

ENGLISH TRANSLATION OF [GERMAN POSITION PAPER](#). THE GERMAN VERSION IS AUTHORITATIVE.

POSITION PAPER

Unlimited use of armed drones in the fight against terrorism in Syria? Germany must oppose the erosion of international law

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Germany's involvement in the anti-ISIS coalition in Syria and Iraq is based on an overly broad interpretation of international law, particularly Article 51 of the UN Charter. This expansive interpretation of the right to self-defense, an exception to the prohibition of the use of force set out in Art 2(4) of the UN Charter, is one of the many ways in which states violate international law in the fight against international terrorism. The US has proposed a number of legal justifications for a more expansive position, which are now echoed by other states, often in connection with the debate on the use of armed drones. Germany has largely followed the US approach on its legal argumentation, undermining long-standing international law principles including a narrow understanding of states' right to self-defense as a way to limit the use of force and avert resort to war.

Germany does not conduct its own airstrikes in the fight against international terrorism but does support strikes through reconnaissance missions and the transfer of data. Any future decision by the German government to acquire armed drones and conduct airstrikes must be guided by a strict and narrow interpretation of international law, an interpretation which must be made public and justified in front of international bodies. Moreover, the decision on when to use armed drones should not be (only) a political decision. The German government must prioritize limiting – not engaging in – the use of force in inter-state relations. Germany's purported legal justification

for its involvement in the anti-ISIS coalition falls short of these requirements.

PROLIFERATION OF ARMED DRONES

The use of armed drones is central in the debate on the interpretation of international law, particularly on the issue of exceptions to the prohibition of the use of force in Article 2(4) of the UN Charter. The first known drone strike was a strike conducted by the US in Afghanistan in 2001. While the technology is still quite young, it has already fundamentally changed modern warfare. Since then, several states have launched their own armed drone programs.¹ However, the majority of drone strikes are still carried out by the US. Since 2009, the US drone program has seen a huge expansion; US drones are now deployed in airstrikes in Afghanistan, Iraq, Libya, Syria, Somalia, Pakistan and Yemen.² The number of victims also continues to rise. The overall number of drone attacks has increased dramatically since President Trump took office.³

GERMANY'S ROLE

The issue of drones is highly relevant for Germany. The debate around the acquisition of armed drones is far from over and will continue

¹ Overviews available from [European Council on Foreign Relations](#) and [New America](#).

² Current overview of US drone strikes available from [The Bureau of Investigative Journalism](#) and [Center for the Study of the Drone at Bard College](#).

³ M. Zenko, "The (Not-So) Peaceful Transition of Power: Trump's Drone Strikes Outpace Obama", [Council on Foreign Relations](#), 2.3.2017.

to be on the government agenda after the elections in September 2017. Furthermore, Germany directly supports US drone strikes by allowing the US to use the Ramstein airbase in Rheinland-Pfalz for drone operations. As part of a global communications network, Ramstein serves as a data relay station supporting drone strikes and has played an even greater role since an expansion of the base in 2015. The base also plays a role in the planning, monitoring and assessment of air operations.⁴

Germany is also involved in the fight against international terrorism in Syria and Iraq through the deployment of six Tornado reconnaissance airplanes, a refueling jet, a frigate, and 1,200 German soldiers as well as through the provision of satellite reconnaissance.⁵

In addition, Germany passes data to the US and other states which in turn is added to the data systems used for drone strikes.⁶

UNLAWFULNESS OF ATTACKS ON FOREIGN TERRITORY (JUS AD BELLUM)

Most drone strikes are unlawful on the basis that they are deployed on and over foreign territory. Such strikes constitute a breach of the prohibition of the use of force, a cornerstone of international law as set out in Article 2(4) of the UN Charter. The prohibition of the use of force protects the inviolability of state territory. Recognized exceptions to this rule exist, but generally do not apply to the use of armed drones. Exceptions would only apply if the affected state consented to such attacks, if the strikes were authorized by a UN Security Council resolution, or in the case of self-defense under Article 51 of the UN Charter.

⁴ German Parliament, [Plenarprotokoll 18/205](#), 30.11.2016, S. 20452-20453.

⁵ German Parliament, [Drucksachen 18/6866](#) (1.12.2015) and [18/6912](#) (2.12.2015).

⁶ German Parliament, [Drucksache 18/12850](#), "Bericht NSA-Ausschuss", 23.6.2017, pp. 1088-1089.

1. State consent

In some cases it is unclear if the affected state has given its consent. This applies for example to drone strikes in Pakistan, Yemen and Somalia. In the case of Iraq, the consent granted to the anti-ISIS coalition to use military force, not just with drones, is too imprecise.⁷ In other states where military force is exercised, such as Syria – through the anti-ISIS coalition with German involvement – there is an explicit lack of consent.⁸ Where there is an invitation from another state to conduct strikes, the limits of the consent must be clearly established; the invitation must include precise details on time frames and on which activities and states are covered by the invitation.

2. UN Security Council resolution

With regard to Syria and Iraq, there is no UN resolution that would permit the use of force. Germany has sought to rely on UN Security Council Resolution 2249⁹ in connection with its actions in Syria and Iraq.¹⁰ This, however, contains no clear authorization for the use of force. Such an authorization must be explicitly defined, especially where this concerns the violation of the sovereignty of foreign territory.¹¹

3. Self-defense

No legitimate grounds for self-defense apply in this case. Under the well-established case law

⁷ Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, [UN Doc. S/2014/691](#) (22.9.2014).

⁸ Letters from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, [UN Doc. S/2015/719](#) (21.9.2015) and "[Drone strikes against Pak sovereignty: FO](#)", The News, Pakistan, 23.6.2017.

⁹ UN Security Council, [Res. 2249\(2015\)](#), 20.11.2015

¹⁰ Letter from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council, [UN Doc. S/2015/946](#) (10.12.2015).

¹¹ D. Akande & M. Milanovic, [The Constructive Ambiguity of the Security Council's ISIS Resolution](#), EJIL: Talk! (21.11.2015); Security Council Report, Special Research Report No. 1: [Security Council Action under Chapter VII: Myths and Realities](#) (23.6.2008).

of the International Court of Justice (ICJ), the right to self-defense can only be exercised in the event of an attack by another state.¹² Terrorist attacks by non-state actors do not meet this requirement. Further, in the context of ISIS, it is not possible to attribute the acts of this non-state actor to individual states.

Even if it were possible to attribute ISIS attacks like the one in Paris to a state, the other requirements for the use of force in a case of self-defense would still not be met. ISIS attacks undertaken outside of Syria and Iraq, whether taken individually or collectively (assuming it were possible to regard them collectively), remain below the threshold set out by the ICJ for attacks triggering the right to self-defense under the UN Charter.¹³ Further, the right to self-defense permits states to take only those measures which are proportionate and necessary in response to the attack.¹⁴ The anti-ISIS coalition's operations in Iraq and Syria contravene this limitation; terrorist attacks carried out in many cases by ideology-driven individuals or small groups acting autonomously cannot be brought to an end through military force on foreign soil.

Some states maintain there is a right to self-defense under the UN Charter in the case of an imminent armed attack.¹⁵ This, however, is only possible when there is an imminent attack that cannot be avoided in any other way and when the use of force taken in self-defense is proportionate and not excessive. Not justified under this approach, however, is the use of force to respond to a vaguely defined potential future attack.

The US¹⁶, the UK¹⁷ and Australia¹⁸ now argue that the requirements to be met to justify the use of force are outdated. They argue that a lower standard is to be applied – one that includes the possibility of self-defense against non-state groups on the territory of another state, without that state's consent and even when there is no imminent threat of an attack. This position does not conform to the law and must be rejected. By putting forward this argument, these states ignore the ICJ's well-established jurisprudence and seriously undermine fundamental rights and principles of the UN Charter such as the prohibition of the use of force. This risks irreparably eroding international law norms and guarantees central to the international legal order established after the Second World War to prevent and limit the use of military force.

4. German position

The German government's broad interpretation of the UN Charter in the context of its operations in Syria and Iraq¹⁹ serves to further a spiraling of violence around the world. It also undermines long-established international law standards. If Germany were to acquire armed drones in the future, there would be a heightened risk of escalation if the weapons were deployed on the same basis as current operations in Syria and Iraq. To avoid such developments, Germany needs to explicitly acknowledge and articulate a narrow interpretation of the prohibition of the use of force and the right to self-defense under international law.

¹² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Reports 136, par. 139 (9.7.2004); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 ICJ Reports 168, paras. 146 and 147 (19.12.2005).

¹³ ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ Reports 14, par. 195 (22.6.1986).

¹⁴ *Ibid.*, par. 176; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Reports 226, par. 41 (8.6.1996); ICJ, *Armed Activities*, supra fn. 12, par. 147.

¹⁵ C. Greenwood, *Self-Defence*, Max Planck Encyclopedia of Public International Law, paras. 45-46 (2011).

¹⁶ B. Egan, U.S. Department of State, *Legal Diplomacy, and the Counter-ISIL Campaign*, Speech as prepared for delivery at the 110th Annual Meeting of the ASIL (1.4.2016).

¹⁷ *The modern law of self-defence*, Attorney General's Speech at International Institute for Strategic Studies (11.1.2017).

¹⁸ G. Brandis, Attorney-General, Australia, *The Right of Self-Defence Against Imminent Armed Attack in International Law*, EJIL: Talk! (25.5.2017).

¹⁹ See the parliamentary decision on Syria and Iraq, supra fn.5.

UNLAWFULNESS OF AIRSTRIKES IN THE FIGHT AGAINST INTERNATIONAL TERRO- RISM (HUMAN RIGHTS AND JUS IN BELLO)

The violation of the territorial sovereignty of other states will often in itself make a drone strike unlawful. Beyond this, the specific act of killing by airstrike will in many cases also be unlawful.

Under a human rights framework, killing is permitted only in a situation of self-defense or emergency and even then only when certain strict conditions are met. These conditions are not met in the case of drone attacks carried out in the name of the fight against terrorism.

1. Armed conflict

Human rights laws are not displaced in a general way through the application of international humanitarian law. International humanitarian law would only apply in certain cases where there is an ongoing armed conflict between a state and an organized armed group.²⁰ The terrorist groups in question in the drone discussion lack the requisite level of organization to be considered a party to the conflict. Also lacking is the requisite level of violence between at least two parties, given that in most of the areas where drones are deployed these airstrikes are the only acts of combat. This applies mainly to drone strikes in Pakistan, Yemen and Somalia. In Syria and Iraq, ISIS could be seen to meet the required level of organization for a party to the conflict and the group engages in military violence.

It is possible to have a situation whereby an armed conflict is ongoing between two or more parties in a given area where there is also action being undertaken against terrorist groups

without these latter groups necessarily being a party to the conflict.

2. International humanitarian law

Even in cases in which drone strikes are carried out as part of an armed conflict and international humanitarian law does apply, the strikes are still unlawful if they violate the principle of distinction between civilians and combatants or the principle of proportionality.

The technology used for targeting by drone is not capable of establishing with sufficient certainty which individual is being targeted.²¹ The technology is not capable of reliably distinguishing between civilians and combatants; drone pilots can generally only observe the outlines of the people they are looking at. These technical shortcomings are reflected in the number of victims and the high proportion of those who are entitled to protection under the law, such as civilians.²²

Beyond the technical problems, the overly broad interpretation of international law norms put forward by the US also leads to airstrikes that violate international law. In particular, the reliance on humanitarian law standards instead of the stricter human rights framework is often erroneous. The Obama administration declared that outside of “areas of active hostilities”, attacks would only be carried out where there was near certainty that no civilians would be among the victims.²³ There are a number of issues with this approach. The term “areas of active hostilities” is a new, non-legal term with no established parameters. This means that the US government can unilaterally categorize certain regions as “areas of active hostilities”, and indeed has already done so. But this cate-

²¹ CorpWatch, “[Drone, Inc. - Marketing the Illusion of Precision Killing](#)” (August 2017).

²² Various assessments indicate more than 4,000 dead, see M. Zenko, [Do Not Believe the U.S. Government's Official Numbers on Drone Strike Civilian Casualties](#), Foreign Policy (5.7.2016).

²³ White House, [Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities](#) (23.5.2013).

²⁰ [How is the Term “Armed Conflict” Defined in International Humanitarian Law?](#), International Committee of the Red Cross (ICRC) Opinion Paper (2008).

gorization does not determine whether or not from a legal perspective there is an armed conflict and whether or not the right to life may lawfully be limited.

A large part of the international fight against terrorism takes place outside armed conflicts. For such drone strikes, the human rights framework applies in full. The strikes therefore constitute criminal acts since there is no legal justification for the killings. Even in the rarer situation in which airstrikes by drone do take place in an armed conflict, not every member of a terrorist group is a legitimate target. Contrary to the position put forward by the US, people who are not involved in the fighting itself, such as drug smugglers or funders of terrorist groups, are not legitimate targets as they do not carry out combat functions comparable to those of a soldier.

Furthermore, there are precautions which must be taken when carrying out an airstrike and the military advantage that stands to be gained from the strike must not be disproportionate to the civilian harm. As such, at each deployment the military aim must be clearly identified and all possible measures must be taken to avoid civilian harm. Attacks may only be carried out in reliance on information that is accurate and verifiable.²⁴ US practice often fails to adequately meet this requirement.

UNLAWFULNESS UNDER GERMAN LAW OF MEASURES SUPPORTING DRONE STRIKES

The fundamental rights set out in Germany's Basic Law, including their protective effect, also apply in principle on foreign territory. This does not mean that the German state is obliged to actively prevent every violation of international law by other states. However, there is a serious conflict with Germany's duties to protect against violations of fundamental rights

when Germany knowingly allows its territory to be used for actions by another state that violate international law. Yet this is exactly what is happening as Germany allows the airbase at Ramstein and other areas of land to be used for US operations. There is an urgent need for effective monitoring mechanisms to review the legality of the various uses of these facilities, the enforcement of accountability mechanisms and where necessary the revocation of permissions for the operation of military bases.

In addition, Germany's involvement in operations in Syria and Iraq also represents a violation of German constitutional law.

In its statement to the UN Security Council, the German government justifies these operations by referencing the right to self-defense of France, Iraq and other states. However, the conditions for exercising France's right to self-defense are not met given the absence of an act of violence reaching the threshold of an armed attack. Furthermore, from a constitutional law viewpoint, Germany may not provide support to France as long as France fails to invoke Germany's NATO mutual-aid obligations. The EU mutual defense rules alone are not sufficient since these do not meet the strict constitutional restrictions on the existence of a system of collective security.

Iraq, on the other hand, does have the right to invite other states onto its territory (and only there) to support it in its exercise of its right to self-defense. Nevertheless, constitutional considerations mean Germany is unable to accept such an invitation. The *Bundeswehr* (Germany's armed forces) can only be deployed in the case of self-defense, collective defense (i.e. attacks on Germany or a NATO partner), or through a UN resolution authorizing force. None of these apply to Iraq. Thus German involvement in the use of force in Syria and Iraq is unconstitutional.

²⁴ UN Special Rapporteur on extrajudicial, summary or arbitrary executions, [Report to the Human Rights Council](#), UN Doc. A/HRC/14/24/Add.6 (28.5.2010), par. 83.

RECOMMENDATIONS

The German government urgently needs to change its policy on international law. Any German involvement in the fight against international terrorism must be based on established, narrowly interpreted principles of international law. Germany must change its current position and in future make public its position. Changing its position may mean that the German government must refrain from using military means and discontinue its support of military actions by other states. Germany should also refrain from acquiring armed drones until it has com-

mitted to a restrictive interpretation of international law.

On an international level, the German government must do more to ensure the adherence to and narrow interpretation of international law to prevent the further erosion of long-established international law standards. Where these standards are violated, there is a need for accountability, for redress for those affected and where appropriate for criminal proceedings against those individuals responsible.

CHRONOLOGY

End of 2001: First airstrikes by US drones in Afghanistan as part of “Operation Enduring Freedom”.

2008/2009: Massive expansion of US drone attacks, especially in Pakistan.

October 2010: Criminal investigation in Germany by the Federal Prosecutor following the first death of a German citizen in a drone strike. Proceedings closed on June 20, 2013. At least seven subsequent additional monitoring proceedings, of which only two reached the investigation stage. One of these since closed, the other is ongoing. See: Deutscher Bundestag, Drucksache [18/12850](#), “Bericht NSA-Ausschuss”, 23.6.2017, p. 1097.

October 2014: ECCHR-supported complaint by Yemeni Bin Ali Jaber family at the Administrative Court of Cologne concerning the use of US airbase Ramstein in US drone attacks.

May 2015: Hearing and ruling by the Administrative Court of Cologne concerning the Bin Ali Jaber case. The central role played by Ramstein in US drone attacks is confirmed, but the case is dismissed for other reasons. Appeal subsequently lodged. Appeal proceedings pending before the Higher Regional Court of Münster (Nordrhein-Westfalen).

September 2015: Lawsuit brought by a Somali claimant before the Administrative Court of Cologne regarding the involvement of Ramstein airbase in a drone attack in which the plaintiff’s father was killed.

September 2015: Beginning of French air strikes in Syria, two months prior to the attacks in Paris on November 13, 2015.

December 2015: German parliament decision on the deployment of *Bundeswehr* in Syria and Iraq.

December 2015: Germany notifies the UN Security Council that it is supporting the military actions of the anti-ISIS coalition in Syria.

Since 2016: *Bundeswehr* Tornado reconnaissance aircrafts flying over Syria and Iraq; intelligence sharing with anti-ISIS coalition for the preparation and carrying out of airstrikes.

April 2016: The Administrative Court of Cologne dismisses the lawsuit brought by the Somali claimant as inadmissible, an appeal is filed.

June 2016: Proceedings brought before German Constitutional Court by political party DIE LINKE, focusing on the incompatibility with international law of the German parliament’s decision on Syria and Iraq.

August 2016: US Embassy in Berlin notifies the German Foreign Ministry that control signals for US drones are sent via Ramstein airbase.

June 2017: German parliamentary budget committee does not place the decision on the procurement of armed drones on the agenda of the last session of the legislative term.

As of July 2017: At least 4,354 civilians killed by the anti-ISIS coalition in Syria and Iraq and a total of 23,345 airstrikes conducted by the anti-ISIS-coalition in Syria and Iraq. See: [Airwars.org](#).

RELEVANT PROVISIONS

Charter of the United Nations

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

(...)

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

German Basic Law (Grundgesetz)

Article 2

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

European Convention on Human Rights

Article 2

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

International Covenant on Civil and Political Rights

Article 6

(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

Article 48 Basic Rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 51 Protection of the Civilian Population

4. Indiscriminate attacks are prohibited.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(...)

b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Article 57 Precautions in Attack

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(...)

ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

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SELECTED PUBLICATIONS

(available at www.ecchr.eu)

ECCHR, Litigating Drone Strikes: Challenging the Global Network of Remote Killing (2017)

ECCHR Ramstein lawsuit with Faisal bin Ali Jaber

ECCHR expert opinion on the case of Bünjamin E. in Pakistan 2010

VIDEOS

(see

<https://www.ecchr.eu/en/videos/drones.html>)

[Clip](#) from ECCHR event in May 2017 with drone whistleblowers

[Clip](#) from ECCHR expert workshop in October 2016 on litigating drone strikes

[Faisal bin Ali Jaber](#) on the Ramstein case

[3D model](#) of 2010 drone strike on Bünjamin E., created in cooperation with Forensic Architecture

Whistleblower [Brandon Bryant](#) speaks at ECCHR about the US drone program

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