others,

> See U.S. National Security Strategy 2002, p. 15 ("taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack"); 2006, p. 28 ("The place of pre-emption in our national security strategy remains the same."), http://nssarchive.us/ (last accessed 9 March 2019).

but it has no basis in current international law.

> See BVerwG, judgment of 21 June 2005 – 2 WD 12.04 –, BVerwGE 127, 302 = juris, recital 212; Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions – Philip Alston, 2010, UN Doc. A/HRC/14/24/Add.6, marginal 45; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (802), https://doi.org/10.1017/S0020589316000385 (last accessed 27 February 2019); Murswiek, NJW 2003, 1014 (1018).

According to Article 51 para. 1 of the UN Charter, the right to self-defense exists "until the Security Council has taken the measures necessary to preserve international peace and security." Unauthorized actions are only covered by Article 51 of the UN Charter if the state cannot wait for the Security Council to intervene due to an imminent danger.

> See Ambos/Alkatout, JZ 2011, 758 (764).

(bb) Irrespective of whether an armed drone deployment is permissible under the rules for the use of force between states, jus ad bellum, it must not violate the provisions of

international humanitarian law and international human rights law. The prohibition on the use of force under international law and the exceptions applicable to it only regulate the question of whether and when a state is entitled to exercise military force against another state. The manner in which it may do so, however, is the subject of international humanitarian law. In addition, the guarantees of human rights under international law are of importance. Neither a justified claim to the right to self-defense under Article 51 of the UN Charter, nor the consent of the state on whose territory military force is exercised, preclude the use of force contrary to international law on the grounds of a violation of international humanitarian or human rights law.

> See only Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (795 f., 809), https://doi.org/10.1017/S0020589316000385 (last accessed 27 February 2019).

(cc) International humanitarian law applies to armed conflicts, which may be both international and non-international in nature. It serves to moderate the use of force and to protect the victims of armed conflicts, including civilians. In this context, the four Geneva Conventions on International Humanitarian Law of 12 August 1949 and the two Additional Protocols to these Conventions, the central provisions of which form part of customary international law, are of particular importance.

The object of the agreements is the amelioration of the condition of the wounded and sick persons of the armed forces in the field (Geneva Convention I, Federal Law Gazette 1954 II p. 783); of the wounded, sick and shipwrecked persons of the armed forces at sea (Geneva Convention II, Federal Law Gazette 1954 II p. 813); the treatment of prisoners of war (Geneva Convention III, Federal Law Gazette 1954 II p. 838); as well as the protection of civilians in times of war (Geneva Convention IV, Federal Law Gazette 1954 II p. 917, corr. 1956 II p. 1586). Almost all countries in the world have signed the agreements. In addition to the Federal Republic of Germany, the contracting states also include the USA and Yemen.

According to their Common Article 2, the Geneva Conventions shall apply in all cases of declared war or other armed conflict between two or more of the High Contracting Parties, with the exception of provisions to be implemented in peacetime, even if the state of war is not recognized by one of them. Such an international armed conflict

presupposes that two or more states face each other as parties to the conflict. If this is not the case, but an armed conflict exists between a state and a non-state actor, or only non-state actors are involved, it is a non-international armed conflict.

> See Ambos, in: Münchener Kommentar zum StGB, 3rd edition 2018, vol. 8, before §§ 8 ff. VStGB para. 23; Heintschel von Heinegg, in: Ipsen, International Law, 7th edition 2018, § 61 para. 1, 4, 31; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (805), https://doi.org/10.1017/S0020589316000385; International Committee of the Red Cross, Commentary on the First Geneva Convention, 2016, Art. 3 marginal 393 f., https://ihl-databases.icrc.org/ihl/full/GCI-commentary (last accessed 20 March 2019).

The Common Article 3 of the Geneva Conventions speaks in this respect of an “armed conflict which is not of an international character” and standardizes, for this purpose, certain minimum requirements for the protection of persons not directly involved in hostilities, as well as wounded and sick persons. An armed conflict shall not lose its non-international character if another state, with the consent of the government of the state on whose territory the conflict is being conducted, fights a non-state party to the conflict alone or jointly with the national armed forces.

> See Heintschel von Heinegg, in: Ipsen, International Law, 7th Edition 2018, § 61 para. 34; International Committee of the Red Cross, Commentary on the First Geneva Convention, 2016, Art. 3 para. 404, 473, https://ihl-databases.icrc.org/ihl/full/GCI-commentary (last accessed 20 March 2019).

The Geneva Conventions do not contain any further definition of non-international armed conflict. The concept is given a certain precision by the Additional Protocol to the Geneva Conventions of 12 August 1949 on the Protection of Victims of Non-International Armed Conflicts, concluded on 8 June 1977 (AP II – ZP II, BGBl 1990 II p. 1637). The Additional Protocol I of the same day (AP I, BGBl 1990 II, 1551) refers to international armed conflicts. Like Additional Protocol II, it was ratified by Yemen, but not by the USA. Additional Protocol II applies to all armed conflicts not covered by Additional Protocol I, which take place in the territory of a High Contracting Party between its armed forces and breakaway forces or other organized armed groups exercising – under a responsible leadership – such control over part of the territory of the High Contracting Party as to enable them to conduct sustained and coordinated hostilities and to apply this Protocol (Article 1(1) of AP II). It does not apply to cases of

internal unrest and tensions, such as riots, isolated acts of violence, and other similar acts that are not considered armed conflicts (Article 1(2) of AP II). Accordingly, a non-international armed conflict exists in any case in which the conflict fulfils the criteria of Article 1(1) of AP II. It does not exist when it "only" concerns one of the cases of isolated disturbances of internal peace mentioned in Article 1(2) of AP II. However, it is recognized that even in situations where the conditions set out in Article 1(1) of AP II are not fulfilled in all respects, namely when "control over part of the territory" is lacking, the assumption of a non-international armed conflict may be justified. According to a widely accepted definition of the International Criminal Tribunal for the former Yugoslavia (ICTY), armed conflict refers to "armed violence between states and prolonged armed violence between government agencies and armed organizations or between such organizations within a state."

> See ICTY, Prosecutor v. Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1, para. 70 ("an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State"), http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (last accessed 1 March 2019); BVerwG, judgment of 24 June 2008 – 10 C 43.07 –, BVerwGE 131, 198 = juris, para. 22 f.

In line with this, the existence of a non-international armed conflict must be determined on the basis of two cumulative criteria: the intensity of the conflict and the degree of organization of the conflicting parties. The prerequisite for a non-international armed conflict – in contrast to ordinary crime, unorganized or short-lived insurrections, or terrorist activities – is, in addition to a certain intensity of the use of armed force, a sufficient degree of organization on the part of the parties to the conflict, which enables them to plan and conduct sustained and concentrated military operations on the basis of military discipline and de facto authority.

> See Ambos, in: Münchener Kommentar zum StGB, 3rd edition 2018, vol. 8, before §§ 8 ff. VStGB para. 22 f.; Ambos/Alkatout, JZ 2011, 758 (759); Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions – Philip Alston, 2010, UN Doc. A/HRC/14/24/Add.6, para. 52; Heintschel von Heinegg, in: Ipsen, International Law, 7th Edition 2018, § 61 para. 32, 35; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (806), https://doi.org/10.1017/S0020589316000385; International Committee of the Red Cross, Commentary on the First Geneva Convention, 2016, Art. 3 para.

422 ff., https://ihl-databases.icrc.org/ihl/full/GCI-commentary; Paulus/Vashakmadze, International Review of the Red Cross (IRRC), vol. 91 no. 873 March 2009, p. 95 (117 et seq.), http://www.icrc.org/en/international-review/article/asymmetrical-war-and-notion-armed-conflict-attempt-conceptualization, each with further notes also on the case law of international courts (links last accessed 2 March 2019).

The circumstances of the specific individual case are decisive in each case. Of significance may be – with regard to the intensity of the conflict – the number, duration, and spatial extent of hostilities; the nature and strength of the forces involved; the type of weapons and other military equipment used; the number of casualties and the extent of material damage; a referral of the conflict to the UN Security Council; and – with regard to the degree of organization of the parties to the conflict – command and control structures; the existence of a headquarters; the conduct of concerted military operations; unified action; and control of parts of the national territory.

See ICTY, Prosecutor v. Haradinaj et al., Judgment, 29 November 2012, IT-04-84bis-T, para. 393 et seq., http://www.icty.org/case/haradinaj/4 (last accessed 20 March 2019); Heintschel von Heinegg, loc. cit.; International Committee of the Red Cross, loc. cit, para. 429 et seq.; Heyns/Akande/Hill-Cawthorne/Chengeta, loc. cit., Paulus/Vashakmadze, loc. cit.

The question of the spatial scope of a non-international armed conflict and, thus, of the geographical limits of the applicability of international humanitarian law – in contrast to the “peacetime law” applicable outside of armed conflicts [see below (dd)] – is unclear in various respects and the subject of controversial assessment.

For an overview of this, see: International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report, October 2015, p. 12 ff.; Commentary on the First Geneva Convention, 2016, Art. 3 para. 452 ff., https://ihl-databases.icrc.org/ihl/full/GCI-commentary; Scientific Services of the German Bundestag, elaboration: “Spatial Scope of International Humanitarian Law and the ‘De-limitation’ of Armed Conflicts”, 2016, WD 2 – 3000 – 016/16, p. 7 ff.

In any case, the assumption of a non-international armed conflict is not excluded from the outset because the conduct of hostilities is not limited to the territory of a single state.

See Advocate General, Discontinuation Order of 20 June 2013 – 3 FOJs 7/12-4 –, p. 21; Heintschel von Heinegg, in: Ipsen, International Law, 7th Edition 2018, § 61 para. 39 et seq.; Herdegen, International Law, 12th Edition 2013, §

56 para. 25; International Committee of the Red Cross, Commentary on the First Geneva Convention, 2016, Art. 3 para. 465 et seq, https://ihl-databases.icrc.org/ihl/full/GCI-commentary (last accessed 20 March 2019); Scientific Services of the German Bundestag, elaboration: "Spatial Area of Application of International Humanitarian Law and the 'De-limitation' of Armed Conflicts", 2016, WD 2 – 3000 – 016/16, p. 4 f.

This does not mean, however, that violence in different states, which individually do not reach the level of intensity necessary for an armed conflict, should be viewed as a whole and treated as part of a single, transnational, possibly even global, non-international armed conflict. Such an aggregated approach is already limited by the fact that the hostilities of sufficient intensity that constitute an armed conflict must exist precisely between the conflict parties with a sufficient degree of organization. An overall view of violence by individuals or groups can therefore only be considered, from the outset, to the extent that these individuals or groups actually belong to one of the conflict parties and are thus integrated into their organizational structure.

See Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions – Philip Alston, 2010, UN Doc. A/HRC/14/24/Add.6, para. 53 ff.; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (806 ff.), https://doi.org/10.1017/S0020589316000385; Paulus/Vashakmadze, International Review of the Red Cross, vol. 91 no. 873 March 2009, p. 95 (119, 124), http://www.icrc.org/en/international-review/article/asymmetrical-war-and-notion-armed-conflict-attempt-conceptualization (last accessed 2 March 2019).

On the other hand, every non-international armed conflict is inherently subject to a geographical limitation, which is presupposed in the relevant international legal frameworks. Common Article 3 of the Geneva Conventions refers to an armed conflict which is not of an international nature and "arising in the territory of one of the High Contracting Parties." In the same essential respect, Article 1(1) of AP II, which regulates the material scope of application of Additional Protocol II, speaks of such armed conflicts "which take place in the territory of a High Contracting Party." These formulations indicate that a non-international armed conflict within the meaning of international humanitarian law is a spatially limited conflict that is, in principle, confined to the territory of a particular state. This does not exclude the possibility of non-international armed conflicts being conducted simultaneously in several states with the participation of one and the same non-governmental organization, nor of an armed conflict spreading from the territory of one state to the territory of another state while

retaining its non-international character (“spill-over effect”). However, such an encroachment presupposes an already existing, territorially limited armed conflict.

> See. Ambos/Alkatout, JZ 2011, 758 (760); International Committee of the Red Cross, Commentary on the First Geneva Convention, 2016, Art. 3 para. 474, https://ihl-databases.icrc.org/ihl/full/GCI-commentary (last accessed 20 March 2019); International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report, October 2011, p. 9; Report, October 2015, p. 15 with footnote 13.

Its criteria – the intensity of hostilities and the degree of organization of the parties involved – must be met in each individual state so that international humanitarian law can be applied there.

> See International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report, October 2015, p. 14 ff., 19.

A cross-national aggregation of isolated, namely terrorist, acts of violence into a single transnational or even global non-international armed conflict would contradict the basic intention of international humanitarian law to limit war, and its negative consequences for those affected by it, as far as possible. Otherwise, the whole globe would become a potential battlefield, where, in particular, the use of deadly force within the framework of international humanitarian law would be permitted and extended to human rights protection in peacetime.

> Ambos/Alkatout, JZ 2011, 758 (760); Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions – Philip Alston, 2010, UN Doc. A/HRC/14/24/Add.6, para. 56; Advocate General, Discontinuation Order of 20 June 2013 – 3 FOJs 7/12-4 –, p. 21 f.; International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report, October 2015, p. 15. See also International Committee of the Red Cross, Commentary on the First Geneva Convention, 2016, Art. 3, para. 480 f., https://ihl-databases.icrc.org/ihl/full/GCI-commentary (last accessed 20 March 2019).

A non-international armed conflict does not end with the armed hostilities falling below the threshold of intensity necessary for the conflict to develop. Non-international armed conflicts are often characterized by a changing intensity over time, not least because of possible organizational instabilities of the non-state conflict parties. The end of the applicability of international humanitarian law must not be assumed prematurely. In the view of the UN Tribunal for the former Yugoslavia, which is broadly recognized in

principle, this is only justified in principle once a peaceful settlement of the conflict has been reached.

> See ICTY, Prosecutor v. Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1, para. 70 ("until […] a peaceful settlement is achieved"), http://www.icty.org/x/cases/tadic/acdec/en/51002.htm; Prosecutor v. Haradinaj u. a., Judgment, 29 November 2012, IT-04-84bis-T, Rn. 396 (each last accessed 1 March 2019); Heintschel von Heinegg, in: Ipsen, Völkerrecht, 7th Edition 2018, § 61 para. 49; International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report, October 2015, p. 10; Commentary on the First Geneva Convention, 2016, Art. 3 para. 485 ff., https://ihl-databases.icrc.org/ihl/full/GCI-commentary (last accessed 20 March 2019).

This does not require a formal peace agreement or any other formal act. The decisive factor is whether, on the basis of the actual circumstances in the specific individual case, it can be assumed that the hostilities have ceased completely and will probably not be resumed. The applicability of international humanitarian law can also be terminated if a non-state party to the conflict has lost a sufficient degree of organization, even if sporadic acts of violence still emanate from its remnants.

> See International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report, October 2015, p. 10; Commentary on the First Geneva Convention, 2016, Art. 3 para. 489 ff., https://ihl-databases.icrc.org/ihl/full/GCI-commentary (last accessed 20 March 2019).

Where a non-international armed conflict exists, international humanitarian law shall apply. In the present context of targeted killings by drone attacks, the rules for the protection of the civilian population against armed attacks are of particular importance. International humanitarian law does not contain a general ban on the use of armed drones.

> See report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions – Philip Alston, 2010, UN Doc. A/HRC/14/24/Add.6, para. 79; UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Ben Emmerson: Interim Report on the use of remotely piloted aircraft in counter-terrorism operations, 2013, UN Doc. A/68/389, para. 60 f., 77, http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx (last accessed 2 March 2019); Research Services of the German Bundestag: "The use of combat drones from an international law perspective", 2012, WD 2 – 3000 – 118/12, p. 7; Ausarbeitung (expertise): "International legal bases for drone

missions in respect of the legal views of Germany, USA, and Israel", 2014, WD 2 – 3000 – 002/14, p. 4.

A fundamental rule of international humanitarian law is that neither the civilian population, as such, nor individual civilians may be attacked unless and until they directly participate in hostilities. A corresponding rule applies to civil objects. These rules and the underlying requirement to distinguish between civilians and – in the law of international armed conflict – combatants or – in the law of non-international armed conflict that does not recognize a combatant status – fighters, as well as between civilian and military objects, are the content of international treaty law.

See, in particular, Common Article 3 of the Geneva Conventions; Arts. 48, 51(2) para. 1 and (3), as well as 52(1) and (2) of AP I; Art. 13(2) and (3) of AP II; Art. 8(2)(b)(i) and (ii), as well as (e)(i) and (ii) of the ICC Statute [Federal Law Gazette 2000 II p. 1393]), and part of customary international law for both international and non-international armed conflicts.

See ICTY, Prosecutor v. Tadić, Decision of the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1, para. 98, 117 ff., 127, http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (last accessed 1 March 2019); ICJ, Report 8 July 1996: "Legality of the Threat or Use of Nuclear Weapons", ICJ Reports 1996, p. 226 (p. 257 f. para. 78 ff.); Supreme Court of Israel, Decision of 11 December 2005: The Public Committee against Torture in Israel et al. v. The Government of Israel et al., HCJ 769/02, para. 23, 26, 29 f.; International Committee of the Red Cross, Henckaerts/Doswald-Beck (Eds.), Customary International Humanitarian Law, 2005, Vol. I: Rules, p. 3 ff. (Rule 1), 19 ff. (Rule 6), 25 ff. (Rule 7), 34 ff. (Rule 10).

According to Article 50(1) para. 2 of AP I, persons in international armed conflicts are regarded as civilians in cases of doubt. A corresponding presumption rule does not exist for non-international armed conflict. However, it follows from the principle of discrimination and the prohibition of attacks on civilians not directly involved in hostilities that there must always be a careful examination as to whether they are protected civilians. The standard of care to be applied depends on the circumstances of the specific situation, namely the urgency of the decision to be taken and the information available or reasonably available to the decision-maker.

See International Committee of the Red Cross, Henckaerts/Doswald-Beck (Eds.), Customary International Humanitarian Law, 2005, Vol. I: Rules, p. 24; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (812 f.), https://doi.org/10.1017/S0020589316000385 (last accessed 2 March 2019).

International humanitarian law prohibits indiscriminate attacks to protect the civilian population and civilian objects. For international armed conflicts, this prohibition is laid down and specified in Article 51(4) and (5) of AP I. It is regarded as customary international law even for non-international armed conflicts.

> See ICTY, Prosecutor v. Kupreškić et al., Decision of 14 January 2000 – IT-95-16 –, para. 524, www.icty.org/case/kupreskic/4 (last accessed 2 March 2019); International Committee of the Red Cross, Henckaerts/Doswald-Beck (Eds.), Customary International Humanitarian Law, 2005, Vol. I: Rules, p. 37 ff. (Rule 11).

According to the definition in Art. 51(4) para. 2 of AP I, which also corresponds to customary international law applicable to non-international conflicts,

> See International Committee of the Red Cross, Henckaerts/Doswald-Beck (Eds.), Customary International Humanitarian Law, 2005, Vol. I: Rules, p. 40 ff. (Rule 12).

indiscriminate attacks are those which are not directed against a particular military target, in which combat methods or means are used that cannot be directed against a particular military target, or in which combat methods or means are used the effects of which cannot be limited in accordance with the requirements of international humanitarian law and which, therefore, can hit military targets and civilians or civilian objects indiscriminately in each of these cases. According to Article 51(5)(b) of AP I, an attack is to be regarded as indiscriminate if, among other things, it is to be expected that it also causes loss of human life among the civilian population, wounding of civilians, damage to civilian objects, or several such consequences together that are out of proportion to the concrete and immediate military advantage expected. That provision is also an expression of the principle of proportionality and is repeated in Article 57(2)(a)(iii) of AP I, according to which the person who plans or decides to launch an attack must refrain from any attack that is likely to result in losses among the civilian population, wounding of civilians, damage to civilian property, or several such consequences that are disproportionate to the concrete and immediate military advantage expected. This prohibition of attacks with disproportionate collateral damage is also customary international law for both international and non-international armed conflicts.

See ICTY, Prosecutor v. Kupreškić et al., Decision of 14 January 2000 – IT-95-16 –, para. 524, http://www.icty.org/case/kupreskic/4; Supreme Court of Israel, Decision of 11 December 2005: The Public Committee against Torture in Israel et al. v. The Government of Israel et al., HCJ 769/02, para. 41 ff., 46; International Committee of the Red Cross, Henckaerts/Doswald-Beck (Hrsg.), Customary International Humanitarian Law, 2005, Vol. I: Rules, p. 46 ff. (Rule 14); Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (814), https://doi.org/10.1017/S0020589316000385 (links last accessed 2 March 2019).

In addition, in determining the targets of attacks, in the choice of means and methods of attack, and in the conduct of attacks, the parties to the conflict shall take all practical precautions to avoid attacks on civilian targets and to minimize civilian casualties, injuries to civilians, and damage to civilian property as a secondary consequence of attacks on military targets. Attacks that may affect the civilian population must be preceded by an effective warning, unless circumstances do not permit it. These duties of care, which are regulated with regard to international conflicts in Article 57(1) and (2) of AP I, are customary international law for both international and non-international armed conflicts.

See International Committee of the Red Cross, Henckaerts/Doswald-Beck (Eds.), Customary International Humanitarian Law, 2005, Vol. I: Rules, p. 51 ff. (Rules 15–20); see also ICTY, Prosecutor v. Kupreškić et al., Decision of 14.1.2000 – IT-95-16 –, para. 524 f., http://www.icty.org/case/kupreskic/4 (last accessed 2 March 2019).

The concept of a civilian is not explicitly regulated for non-international armed conflict in the Geneva Conventions and Additional Protocols. For international armed conflict, Article 50(1) para. 1 of AP I stipulates that anyone who is not a member of the armed forces, of an organized armed association (militia or voluntary corps) belonging to a party to the conflict, or of a so-called "*levée en masse*" must be regarded as a civilian. Therefore, extending this definition to participants in a non-international armed conflict, all persons who are not members of state armed forces or organized armed groups are civilians.

See Federal Attorney General, Discontinuation Order 20 June 2013 – 3 BJs 7/12-4 –, p. 23; International Committee of the Red Cross, Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 2009, p. 27.

Since, unlike soldiers, the fighters belonging to a non-state party to the conflict are not necessarily recognizable externally by uniforms or insignia, and typically do not become members of the party to the conflict through a formal act, but through actual affiliation, a distinction must be made between them and civilians on the basis of actual functional aspects. Accordingly, a person is to be considered a member of such a group if his or her continued or permanent function is to participate directly in hostilities ("continuous combat function").

> See International Committee of the Red Cross, Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 2009, p. 27 et seq, also Federal Prosecutor General, Discontinuation Order 20 June 2013 – 3 FOJs 7/12-4 –, p. 23; Herdegen, International Law, 12th Edition 2013, § 56 para. 27; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (810 ff.), https://doi.org/10.1017/S0020589316000385 (last accessed 2 March 2019). Different in: Heintschel von Heinegg, in: Ipsen, International Law, 7th Edition 2018, § 63 para. 25.

This understanding is already present in the functional designation of non-state parties to a conflict as "armed forces" (Common Article 3 No. 1 of the Geneva Conventions, English version: "armed forces") and "organized armed groups" (Art. 1(1) of AP II, English version: "organized armed groups"), which refers to a purpose for the conduct of armed hostilities. The restrictive definition of the group of persons whose family members do not enjoy the protection status of civilians brought about by the functional criterion of the continued combat function also corresponds to the orientation of international humanitarian law aimed at effective protection of the civilian population. Non-state actors, who usually do not differ externally from the civilian population by uniforms or other signs, are often not recognizable as such. This lack of external distinctiveness makes it more difficult for the civilian population worthy of protection to avoid or reduce the risk of an incorrect classification as a member of a conflict party or as collateral damage through targeted behavioral adaptation. The perception of a continued fighting function by a person is also not to be seen in every situation without further ado, but must at least be recognizable, as such, rather than a mere membership or non-fighting function. Above all, however, it does not seem justified to regard members of a non-state actor who do not participate functionally in hostilities, but are to be regarded as civilian supporters, as legitimate military targets, while only

members of the armed forces may be attacked in the case of state parties to a conflict. The objection raised against the criterion of the continued combat function of a dangerous asymmetry, which is threatened because members of state armed forces may, in principle, be attacked independently of their concrete function, is not convincing.

> Cf. Boothby, The Law of Targeting, 2012, p. 150 f.; Heintschel von Heinegg, in: Ipsen, International Law, 7th edition 2018, § 64 para. 25,

It is based on an incorrect premise. International humanitarian law grants a power to exercise the use of force only to combatants in international armed conflicts (Cf. Article 43(2) of AP I). The law of non-international armed conflicts does not include the status of combatants or the legal status of non-state actors that entitles them to engage in hostilities. Moreover, the use of force in non-international armed conflicts is not only limited by international law, but is also a question of domestic law, according to which members of a non-governmental party to a conflict are responsible for any violations of law, which include attacks on lawfully-acting members of the armed forces.

> See Herdegen, International Law, 12th Edition 2013, § 56 para. 27; International Committee of the Red Cross, Henckaerts/Doswald-Beck (Hrsg.), Customary International Humanitarian Law, 2005, Vol. I: Rules, p. 3, 11 ff.; International Committee of the Red Cross, Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 2009, p. 33, 83.

In addition, a demarcation proposed in the literature – although it is not sufficiently reflected in the wording of the Geneva Conventions – according to which members of a non-state party to a conflict may always be attacked, or at least always if they fulfil a function which is also assumed by members of regular armed forces, could not ensure that attacked persons are indeed legitimate targets because of the breadth of their possible functions and the often-lacking recognizability of their assignment to the armed conflict.

> See Heyns /Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, p. 791 (812), https://doi.org/10.1017/S0020589316000385 (last accessed 2 March 2019).

The continued combat function requires permanent integration into an organized armed group in such a way that the person is involved in the preparation, conduct, or direction of actions for immediate participation in hostilities.

> See International Committee of the Red Cross, Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 2009, p. 34.

Direct participation in hostilities – that is, where civilians who are not part of an organized armed group lose the special protection granted to them by international humanitarian law – involves those acts which have as their direct object the harming of the enemy, i.e. its staff, its equipment, or its military operations. This includes damage to the civilian population of the state concerned.

> See International Committee of the Red Cross, Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 2009, p. 46 et seqq.; Supreme Court of Israel, Decision of 11 December 2005: The Public Committee against Torture in Israel et al. v. The Government of Israel et al., HCJ 769/02, para. 33; Ambos/Alkatout, Juristenzeitung 2011, 758 (762).

“Direct” participation in hostilities presupposes a direct link between the act or military operation in which it is engaged and the potential harm to the enemy. Only indirect contributions are not enough.

> See International Committee of the Red Cross, Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 2009, p. 51 ff.

There is no generally accepted definition of what constitutes “direct” participation. What is ultimately required is a case-by-case assessment, which must take into account the protection of the civilian population, on the one hand, and military necessities, on the other. There is no doubt that the use of arms in connection with an armed conflict and other forms of violence against the staff or material of a party to the conflict is a direct participation in hostilities. On the other hand, it can be taken for granted that political, idealistic, propagandistic, or financial support is just as insufficient as the provision of food or medicine to one of the parties to the conflict.

> See Supreme Court of Israel, Decision of 11 December 2005: The Public Committee against Torture in Israel et al. v. The Government of Israel et al., HCJ 769/02, para. 34 f.; International Committee of the Red Cross,

Henckaerts/Doswald-Beck (Eds.), Customary International Humanitarian Law, 2005, Vol. I: Rules, p. 22 et seq.

On this basis, persons who are permanently integrated into an organized armed group fulfil a continued combat function at any rate if they are involved in the preparation, execution, or direction of armed or otherwise violent actions. This includes, in particular, persons who plan and decide on the implementation of such actions, whether or not they carry them out themselves. The same applies to a person who has been recruited, trained, and equipped by a group for the purpose of continued and immediate participation in hostilities, even if that person himself has not yet participated in any hostile act.

See Attorney General, Discontinuation Order 20 June 2013 – 3 BJs 7/12-4 –, p. 24; International Committee of the Red Cross, Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 2009, p. 34.

On the other hand, some recruiters, financiers, or propagandists do not fulfil a continued combat function as long as they limit themselves to these roles.

See International Committee of the Red Cross, Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 2009, p. 34.

Members of organized armed groups may be targeted, even if they are not directly involved in hostilities at that moment. The regaining of the legal protection status of a civilian is only possible for the member of such a group if he permanently and recognizably gives up his continued fighting function.

Cf. Attorney General, Discontinuation Order 20 June 2013 – 3 FOJs 7/12-4 –, p. 24.

(dd) Finally, human rights, in particular the right to life, are of importance for the assessment of the admissibility of armed drone attacks under international law. It is part of customary international law and laid down in international treaty law, in particular in Article 6(1) of the International Covenant on Civil and Political Rights of 19 December 1966 – ICCPR – (BGBl 1973 II p. 1553). The contracting states also include Yemen and the USA.

According to Article 2(1) of the ICCPR, each Contracting State undertakes to respect the rights recognized in the Covenant and to guarantee them indiscriminately to all persons within its territory and subject to its sovereignty. Accordingly, the obligations of the Covenant – in accordance with their meaning and purpose, contrary to the narrow wording of Article 2(1) ICCCPR – also apply if a state exercises power outside its own territory.

> See ICJ, Report 9 July 2004: "Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory", ICJ Reports 2004, 136 (178 ff. Nr. 107 ff., esp. No. 111); Nowak, CCPR-Commentary, 1989, Art. 2 para. 26 ff.

This may be the case, in particular, where a state, with the consent of the government of another state, assumes powers on the other state's territory which are normally exercised by the state government.

> See – on the corresponding provision in Article 1 of the ECHR – ECHR, judgment of 7 July 2011 – 55721/07 (Al-Skeini and Others v United Kingdom – , NJW 2012, 283 (286, § 135).

The provisions of international law for the protection of human rights do not only apply in peacetime. In the event of an armed conflict, they are applied in addition to the specific provisions of international humanitarian law.

> See ICJ, Expert opinion 8 July 1996: "Legality of the Threat or Use of Nuclear Weapons", ICJ Reports 1996, 226 (240, No. 25); Expert opinion 9 July 2004: "Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory", ICJ Reports 2004, 136 (177 f. Nr. 144 ff.); ECtHR, Judgement of 16 September 2014 – 2970/09 (Hassan v. UK) –, NJOZ 2016, 351 (354, § 77; 356, § 104); Supreme Court of Israel, Decision of 11 December 2005: The Public Committee against Torture in Israel et al. v. The Government of Israel et al., HCJ 769/02, para. 18; Heintze and Heintschel von Heinegg, in: Ipsen, International Law, 7th Edition 2018, § 32 para. 13 f., § 61 para. 52 ff.; UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Fionnuala Ni Aoláin: Report 2018, UN Doc. A/HRC/37/52, para. 40 ff., 67 ff., https://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx.

This is also made clear by the emergency clause in Article 4(1) of the ICCPR, which allows the contracting states "in the event of a public emergency threatening the life of the nation" and which has been officially proclaimed, under certain conditions, to take measures which suspend their obligations under the Covenant to the necessary extent (cf. also Article 15(1) of the ECHR). In this respect, it must of course be

emphasized that this power, in particular, does not extend to the obligation of the Contracting States to respect the right to life (See Article 4(2) of the ICCPR).

According to Article 6(1) para. 3 of the ICCPR, no one may be arbitrarily deprived of his or her life.
Non-arbitrary killings in this sense are, in particular, those which are permissible within the framework of an armed conflict under the then-applicable international humanitarian law.

> See ICJ, Expert opinion 8 July 1996: "Legality of the Threat or Use of Nuclear Weapons", ICJ Reports 1996, 226 (240, No. 25); International Committee of the Red Cross, Henckaerts/Doswald-Beck (Eds.), Customary International Humanitarian Law, 2005, Vol. I: Rules, p. 313 et seq.

Article 6(2) of the ICCPR also permits the imposition and execution of the death penalty outside of armed conflicts, but only on the basis of a final judgment issued by a competent court (Article 6(2) para. 2 of the ICCPR). Killing without prior judicial proceedings or after summary or unfair proceedings is prohibited and constitutes extrajudicial or extralegal – arbitrary – executions.

> See Ambos/Alkatout, Juristenzeitung 2011, 758 (763).

Apart from this, the targeted use of deadly force outside of armed conflicts is generally only permissible to the extent that it is necessary in self-defense or emergency situations to avert immediate dangers to life and physical integrity.

> See Ambos/Alkatout, Juristenzeitung 2011, 758 (763); Report by the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions – Philip Alston, 2010, UN Doc. A/HRC/14/24/Add.6, para. 32; Droege, International Review of the Red Cross (IRRC), vol. 90 no. 871 September 2008, 501 (525), http://www.icrc.org/en/international-review/article/elective-affinities-human-rights-and-humanitarian-law; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, 791 (819 f.), https://doi.org/10.1017/S0020589316000385; International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report, October 2015, p. 15; UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Ben Emmerson: Interim Report on the use of remotely piloted aircraft in counter-terrorism operations, 2013, UN Doc. A/68/389, p. 17 para. 60, http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx (links last accessed 2 March 2019).

The prohibition of arbitrary killings pursuant to Article 6(1) para. 3 of the ICCPR would be practically ineffective if there were no procedure for examining the legality of the use of lethal force. The obligation under Article 6(1) para. 2 of the ICCPR to protect the right to life in conjunction with the general duty of states under Article 1(1) of the ICCPR "to respect the rights recognized in this Covenant and to guarantee them to all persons within its territory and subject to its jurisdiction [...]" therefore requires, even without express provision, that effective official investigations be carried out when persons are killed by the use of force, in particular by representatives of the state. The essential objective of such investigations is to ensure the effective application of national legislation to protect life and, where government representatives or agencies are involved, to ensure their accountability for deaths that have occurred under their responsibility.

Investigations into allegedly unlawful killings by representatives of the state are only effective if those responsible for the investigation are independent of those involved in the events.

> Cf. for the corresponding guarantees in Articles 1 and 2(1) of the ECHR: ECHR, judgment of 7 July 2011 – 55721/07 (Al-Skeini et al. v. UK, NJW 2012, 283 (288 f. para. 163, 167). For Article 6 of the ICCPR: Human Rights Committee, General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, 2018, UN Doc. CCPR/C/GC/36, para. 29, in general regarding the human right to life: Aide-mémoire on the Declaration of the Presidency of the Security Council of 21 September 2018 on the protection of civilians in armed conflicts, UN Doc. S/PRST/2018/18, p. 19 et seq.; Office of the United Nations High Commissioner for Human Rights, The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), 2017, para. 15 et seq.; UN General Assembly Resolution 67/168 of 20 December 2012: Extrajudicial, summary or arbitrary executions, UN Doc. A/RES/67/168, p. 2 No. 3; International Committee of the Red Cross, Henckaerts/Doswald-Beck (Eds.), Customary International Humanitarian Law, 2005, Vol. I: Rules, p. 314, ww. N.; Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, 791 (817), https://doi.org/10.1017/S0020589316000385 (last accessed 2 March 2019). For Article 2(2) GG: BVerfG, Decision of 19 May 2015 – 2 BvR 987/11 –, NJW 2015, 3500 = juris, para. 27.

This obligation exists – as appropriate – even under difficult security conditions, including armed conflict.

> See ECtHR Judgement of 7 July 2011 – 55721/07 (Al-Skeini and others v. the United Kingdom –, NJW 2012, 283 (288, § 164); Office of the United Nations

High Commissioner for Human Rights, The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), 2017, para. 20 f.; International Committee of the Red Cross, Henckaerts/Doswald-Beck (Eds.), Customary International Humanitarian Law, 2005, Vol. I: Rules, p. 314.

(b) There are important factual indications, known to the defendant or at least obviously apparent, that armed drone missions carried out in the past by the USA with the involvement of the Ramstein Air Base in Yemen, including in the Hadramout Province, were not only incompatible with the international legal requirements outlined above in individual cases, but also that further drone missions contrary to international law must therefore be expected in the future.

Although the operations take place with the consent of the Yemeni Government and, therefore, do not violate the prohibition on the use of force (see (aa)), in principle, they are also related to armed conflicts in Yemen, which are still ongoing, so that their admissibility must currently be assessed under international humanitarian law (see (bb)). However, there are considerable doubts as to whether the general US deployment practice for armed drone missions in Yemen takes into account the required principle of distinction of international humanitarian law in the necessary manner, in particular that targeted attacks are limited to persons who, as members of a party to the conflict, fulfil a continued combat function or, as civilians, participate directly in hostilities (see (cc)). It is also not apparent that the USA, in connection with its drone operations in Yemen, is sufficiently fulfilling its obligation to conduct an effective independent official investigation into deaths (see (dd)).

(aa) The disputed US drone missions in Yemen take place with the consent of the Yemeni Government and therefore do not violate the prohibition on the use of force according to Article 2(4) of the UN Charter.

The USA explicitly refers to such consent to justify the operations.

See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 18, http://www.hsdl.org/?abstract&did=798033; Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2018, p. 6, http://www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force (links last accessed 22 February 2019).

The drone missions have also been reported by third parties, notably the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms in the fight against terrorism.

> See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Ben Emmerson: Interim Report on the use of remotely piloted aircraft in counter-terrorism operations, 2013, UN Doc. A/68/389, para. 52, http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx. See furthermore Heyns/Akande/Hill-Cawthorne/Chengeta, The international law framework regulating the use of armed drones, ICLQ vol. 65, 2016, 791 (797), https://doi.org/10.1017/S0020589316000385 (links last accessed 27 February 2019).

There are no grounds for serious doubts as to the effectiveness or continuation of the approval.

(bb) The drone missions are generally related to armed conflicts in Yemen, which are still ongoing.

In order to answer the question as to the existence of an armed conflict in the sense of international humanitarian law, and for the classification of the disputed drone missions as such a conflict, a clear distinction must be made between the conflict relations under consideration in this respect.

On this basis, the missions are not related to the ongoing armed conflict in which the Yemeni Government and an international military coalition led by Saudi Arabia, on the one hand, face the Houthi rebels, on the other hand, as conflict parties. This is undisputed between the parties involved and is confirmed by official announcements by the USA. US airstrikes in Yemen are directed against AQAP and the Islamic State ("ISIS"), while coalition troops in their fight against the Houthi are granted only limited support, in particular, logistical assistance and the exchange of information and advice, but not direct military action ("non-combat role").

> See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 2 et seq., 18, http://www.hsdl.org/?abstract&did=798033; Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2018, p. 2, 6,

http://www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force; Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 11 December 2017, http://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-2/; US Congress, Joint Resolution Directing the removal of United States Armed Forces from hostilities in the Republic of Yemen that have not been authorized by Congress, H. J. Res. 37, p. 6, https://congress.gov/bill/116th-congress/house-joint-resolution/37; Report on the activities of the Committee on armed services for the 115th Congress, H. Rept. 115–1100, p. 41, 43, 109, http://www.congress.gov/congressional-report/115th-congress/house-report/1100/1?s=1&r=39 (links last accessed 22 February 2019).

The US drone missions in Yemen directed against AQAP, however, are connected with a non-international armed conflict between the armed forces of the Yemeni Government and AQAP, which, at any rate, has not yet ended. On the basis of the findings on the actual situation in Yemen available to the Chamber, in particular under the auspices of the United Nations, all the evidence suggests that, on the one hand, AQAP and the Yemeni Government, which has asked for international support in this respect, and is supported, inter alia, by the United States, have carried out armed hostilities which have lasted into the recent past and have reached the level of intensity necessary for the designation of a non-international armed conflict. It can also be assumed that AQAP has so far had a sufficient degree of organization to be a party to a non-international armed conflict, and that this degree of organization has not yet been lost so sustainably, despite a considerable weakening of the group, that the armed conflict could therefore already be regarded as over.

Already in its Resolution 2014 (2011) of 21 October 2011, the UN Security Council expressed its serious “concern about the deterioration of the security situation, in particular armed conflicts, [...] about the increasing threat posed by Al-Qaeda on the Arabian Peninsula and about the danger of new terrorist attacks in parts of Yemen.” Security Council Resolution 2216 (2015) of 14 April 2015 “condemns the increasing number and scale of the attacks perpetrated by al-Qaida in the Arabian Peninsula” and expresses “concern about Al-Qaida’s ability in the Arabian Peninsula to benefit from the deterioration of the political and security situation in Yemen”. In 2015, AQAP succeeded in bringing areas under its control, particularly in the south of the country,

by exploiting a political vacuum created by the outbreak of armed conflict between the Government, supported by an international military coalition, and the Houthi rebels.

Among other things, the organization has occupied the port city of Mukalla in the Hadramout Province since April 2015, until it was forcibly expelled from there by coalition troops in April 2016. During this time, AQAP is said to have captured money with an estimated value of USD 100 million in the local branch of the central bank. Yemeni security circles were quoted as saying that this would cover the organization's financial needs at the current level for at least ten years. As early as 2012, AQAP had temporarily exercised control over cities in the southern province of Abyan, until they were expelled by Government troops. Even in the years after 2015, the organization remained present in parts of the country in southern and central Yemen, including the province of Hadramout. The report covers armed clashes between Government and coalition troops, on the one hand, and AQAP, on the other, since 2015. AQAP also deploys rocket launchers, ground-to-air missiles, anti-aircraft cannons, grenade launchers, anti-tank missiles, and armored vehicles.

> See Counter Extremism Project, Report: Al-Qaeda in the Arabian Peninsula (AQAP), p. 2, 4 f., 13 ff., http://www.counterextremism.com/threat/al-qaeda-arabian-peninsula-aqap; European Council on Foreign Relations, Mapping the Yemen Conflict, http://www.ecfr.eu/mena/yemen; UN Analytical Support and Sanctions Monitoring Team, Eighteenth report submitted pursuant to resolution 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals and entities, UN Doc. S/2016/629, para. 24 f.; Twenty-second Report submitted pursuant to resolution 2368 (2017) concerning ISIL (Da'esh), Al-Qaida and associated individuals and entities, U.N. Doc. S/2018/705, para. 25 et seq.; UN Panel of Experts on Yemen, Final Report, 27 January 2017, UN Doc. S/2018/193, para. 51 et seqq., http://www.un.org/securitycouncil/sanctions/2140/panel-of-experts/work-and-mandate/reports (links last accessed 28 February 2019).

The organizational structure of AQAP is reported to be hierarchical and divided into branches. It has a political, a military, a propaganda, and a religious branch. The military branch is responsible for planning and carrying out violent actions. The propaganda branch promotes the goals of the group, partly in English publications and social media, in order to recruit new members and inspire sympathizers, especially in western countries to attack in their home countries. Members of the religious branch decide on religious questions through binding "fatwas" and try to religiously justify the violent ideology of the organization. In this respect, it complements the activity of the

propaganda branch. The political branch is responsible for leadership, including supervision of the other branches. The total number of AQAP members was estimated to be 6,000 to 7,000 in 2018.

> See Counter Extremism Project, Report: Al-Qaeda in the Arabian Peninsula (AQAP), p. 2 et seqq., 6, http://www.counterextremism.com/threat/al-qaeda-arabian-peninsula-aqap (last accessed 28 February 2019); UN Analytical Support and Sanctions Monitoring Team, Twenty-second Report submitted pursuant to resolution 2368 (2017) concerning ISIL (Da'esh), Al-Qaida and associated individuals and entities, UN Doc. S/2018/705, para. 23 et seq.

In January 2018, the UN Commission of Experts on Yemen reported that AQAP had carried out more than one attack on average every two days during 2017. These were suicide attacks, grenade attacks, assassinations, attacks with explosives, and small-scale attacks, which took place mainly in the provinces of Bayda, Abyan, and Hadramout. AQAP is waging a multi-front war against the Houthis, the USA, and the West, as well as against the Yemeni Government and the coalition troops led by Saudi Arabia. The aim is to gain territorial control. AQAP is currently more vulnerable than in previous years due to air and drone attacks by the USA and an extensive ground offensive launched by Yemeni and international troops in August 2017. As part of the ground offensive in the provinces of Shabwah, Hadramaut, and Abyan, various middle and lower-ranking AQAP members were killed or captured. The core leadership of the organization remained intact.

> See Panel of Experts on Yemen, Final Report, 26 January 2018, UN Doc. S/2018/594, para. 66 et seqq., http://www.un.org/securitycouncil/sanctions/2140/panel-of-experts/work-and-mandate/reports (last accessed 28 February 2019).

In its Resolution 2402 (2018) of 26 February 2018, the United Nations Security Council expressed its "concern" that "areas of Yemen are under the control of Al-Qaeda in the Arabian Peninsula and the negative impact of their actions on stability in Yemen and the region."

In January 2019, the UN Commission of Experts on Yemen reported that AQAP was still active in a number of southern provinces, as well as in Ta'izz province, although the organization's capacity had decreased compared to previous years. Compared to 2017, the number of attacks led by the US in 2018 decreased significantly. AQAP

remains the target of attacks in the provinces of Bayda and Shabwah. Regarding the group “Ansar al-Sharia,” which is attributed to the military wing of AQAP,

> Cf. Counter Extremism Project, Report: Al-Qaeda in the Arabian Peninsula (AQAP), p. 3, http://www.counterextremism.com/threat/al-qaeda-arabian-peninsula-aqap (last accessed 28 February 2019),

the UN experts report that their military clout has been greatly reduced and their leadership remains unclear. The group was broken up into fragments which were only loosely linked to the central management of AQAP. According to the UN experts’ final assessment in this context, AQAP “appeared as a disparate network of individuals.”

> See Panel of Experts on Yemen, Final Report, 25 January 2019, UN Doc. S/2019/83, para. 68 et seqq., http://www.un.org/securitycouncil/sanctions/2140/panel-of-experts/work-and-mandate/reports (last accessed 28 February 2019).

In its Resolution 2456 (2019) of 26 February 2019, the UN Security Council reiterated “its grave concern that areas of Yemen are under the control of Al-Qaeda on the Arabian Peninsula and about the negative impact of their presence, extremist ideology of violence and actions on stability in Yemen and the region, including the devastating humanitarian impact on civilians.” At the same time, it recalled that “Al-Qaida on the Arabian Peninsula and its associated persons have been included in the ISIL (Da’esh) and Al-Qaida Sanctions List” and stressed “in this context, the measures set out in paragraph 2 of Resolution 2253 (2015) as a key instrument to combat terrorist activities in Yemen must be robustly implemented.”

In the overall view of these sources of knowledge, the picture currently emerges of a still-ongoing, non-international armed conflict between AQAP and the Yemeni Government, which is supported by the USA among others. An end to this conflict, however, seems to be approaching at this stage, especially since AQAP appears to be considerably weakened in organizational terms. Combating the group without the military instruments available in the armed conflict would also be in line with the UN Security Council’s understanding, as has just been stated, that the measures in paragraph 2 of Resolution 2253 (2015) are the relevant instruments for combating terrorist activities in Yemen, since these measures are non-military sanctions (freezing of assets, travel restrictions, arms embargo).

Cf. also UN Security Council, Resolution 60/158 of 16 December 2005, which, according to Section IV No. 1 of the United Nations Global Counter-Terrorism Strategy of 8 September 2006 (General Assembly Resolution 60/288) provides the basic framework for the protection of human rights in the fight against terrorism; currently see also UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Fionnuala Ni Aoláin: Report 2019, UN Doc. A/HRC/40/52, para. 1 et seqq., 16 et seqq., 28 et seqq., https://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx.

The same applies as far as the disputed US drone missions are directed against the Yemeni branch of the so-called Islamic State (IS, ISIS, ISIL) in Yemen. Although the information situation is less dense than in the case of AQAP, the conclusion seems justified that there is still a continuing non-international armed conflict between ISIS in Yemen and the Yemeni Government, which is supported by the USA and international coalition forces, but that the question could also arise in the foreseeable future as to whether the group is so sustainably weakened that it can no longer be a party to a non-international armed conflict.

In its Resolutions 2402 (2018) of 26 February 2018 and 2456 (2019) of 26 February 2019, the UN Security Council expressed its “concern about the increasing presence and possible future growth” of the organization. The number of its members is given as between 250 and 500. The leadership of the group is reported to include a leader and his deputy, a person in charge of finances, and several military commanders. ISIS is reported to be targeting its attacks primarily against Yemeni state targets and targets in Yemen attributable to the United Arab Emirates. These are mostly bomb attacks and attacks on security forces. Extreme ideology and brutality are attributed to ISIS. The UN Commission of Experts on Yemen reported in January 2018 that ISIS is still capable of carrying out coordinated large-scale attacks. A year later, the Commission noted that ISIS appeared to be less capable of carrying out large-scale attacks beyond its bases in the Qayfah and Humaydah districts of the Bayda’ governorate. The last major attack proclaimed by ISIS for itself took place in February 2018 in Aden.

See UN Analytical Support and Sanctions Monitoring Team, Twenty-second Report submitted pursuant to resolution 2368 (2017) concerning ISIL (Da’esh), Al-Qaida and associated individuals and entities, UN Doc. S/2018/705, para. 28; UN Panel of Experts on Yemen, Final Report, 27 January 2017, UN Doc. S/2018/193, para. 55; Final Report, 26 January 2018, UN Doc. S/2018/594, para. 74; Final Report, 25 January 2019, UN Doc. S/2019/83,

para. 73, http://www.un.org/securitycouncil/sanctions/2140/panel-of-experts/work-and-mandate/reports (last accessed 28 February 2019).

(cc) There are considerable doubts as to whether the general US deployment practice for armed drone missions in Yemen takes into account the principle of distinction required by international humanitarian law in the appropriate manner, in particular, whether targeted attacks are limited to those persons who, as members of a party to a conflict, fulfil a continued combat function or, as civilians, participate directly in hostilities.

After evaluating all public statements of the US administration available to the Chamber, they clearly indicate that the US sees its struggle against al-Qaida, the Taliban and associated forces, including AQAP and the Yemeni branch of ISIS, as a unified, potentially worldwide armed conflict. They do not distinguish clearly between different concrete, spatially limited armed conflicts involving concrete, possibly organizationally independent regional armed (terrorist) groups, nor between whether an attacked person fulfils a continued combat function for a party to a conflict. This broad understanding of a non-international armed conflict, which is not consistent with international humanitarian law, and of the group of people who may be attacked in a targeted manner in such a conflict as a member of one of the parties to the conflict, has not been officially abandoned by the USA in this regard, even if it actually concentrates its military operations on regional armed conflicts.

According to official statements, the USA assumes that its military actions against AQAP and ISIS in Yemen are each connected with an armed conflict in the sense of international humanitarian law.

See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 18, http://www.hsdl.org/?abstract&did=798033; Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2018, p. 6, http://www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force (links last accessed 22 February 2019).

There is overwhelming evidence that this is based on a (too) broad understanding of a non-international armed conflict that is incompatible with international humanitarian

law, according to which the US has, in any case, also considered its attacks on AQAP and ISIS in Yemen as part of a wider international conflict that has been unfolding since the terrorist attacks of 11 September 2001, which is ultimately a worldwide non-international armed conflict between itself and its own coalition partners, on the one hand, and al-Qaida, the Taliban and "associated" or "affiliated" groups thereto, on the other, which, in its emergence and continuation, is independent of the concrete armed conflicts in Yemen described above.

In the USA, the "Authorization for Use of Military Force" (2001 AUMF, Pub. L. No. 107-40, 115 Stat. 224) adopted by Congress on 18 September 2001 as a Joint Resolution in direct temporal and factual connection to the terrorist attacks of 11 September 2001 is regarded as the domestic basis of authorization for the worldwide fight against terrorism, including the use of military means.

> See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 3 f., http://www.hsdl.org/?abstract&did=798033; Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2018, p. 2, 6, http://www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force (links last accessed 22 February 2019); Final Report of the NSA Committee of Inquiry of 23 June 2017, BT-Drs. 18/12850, p. 1126 f.

This also applies, in particular, to the fight against AQAP and ISIS in Yemen.

> See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 4 et seqq., 18; 2018, p. 6.

The 2001 AUMF regulates under Section 2(a):

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

This provision is considered an authorization to use force against al-Qaida, the Taliban or associated forces engaged in hostilities against the US or its coalition partners ("2001 AUMF authorizes the use of force against al-Qa'ida, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition

partners."). "Associated forces" are those organized armed groups that fight alongside al-Qaida or the Taliban and participate as their allies in hostilities against the US or its coalition partners ("First, the entity must be an organized, armed group that has entered the fight alongside al-Qa'ida or the Taliban. Second, the group must be a co-belligerent with al-Qa'ida or the Taliban in hostilities against the United States or its coalition partners."). A mere involvement in terrorist attacks is not sufficient for this. Associated forces, in this sense, were various groups in Afghanistan, AQAP, al-Shabaab, individuals belonging to al-Qaida in Libya, al-Qaida in Syria and ISIL/ISIS/IS.

> See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 4 et seq.

From the point of view of international law, the USA apparently sees its fight against these groups as a uniform, potentially worldwide armed conflict – at least since the terrorist attacks of 11 September 2001. This is what the international law part of the White House report quoted above says about ending an armed conflict with non-state armed groups such as al-Qaida:

> At a certain point, the United States will degrade and dismantle the operational capacity and supporting networks of terrorist organizations like al-Qa'ida to such an extent that they will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States. At that point, there will no longer be an ongoing armed conflict between the United States and those forces.
>
> (See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 11 et seq.)
>
> Unfortunately, that day has not yet come. Progress has been made in disrupting and degrading Al-Qaida's core and senior leadership, and in disrupting and degrading ISIL. But these groups still pose a real and profound threat to U.S. national security. As a result, the United States remains in a state of armed conflict against these groups as a matter of international law […]. (Cf. Op. Cit., p. 12.)

These "groups," and thus the parties to this assumed armed conflict, are in any case the above-mentioned "groups associated with al-Qa'ida or the Taliban," which "as their allies, participate in hostilities against the USA or its coalition partners." An armed conflict outlined in this way is practically borderless and potentially global. Various non-

state armed groups, acting in different states and not necessarily organizationally linked, on the one hand, and a group of states ("coalition partners"), on the other, each become parties to a worldwide conflict aggregated by terrorist acts and armed counter-terrorism measures.

This broad understanding of (non-international) armed conflict, which is inconsistent with international humanitarian law, is not abandoned in the follow-up report of 2018.

> See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2018, http://www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force (last accessed 22 February 2019).

It is also expressed in the description of the worldwide anti-terror struggle as a "global war against terrorism," which is still used officially in the USA today.

> See US budget for the financial year 2019, Annex, p. 303 et seqq. and passim ("Gobal war on Terrorism"), http://www.govinfo.gov/app/collection/budget/2019; Report on the Activities of the Committee on Armed Services for the 115th Congress, 21 December 2018, H. Rept. 115-1100, p. 109 ("Global war on Terrorism"), http://www.congress.gov/congressional-report/115th-congress/house-report/1100/1?s=1&r=39 (last accessed 23 March 2019).

The Chamber does not overlook the fact that this term was coined by the administration of former US President George W. Bush after the terrorist attacks of 11 September 2001,

> See U.S. National Security Strategy 2002, p. 5 ("a war against terrorists of global reach"); 2006, p. 13 ("The war against terror is not over."), http://nssarchive.us/ (last accessed 9 March 2019).

and was not understood, either then or later, in a narrow sense limited to the exercise of military force. Rather, it is a buzzword description of a broad approach, including political and legal measures, to the fight against international terrorism, endorsed by the United Nations Security Council. However, the USA has never abandoned its claim that the set of instruments at its disposal in this respect also includes the worldwide exercise of military force. The 2010 National Security Strategy stated, for example:

> The United States is waging a global campaign against al-Qa'ida and its terrorist affiliates. […] Success requires a broad, sustained, and integrated

> campaign that judiciously applies every tool of American power – both military and civilian – as well as the concerted efforts of like-minded states and multilateral institutions.
>
> (Cf. U.S. National Security Strategy 2010, p. 19, http://nssarchive.us (last accessed 9 March 2019))

The Obama administration proclaimed a change of strategy away from large-scale ground wars, as in Iraq and Afghanistan, and towards targeted counter-terrorist operations, as far as combating terrorism with military means is concerned.

> Cf. U.S. National Security Strategy 2015, p. 9, http://nssarchive.us/ (last accessed 9 March 2019).

However, these were also understood as parts of an unchanged "war" against terrorism.

> See Obama, Remarks by the President at the National Defense University, Washington D.C., 23 May 2013 ("the United States is at war with al-Qaeda, the Taliban, and their associated forces"), https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university (last visited 23 March 2019).

Even later, the USA did not noticeably move away from this understanding.

The assumption of a global war against al-Qaida, the Taliban and "associated" forces harbors a considerable structural risk of violations of the principle of distinction and the fundamental prohibition of direct attacks on civilians, even where – as here – a non-international armed conflict in the sense of international humanitarian law actually exists.

> See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Fionnuala Ni Aoláin: Report 2018, UN Doc. A/HRC/37/52, para. 7, 57, esp. 63 each et seqq., https://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx.

The focus is not on whether the objectives are actually legitimate under international humanitarian law within the framework of the respective armed conflict, because the US-American statements do not make any recognizable reference to the legally decisive organizational integration of the targeted person into a particular non-state party to the conflict. It thus remains unclear whether direct attacks are limited to those persons who are either organizationally integrated into the respective opposing party

to the conflict – in this case, only AQAP or the Yemeni branch of ISIS – and fulfil a continued combat function, or who participate as civilians directly in hostilities within the framework of the concrete conflict. Reports of US attacks on members of the religious and propaganda branch of AQAP,

> See Counter Extremism Project, Report: Al-Qaeda in the Arabian Peninsula (AQAP), p. 4, 13 et seq. ("religious judge," "propaganda official," "chief financial officer").

make this doubtful as well. These doubts are reinforced by the fact that the USA additionally invokes its individual right of self-defense to justify its armed operations in Yemen under international law,

> See White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 18 ("and in furtherance of U.S. national self-defense"), http://www.hsdl.org/?abstract&did=798033; Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2018, p. 6 ("and also in furtherance of U.S. national self-defense"), http://www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force (links last accessed 22 February 2019).

from which, as already mentioned, they have in the past, with regard to terrorist threats, derived a justification – alien to the applicable international law – for the preventive or "pre-emptive" exercise of violence, even in situations in which there is still uncertainty about the time and place of an attack. The Chamber is not in a position to recognize an immediate or at least imminent armed attack by AQAP or the Yemeni branch of ISIS against the US, which could trigger a right to self-defense. It does not ignore the fact that both groups are calling for terrorist violence, especially against the US. AQAP has been held responsible for a number of past or attempted terrorist attacks "against the West," including the suicide attack on the USS Cole in Aden in October 2000, the attack on the satirical magazine Charlie Hebdo in Paris in January 2015, and attempted attacks on a scheduled flight from Amsterdam to Chicago in December 2009 ("Christmas Day Bomber"/"Underwear Bomber") and at Times Square in New York in October 2010 ("Times Square Bomber").

> Cf. Counter Extremism Project, Report: Al-Qaeda in the Arabian Peninsula (AQAP), p. 2, http://www.counterextremism.com/threat/al-qaeda-arabian-peninsula-aqap (last accessed 28 February 2019).

However, an imminent threat justifying the targeted use of deadly force cannot under any circumstances be assumed if there is only a general threat of terrorist attacks, but a certain future attack scenario is not even concretized in terms of its nature and foreseeability in time. In this respect, the fact that the Security Council of the United Nations has addressed the general threat of terrorism, has repeatedly qualified it as a threat to world peace and international security, and has adopted measures against it in accordance with Chapter VII of the UN Charter, also precludes a reference to the right to self-defense under Article 51 of the UN Charter

> See Ambos/Alkatout, Juristenzeitung 2011, 758 (764).

These are essentially sanction measures and an underlying sanctions list on which to include terrorist organizations and persons, groups, undertakings and entities associated with them ("ISIL [Daesh] and Al-Qaida Sanctions List").

> See, among others, Resolutions 1373 (2001) of 28 September 2001; 1267 (1999) of 15 October 1999; 1989 (2011) of 17 June 2011; 2083 (2012) of 17 December 2012; 2140 (2014) of 26 February 2014; 2178 (2014) of 24 September 2014; 2396 (2017) of 21 December 2017; 2402 (2018) of 26 February 2018; and 2456 (2019) of 26 February 2019, among others.

The Security Council has repeatedly described the sanctions measures as the "key instrument in the fight against terrorist activities."

> See – in general – Resolution 2083 (2012) of 17 December 2012 and – specifically on Yemen – Resolutions 2140 (2014) of 26 February 2014 and 2456 (2019) of 26 February 2019.

(dd) It is also not apparent that the United States, in the context of its drone operations in Yemen, is, in fact, sufficiently fulfilling its obligation to carry out effective official investigations into deaths.

As a State Party to the International Covenant on Civil and Political Rights, the US, in its military operations in Yemen, is bound by the prohibition of arbitrary killings pursuant to Article 6(1) para. 3 of the ICCPR and, pursuant to Article 6(1) para. 2 of the ICCPR, is obliged to protect the right to life, in particular, to carry out effective official investigations when persons are killed by the use of force by representatives of the state. Persons who are killed by US drone attacks in Yemen are, at the moment

of the attack, subject to the authority of the USA in the sense of Article 2(1) of the ICCPR. In any case, this is because the USA, by exercising armed force in Yemen with the consent of the Yemeni Government, is assuming responsibilities that are usually assumed by the Government within the framework of the state monopoly on the use of force.

As early as 2014, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms in the Fight against Terrorism reported that, the majority of people killed in US drones attacks in Yemen were believed to be legitimate military targets in non-international armed conflicts. Nevertheless, he cited a number of attacks with proven or possible US involvement in Yemen, which would have led to civilian casualties and for which there was "reasonable suspicion" of illegality.

> See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Ben Emmerson: Report 2014, UN Doc. A/HRC/25/59, para. 27, 34, 55 et seqq., http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx (last accessed 22 February 2019).

Executive Order 13732 of 1 July 2016, issued later by then-US President Obama, with "Rules on Pre- and Post-Strike Measures to Address Civilian Casualties in US Operations Involving the Use of Force,"

> See https://obamawhitehouse.archives.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures (last accessed 9 March 2019); see also White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 26 et seq., www.hsdl.org/?abstract&did=798033 (last accessed 22 February 2019).

in Section 2(b), regulates, *inter alia*:

> […] relevant agencies shall also, as appropriate and consistent with mission objectives and applicable law, including the law of armed conflict:
>
> (i) review or investigate incidents involving civilian casualties, including by considering relevant and credible information from all available sources, such as other agencies, partner governments, and nongovernmental organizations […].

However, this does not justify the conclusion that the USA would, in fact, sufficiently fulfil its obligation to investigate. This is true even if the conduct of such investigations is apparently understood as a question of political expediency, but not as the fulfilment of a corresponding obligation under international law,

> See Executive Order 13732, Sec. 1 ("As a matter of policy, the United States therefore routinely imposes certain heightened policy standards that are more protective than the requirements of the law of armed conflict that relate to the protection of civilians"); White House Office: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, p. 27 ("as a matter of policy").

and that an inaccurately broad understanding of the preconditions of an armed conflict and of persons who may be deliberately attacked as members of a party to the conflict also entails a narrowing of the circle of the specially protected civilian population contrary to international law.

In any event, it is not clear that those responsible for investigations are independent of those involved in drone operations, including the commanders responsible for them, which is a necessary condition for the investigations to be effective. Moreover, the Chamber is already unable to determine whether – beyond purely internal evaluations of the situation – regular investigations are actually taking place at all into the circumstances and consequences of US drone attacks, and into the respective responsibilities. Nothing has become known about this in the current proceedings, although there are numerous, not implausible reports from the media and non-governmental organizations about US drone attacks in Yemen with civilian victims. Last year, the Yemeni Minister of Human Rights also reported in a newspaper article about unexplained US drone attacks with several deaths in which Yemeni investigations had revealed no evidence that even one of the victims was connected to al-Qaida.

> See Mohamed Askar: Drone strikes on Yemen don't make my country safer – or yours, 10 August 2018, http://www.theguardian.com/commentisfree/2018/aug/10/yemen-open-letter-drone-strikes-us (last visited 25 March 2019).

The defendant's representative stated in the oral hearing that he did not know whether the Federal Government had asked the United States whether independent

investigations had been carried out or permitted on suspicion of violations of international law during armed drone missions in Yemen. The first plaintiff's attempt to obtain a review of the killing of his relatives by an independent US court has been unsuccessful.

(3) For the plaintiffs, the US practice described above creates a considerable risk of damage to life or physical integrity as a result of a drone attack involving Ramstein Air Base carried out in violation of international law. Therein, it does not matter how many US drone missions have been flown in Yemen in general, or in Hadramout province in particular, or how many civilians exactly have been killed or injured. There is no official information from the US side that claims to be complete. For anti-terrorist attacks (without limitation to air attacks) "outside areas with active hostilities" for which US Government agencies – not the military – are responsible, official data on the number of victims between 20 January 2009 and 31 December 2015 (2,372–2,581 "Combatant Deaths" and 64–116 "Non-Combatant Deaths"), and between 1 January 2016 and 31 December 2016 (431–441 "Combatant Deaths" and 1 "Non-Combatant Death.")

> See Director of National Intelligence (DNI), Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities, https://www.dni.gov/files/documents/Newsroom/Press Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF; https://www.dni.gov/files/documents/Newsroom/Summary-of-2016-Information-Regarding-United-States-Counterterrorism-Strikes-Outside-Areas-of-Active-Hostilities.pdf; See also UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Ben Emmerson: Report 2017, UN Doc. A/HRC/34/61, para. 29, http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx (last accessed 22 February 2019).

On the basis of the information available to the Chamber – official announcements by the US, media reports, research by non-governmental organizations – it is, in any event, certain that drone attacks with civilian victims occur so frequently, particularly in the province of Hadramout, that, with regard to the high rank of the legal interests of Article 2(2) para. 1 of the Basic Law and the irreversibility of a violation of the fundamental right to life, there is a constitutionally considerable risk for the plaintiffs.

b) So far, the defendant has only inadequately fulfilled its constitutional protection obligation resulting from this. It is true that it has a wide margin of discretion in fulfilling

the duty to protect and the corresponding right to protection of the plaintiffs [see aa)]. However, it has exceeded the limits of this leeway, because the measures it has taken to date regarding the use of the Ramstein Air Base for US drone missions are based on the inaccurate assessment (at least in relation to Yemen) that there is no reason to doubt the compliance of the US missions with international law, which proves to be completely inadequate to achieve the constitutional goal of protection [see bb)].

aa) The state and its organs have a wide scope of assessment, evaluation, and design in fulfilling their obligations to protect fundamental rights. In contrast to fundamental rights in their function as subjective defensive rights, the state's duties to protect, resulting from the objective content of fundamental rights, are fundamentally indefinite. In principle, it is up to the state authorities to decide for themselves how to fulfil such protection obligations. This also applies to the duty to protect human life,

> See Federal Constitutional Court (BVerfG) judgment of 15 February 2006 – 1 BvR 357/05 –, BVerfGE 115, 118 = juris, para. 137.

and both to the legislative and executive authorities.

> See BVerfG, decision of 30 November 1988 – 1 BvR 1301/84 –, BVerfGE 79, 174 = juris, para. 82.

According to the case law of the Federal Constitutional Court, a breach of the duty to protect can only be considered if protective measures have either not been taken at all; if the regulations and measures taken are obviously inappropriate or completely inadequate; if they fall considerably short of the objective to protect; or if they are based on an inadequate ascertainment of facts or unjustifiable assessments.

> See BVerfG, Chamber decision of 15 March 2018 – 2 BvR 1371/13 –, NVwZ 2018, 1224 = juris, para. 32.

In its second judgment on abortion, the Federal Constitutional Court ruled that the legislature must observe the "prohibition on undersizing" (German: Untermaßverbot) when fulfilling its duty to protect unborn children. What is needed is adequate protection, taking into account conflicting legal interests; what is decisive is that it is effective, as such. The precautions taken by the legislature must be sufficient for adequate and effective protection, and must also be based on careful fact-finding and justifiable assessments.

See BVerfG, judgment of 28 May 1993 – 2 BvF 2/90 and others –, BVerfGE 88, 203 = juris, para. 166.

In some cases, the Federal Constitutional Court combines the above standards and demands that protective measures in the sense of the “prohibition on undersizing” be sufficient for adequate and effective protection and, in addition, be based on careful fact-finding and justifiable assessments. In view of the broad scope of assessment, evaluation, and design of the competent state organs, however, it also assumes that a violation of the duty to protect can only be established by a court if the public authority has not taken protective measures at all, or if the measures taken are wholly unsuitable or completely inadequate to achieve the required protective objective, or fall considerably short of it.

See BVerfG, Chamber Decisions of 27 April 1995 – 1 BvR 729/93 –, NJW 1995, 2343 = juris, para. 4, and of 4 May 2011 – 1 BvR 1502/08 –, NVwZ 2011, 991 = juris, para. 38. Similar to BVerfG, Chamber decisions of 29 July 2009 – 1 BvR 1606/08 –, NVwZ 2009, 1494 = juris, para. 12, and of 15 October 2009 – 1 BvR 3474/08 –, NVwZ 2009, 1489 = juris, para. 27.

Irrespective of these differences in the wording at least, the Federal Constitutional Court has always emphasized, when determining the foreign-related content of fundamental rights protection obligations, that the state has a particularly wide scope in this respect when granting protection. The wide discretion available to the Federal Government in the foreign sphere, and to all other state bodies called upon to act in this respect, is due to the fact that the shaping of foreign relations and events cannot be determined solely by the will of the Federal Republic of Germany, but is, in many cases, dependent on circumstances that elude its determination. In order to make it possible to implement the respective political goals of the Federal Republic of Germany within the framework of what is permissible under international and constitutional law, the Basic Law grants the state organs possessing foreign competencies a very wide scope in the assessment of significant foreign policy issues, such as the expediency of possible conduct.

See BVerfG, decision of 16 December 1980 – 2 BvR 419/80 –, BVerfGE 55, 349 = juris, para. 36 f., and Chamber decision of 4 September 2008 – 2 BvR 1720/03 –, BVerfGK 14, 192 = juris, para. 38. See in this connection also BVerfG, judgment of 10 January 1995 – 1 BvF 1/90 and others –, BVerfGE 92, 26 = juris, para. 60.

The obligation of the Federal Republic of Germany to (diplomatically) protect its citizens vis-à-vis foreign countries, which is, in any case, also founded on fundamental rights, therefore contains only the obligation to exercise discretion without erring.

> See BVerfG, decision of 16 December 1980 – 2 BvR 419/80 –, BVerfGE 55, 349 = juris, para. 36, and Chamber decision of 4 September 2008 – 2 BvR 1720/03 –, BVerfGK 14, 192 = juris, para. 38.

In this exercise of discretion, important interests of the state, the general public, and foreign policy relations can take precedence over the individual interests of the person concerned.

> See BVerfG, decisions of 7 July 1975 – 1 BvR 274/72 and others –, BVerfGE 40, 141 = juris, para. 120 f., and of 16 December 1980 – 2 BvR 419/80 –, BVerfGE 55, 349 = juris, para. 39; Dreier, in: Dreier., (ed.), GG, vol. I, 3rd edition 2013, Art. 1 III para. 47.

In general, a breach of the obligation to protect can only be established in the case of infringements of fundamental rights by foreign states if the addressee of the fundamental right has remained completely inactive, or if the measures taken are obviously completely unsuitable or inadequate.

> See BVerfG, Chamber decision of 4 September 2008 – 2 BvR 1720/03 –, BVerfGK 14, 192 = juris, para. 38.

(bb) On this basis, the defendant has currently failed to adequately fulfil its duty to protect the plaintiffs. Measures taken so far by the Federal Government against the US because of the use of Ramstein Air Base for US drone missions are based on the incorrect assessment – at least with regard to Yemen – that there is no reason to doubt their conformity with international law. In this respect, the Federal Government has no room for maneuver in its assessment, which is beyond the control of the courts [see (1)]. The measures it has taken so far are completely inadequate to achieve the constitutional goal of protection [see (2)].

In response to a parliamentary request on the role of Ramstein Air Base in the deployment of drones, the Federal Government took the view that, due to its long-standing and trusting cooperation with the USA, it had no reason to doubt the assurance of the USA that activities in US military properties in Germany were carried

out in accordance with the applicable law (see BT-Drs. 18/11023 of 25 January 2017, p. 7). In this sense, it has also responded to other parliamentary requests (see BT-Drs. 19/2318 of 24 May 2018, p. 4, and BT-Drs. 19/2766 of 15 June 2018, p. 45). In the present proceedings, the representatives of the defendants have taken the view that there are no general objections under international law to the US drone deployment practice in Yemen.

These assessments are inaccurate because, as already explained, it is moreover subject to considerable doubts as to whether the general drone deployment practice of the USA in Yemen takes due account of the “principle of distinction” (German: Unterscheidungsgebot) required by international humanitarian law, and whether, in connection with its drone deployment in Yemen, the USA actually sufficiently fulfils its obligation, under the human right to life, to carry out effective official investigations into deaths. These obligations under international law, which are an integral part of national law in accordance with Articles 25 and 59(2) of the Basic Law, are to be interpreted in accordance with Article II para. 1 of the NATO Status of Forces Agreement, and Art. 53(1) para. 2 of the Supplementary Agreement to the NATO Status of Forces Agreement, to be observed by the US guest forces when using Ramstein Air Base.

The Federal Government has no room for discretion in assessing or evaluating the deployment of drones under international law.

The domestic validity of international law, which binds the judge pursuant to Article 20(3) of the Basic Law, as well as the guarantee of effective legal protection pursuant to Article 19(4) para. 1 of the Basic Law, fundamentally oppose the granting of non-justiciable discretion to the executive branch. Above all, the requirement of effective legal protection regularly gives rise to a duty on the part of the courts to fully review contested state measures from both a factual and a legal point of view; this, in principle, precludes the binding of the judiciary to factual or legal findings and assessments by other authorities with regard to what is legal in the individual case.

> See BVerfG, Chamber decision of 13 August 2013 – 2 BvR 2660/06 and others –, EuGRZ 2013, 563 = juris, para. 53.

Although the legislature may, within the limits set by the Basic Law, provide for exceptions to the principle of full judicial review of decisions of the executive branch, there is no apparent norm to this effect in the present context. It has not been conclusively clarified to what extent the executive branch's scope for decision-making, which is subject to only limited judicial review, is exceptionally permissible under the Basic Law, even without a legal basis. At best, this should be considered for limited areas, namely when undefined legal concepts are especially vague due to the high complexity or particular dynamics of the regulated matter, and their concretization in the follow-up to the executive's decision is so difficult that their judicial control would reach the functional limits of case law.

> See BVerfG, Chamber decision of 13 August 2013 – 2 BvR 2660/06 and others –, EuGRZ 2013, 563 = juris, para. 54.

In the area of foreign protection – as is the case here – a legal interpretation of the Federal Government which is incorrect under international law, when examining the conditions for discretionary powers and exercising its discretion, does not, in itself, automatically justify the incorrect exercise of discretion.

> See BVerfG, decision of 16 December 1980 – 2 BvR 419/80 –, BVerfGE 55, 349 = juris, para. 40.

However, this does not mean that the Federal Government would (already) have a non-justiciable margin of discretion with regard to the assessment of the respective facts under international law. Such a situation cannot be justified in the present context. The qualification of a person or an object as a legitimate military objective within the framework of an armed conflict or in the exercise of self-defense, is not a political decision that would be exempt from judicial control from the outset, but a question of international law. It is also not clear that the case law would reach its functional limits by clarifying this question. The provisions of international law at issue here use indeterminate legal terms to describe what can be a legitimate military objective. However, their interpretation and application can be verified on the basis of objective criteria.

> See BVerfG, Chamber decision of 13 August 2013 – 2 BvR 2660/06 and others –, EuGRZ 2013, 563 = juris, para. 55.

The same applies to the human rights obligation to an effective official investigation into deaths.

Incidentally, however, it is not already apparent here that the Federal Government would have already formed its own opinion on the question of the conformity of the disputed drone deployments with international law in order to be able to make an appropriate decision on its further course of action in this matter. Its view that there are no grounds for doubting the assurance of the United States that activities from US military properties in Germany were conducted in accordance with applicable law is not based, to the extent recognizable, on the Federal Government's own actual and legal review. Rather, it justified its position merely with the "long-standing and trusting cooperation with the USA," and with the fact that the USA "as a constitutional state had a broadly institutionally anchored tradition of respecting international humanitarian law and also enforcing its observance" (cf. BT-Drs. 18/11023 of 25 January 2017, p. 7, on question 11; cf. also BT-Drs. 18/2318 of 24 May 2018, p. 5, on question 7). When asked which of its own examinations under international law of the legality of US drone missions prompted it to do so, the Federal Government declared that it had already been dealing for some time with the legal questions raised by the deployment of unmanned aerial vehicles (see BT-Drs. 18/11023 of 25 January 2017, p. 7, on question 12). The outcome of this referral in relation to the legality of US armed drone operations in general, and of operations in Yemen in particular, if any, has not been disclosed in this context or in any other context. When asked about its own checks under international law with regard to a possible responsibility of Germany under international law, the Federal Government rather stated that there was no reason to assume that letting Ramstein Air Base be used by the US could constitute aiding and abetting of an offence under international law, or itself be an offence under international law (see BT-Drs. 19/2318 of 24 May 2018, p. 5 in conjunction with p. 4, on question 5b). Because of the assurance of the USA that activities in US military properties in Germany were carried out in accordance with the applicable law, the question does not arise as to what extent military operations contrary to international law that are carried out by foreign states from German territory may not be tolerated (see BT-Drs. 18/11023 of 25 January 2017, p. 8, on question 15).

(2) Against this background, the measures taken so far by the Federal Government prove to be completely inadequate in order to achieve the constitutional protection objective of protecting the plaintiffs from harm to life or physical integrity as a result of US drone attacks that use Ramstein Air Base in violation of international law.

> Cf. Heinz, in: Niebank/Kämpf/Heinz, Avoiding aiding and abetting human rights violations: A critical examination of foreign policy cooperation (Analyse/Deutsches Institut für Menschenrechte), 2017, p. 39, https://nbn-resolving.org/urn:nbn:de:0168-ssoar-55629-4 (last accessed 29 March 2019).

The Federal Government has publicly stated that it is in a trusting dialogue with its US partners on the issue of the use of unmanned aerial vehicles and the role of the US base Ramstein (cf. BT-Drs. 18/11023 of 25 January 2017, p. 3). In reaction to the information from the talks held in August 2016 with representatives of the US Embassy at the Federal Foreign Office, the Political Director of the Federal Foreign Office held high-level talks in Washington in mid-September 2016. The international legal adviser of the Federal Government was also in regular contact with the legal adviser of the US State Department on the international legal issues raised in this context. The German Federal Government will continue this dialogue with its American partners on the deployment of unmanned aerial vehicles and the role of the Ramstein Air Base. For the Federal Government, the US assurance that activities in US military properties in Germany were carried out in accordance with applicable law (loc. cit) continued to be decisive. It remains in close contact with its US partners on the role of Ramstein Air Base in the deployment of unmanned aerial vehicles (loc. cit., p. 5, on questions 2 to 5). The dialogue with the USA was to be continued (loc. cit., p. 6, on question 10) and would also cover legal questions raised by the use of unmanned aerial vehicles (loc. cit., p. 7, on question 12). The Federal Government is in regular, trusting exchange with its US partners on political, military, and legal issues affecting US armed forces in Germany (see BT-Drs. 19/2318 of 24 May 2018, p. 4, on questions 1 to 3, and BT-Drs. 19/2766 of 15 June 2018, p. 45, on question 53).

This dialogue and exchange with the USA is – to this moment – completely inadequate to protect the plaintiffs from harm caused by drone attacks contrary to international law. As stated above, it is based on the incorrect premise on the part of the Federal Government that there are no grounds for doubting the legality of the use of Ramstein Air Base for armed drone missions. However, since it is actually subject to

considerable doubt as to whether the general drone deployment practice of the USA in Yemen actually takes into account the principle of distinction as provided by international humanitarian law in the necessary manner, and whether the USA, in connection with its drone deployment in Yemen, actually sufficiently fulfils its obligation to carry out effective official investigations into deaths resulting from the human right to life, the Federal Government may not be content with the general assurance of the US side that activities in US military properties in Germany are in conformity with applicable law. A corresponding German demand directed only to the USA, in general, not legally specified in more detail, for an exclusively lawful use of the properties, without any recognizable examination of its own and announcement of what is concretely lawful in relation to the respective drone deployments, is neither subjectively directed at nor objectively suitable to exclude, or even only reduce, the danger actually threatening the plaintiffs with regard to harm to life or physical integrity by a future US drone attack carried out in violation of international law with the involvement of Ramstein Air Base. It is not apparent that the Federal Government has, so far, gone beyond such a general demand for legality in the dialogue it has conducted with the US side. In order to fulfil its obligation to protect the fundamental rights of the plaintiffs, it must investigate the existing general doubts as to the conformity of the drone deployment practice in Yemen with international law and, if necessary, work specifically with the USA to ensure that German properties are used exclusively for deployments in accordance with international law. This includes providing the US side with the German understanding of international law, as it is part of domestic law in accordance with Article 25 and 59(2) of the Basic Law, and, thus, in accordance with Article II para. 1 of the NATO Status of Forces Agreement and Article 53(1) para. 2 of the Supplementary Agreement to the NATO Status of Forces Agreement, is to be observed by the US guest forces when using Ramstein Air Base, and confronting the resulting doubts as to the conformity of the drone missions in Yemen with international law. The Federal Government must also keep an eye on the further development of the armed conflicts with AQAP and the Yemeni branch of ISIS, which are currently still continuing in Yemen and fundamentally legitimize the exercise of military force against members of the opposing conflict parties, but which, as explained above, have finally come to a possible end. Moreover, the decision on the manner in which protection is granted is incumbent on the Federal Government within

the framework of the broad discretion to which it is entitled in this respect (cf. also immediately under point 3.).

There is no reason to fear a disproportionate impairment of the foreign and defense policy interests of the Federal Republic of Germany or of the international cooperation of states, which is also desired by the Basic Law, if the defendant assumes a duty to protect the plaintiffs determined in this way. Germany and the USA are democratic constitutional states which have committed themselves to the principles of the rule of law in a variety of ways, both politically and legally, including at the international level, in particular for the protection and safeguarding of human rights. Where there is reason to do so, pressing for compliance with international humanitarian law and respect for human rights in the use of military force corresponds to these common fundamental values.

3. The defendant's duty to protect the plaintiffs under Article 2(2) para. 1 of the Basic Law does not require a prohibition of the use of Ramstein Air Base for armed drone missions in the plaintiffs' home region, as requested by them.

Apart from the fact that the disputed drone missions are – from the outset – not generally contrary to international law, but are, in principle, permissible in the context of ongoing non-international armed conflicts in Yemen, the decision on the manner in which the Federal Government is to grant protection falls within the scope of the broad discretion to which it is entitled in this respect. Beyond the confrontation of the USA with the existing concrete doubts about its current operational practice under international law, which is, in any case, necessary, it is the responsibility of the Federal Government – also in consideration of foreign and defense policy interests of the state – to decide which concrete measures it intends to take to protect the plaintiffs from damage to life or physical integrity caused by US drone attacks contrary to international law that use Ramstein Air Base. It has a wide range of instruments at its disposal.

> Cf. the possible courses of action under consideration: BVerfG, decision of 29 October 1987 – 2 BvR 624/83 et al. –, BVerfGE 77, 170 = juris, para. 120; BVerwG, judgment of 21 June 2005 - 2 WD 12.04 –, BVerwGE 127, 302 = juris, para. 251; Deiseroth, DVBl 2017, 985 (990); see already Heinz, When does the state have the right to kill? (Policy Paper/German Institute for Human Rights),

2014, p. 12, https://www.institut-fuer-menschenrechte.de/publikationen/show/policy-paper-nr-23-wann-hat-der-staat-das-recht-zu-toeten-gezielte-toetungen-und-der-schutz-der-men/ (last accessed 29 March 2019).

4. A further-reaching claim by the plaintiffs does not arise from Article 25 of the Basic Law, according to which the general rules of international law are part of federal law (sentence one), take precedence over the federal laws, and create rights and obligations directly for the inhabitants of the federal territory (second sentence).

The plaintiffs cannot invoke Article 25 second-half of sentence 2 of the Basic Law because they live abroad and are therefore not “residents of the federal territory.” This only includes natural persons staying within the territory of the Federal Republic of Germany.

> See Federal Court (BGH) judgment of 2 November 2006 – III ZR 190/05 –, BGHZ 169, 348 = juris, para. 16; Jarass, in: Jarass/Pieroth, GG, 15th edition 2018, Art. 25 para. 16; Koenig, in: von Mangoldt/Klein/Starck, GG, vol. II, 4th edition 2000, Art. 25 para. 56; Streinz, in: Sachs (ed.), GG, 8th edition 2018, Art. 25 para. 50. Further Herdegen, in: Maunz/Dürig, GG, November 2018, Art. 25 para. 84; Tomuschat, in: Bonner Commentary on the Basic Law, 2019, Art. 25 para. 97 et seq.; Wollenschläger, in: Dreier (Eds.), GG, Volume II, 3rd edition 2015, Article 25, para. 39, left open by BVerfG, Chamber decision of 13 August 2013 – 2 BvR 2660/06 and others –, EuGRZ 2013, 563 = juris, para. 44.

To the extent that the general rules of international law, within the meaning of Article 25 para. 1 of the Basic Law, already refer to individuals at the level of international law, i.e. entitling or obliging individuals and, therefore, also creating rights and obligations within the state, irrespective of the provision in Article 25 second-half of sentence 2 of the Basic Law, which is, in any case, only declaratory in this respect,

> Cf. Federal Administrative Court (BVerwG) judgment of 5 April 2016 – 1 C 3.15 –, BVerwGE 154, 328 = juris, para. 44; Herdegen, in: Maunz/Dürig, GG, as at: November 2018, Art. 25 para. 85; Wollenschläger, in: Dreier (ed. by the Federal Court of Justice), p. 1; Wollenschläger, in: Dreier (Eds.), GG, Vol. II, 3rd edition 2015, Art. 25 para. 34; see also BVerfG, Chamber decision of 15 March 2018 – 2 BvR 1371/13 –, NVwZ 2018, 1224 = juris, para. 35 et seq.

in contrast to international humanitarian law, in particular, with regard to the elementary existence of human rights recognized under customary international law,

Cf. BVerwG, judgment of 5 April 2016 – 1 C 3.15 –, BVerwGE 154, 328 = juris, para. 44 et seq.

no claims for protection of the plaintiffs against the defendant beyond the scope of Article 2(2) para. 1 of the Basic Law result from this.

B.

Insofar as relates to the action, in which the principal motion is unfounded and, therefore, the auxiliary motion is to be decided, the auxiliary motion also remains unsuccessful. In this respect, the action is inadmissible because of the subsidiarity of the declaratory action against a general performance suit pursuant to Sec. 43(2) para. 1 of the Code of Administrative Court Procedure (VwGO). The action is also unfounded insofar as the defendant is not obliged, for the reasons set out above, to prevent the use of Ramstein Air Base for armed drone missions in the plaintiffs' home province.

The decision on costs follows from Sec. 155(1), 159 para. 1 of the Code of Administrative Court Procedure (VwGO), Sec. 100(1) of the Code of Civil Procedure (ZPO).

The decision on provisional enforceability is based on Sec. 167 of the Code of Administrative Court Procedure (VwGO), in conjunction with Sec. 708 No. 10, 711 of the Code of Civil Procedure (ZPO).

The appeal shall be admissible because of the fundamental importance of the case, based on Sec. 132(2) No. 1 of the Code of Administrative Court Procedure (VwGO).