Verwaltungsgericht Köln, judgement of 27 May 2015 – 3 K 5625

Translated by Lukas Pirnay[1]

Translator's introduction

Since September 11, 2001, the U.S. has been waging a global war on terror. Most anti-terror operations have been carried out by remotely piloted unmanned aircraft, more commonly known as drones. Drones strikes have killed alleged terrorists all over Central Asia, in particular in Pakistan, Yemen and Somalia. In 2014, after their home region in Yemen had become a focal point of U.S. anti-terror operations, three Yemeni Citizens filed a lawsuit with the German Administrative Court [Verwaltungsgericht] of Cologne against the German Federal Republic. U.S. drone strikes, the applicants argued, would not be possible without Ramstein Air Base, a U.S. military base located in southwestern Germany, whose satellite relay station is relaying all communication between the drone operator and the drone itself. Alleging that U.S. drone strikes are violating international law, the applicants claimed that the German Federal Government is under a duty to intervene in the use of Ramstein Air Base. The Administrative Court of

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Cologne found the action to be admissible but dismissed it on the merits.

Judgement [2]

Operative Part

The action is dismissed.

The applicant shall bear the costs.

The right to appeal is granted.

State of Affairs

[1] The plaintiffs are Yemeni citizens living in Yemen. Plaintiff 1) is currently living in Sana'a, Plaintiffs 2) and 3) are living in Khashamer, Hadramout.

[2] Their lawsuit, filed 15 October 2014, is challenging United States of America (hereafter "U.S.") drone operations in Yemen which are carried out with the help of Ramstein Air Base.

[3] The plaintiffs state that the U.S. has been carrying out drone attacks in Yemen since 2002 as part of its 'war on terror'. Attacks have intensified since 2009. Yemen has given its consent. These drone attacks are mainly directed against the local wing of al-Qaeda 'Al-Qaeda in the Arabian Peninsula' (hereafter "AQAP"). So-called 'signature strikes' – attacks where targets are selected according to certain behavioral patterns without actually knowing their identity – are being employed since 2012. The drone crews are stationed in the U.S. The data is being transferred from the U.S. to Ramstein/Germany through optic fiber cables and then relayed to the drones using a satellite relay station. The U.S. drone pilot in the U.S. is in constant contact with his colleagues in Ramstein. Due to the curvature of

2 This translation is based on the judgement as published by German legal database juris (https://www.juris.de/). The paragraphs of this translation correspond to the paragraphs assigned to the judgement by the juris original.

the earth it would not be possible to pilot the drones directly from the U.S. without using the satellite relay station in Ramstein. This satellite relay station was built in 2010, which the U.S. has informed the defendant about.

[4] This is known to the defendant, even though it has repeatedly and publicly, in particular in response to Parliamentary Inquiries, denied to have any knowledge and referred to ongoing inquiries with the U.S. government. However, given that these events have received extensive media coverage, the defendant cannot rely on a lack of knowledge.

[5] The drone attacks are frequently carried out in Hadramout, a region where AQAP is particularly strong and where both Plaintiff 2) and 3) reside. As residents of Hadramout, the plaintiffs are in constant mortal danger of falling victim to one of the many drone attacks. The fear of these attacks is traumatizing a whole generation. On 29 August 2012, their close relatives [redacted], a policeman, and [redacted], a Muslim priest, died in one of these attacks. Just the Friday before [redacted] had denounced al-Qaeda's actions in the mosque. As a consequence, he had been approached by several al-Qaeda members on 28 August 2012 and had been demanded to attend a meeting where they would talk. While at the meeting with his cousin, a drone attacked, killing all participants with four rockets. Moreover, the plaintiffs are possible targets of so-called 'signature strikes'. Family gatherings of the tribe they belong show certain patterns of behavior that might trigger a 'signature strike'. Plaintiff 1) is at risk because he visits Hadramout on a regular basis. His family lives there.

[6] The plaintiffs allege that their action is admissible as general action [Allgemeine Leistungsklage] for an intervention of the defendant in the, what they believe to be, illegal use of Ramstein Air Base by the U.S. Their right to action [Klagebefugnis] is based on the defendant's fundamental duty to protect their right to life under Art. 2 para. 2 sentence 1 of the Basic Law for the Federal Republic of Germany (hereafter "Grundgesetz" or "GG"). Drone strikes affect them individually, presently and directly. Where the right to life is concerned, the requirements as to the intensity of the danger have to be low. Moreover, having to live in constant fear of

drone strikes has violated their right to physical integrity.

[7] The plaintiffs allege that their action is well founded in law. It is commonly accepted that the fundamental right to life imposes upon the Federal Republic of Germany (hereafter "Germany") a duty to protect. Germany must protect the fundamental rights against all infractions by third parties, including foreign States.

[8] They further allege that they can avail themselves of the fundamental right to life (Art. 2 para. 2 sentence 1 GG), which is a universal human right [Jedermannsgrundrecht]. Because fundamental rights are applicable without regards to territory (Art. 1 para. 3 GG), this is true even for foreigners living abroad. As far as one demands a territorial link, such is established by the use of Ramstein Air Base and therefore German territory for the drone war, i.e. activities which violate international law and oblige the defendant to intervene. It is commonly accepted that the German legal order also protects legal interests abroad. A duty to protect also arises from Art. 2 para. 2 GG read in conjunction with Art. 25 GG. For lack of an armed conflict international humanitarian law, which, in certain conditions, would allow for the killing of innocents, is inapplicable. The predominant majority takes the view that a conflict in the meaning of international law needs to be geographically limited. The U.S., however, believes itself to be at a global war with al-Qaeda. Moreover, U.S. enemies are not sufficiently organized to qualify as 'adversary'. It is common knowledge that al-Qaeda and its offshoot AQAP are organized in a decentral way and do not know classic chains of command. This has not been changed by recent events in Yemen. If the drone war violates international law, the defendant must not tolerate its operation from his territory. Its claim not to have secure knowledge of any of this is irrelevant. Nor is its responsibility excluded by the fact that the U.S. is acting autonomously and sovereignly. There is sufficient margin for the defendant to exercise decisive influence. It either has to make use of the legal framework underlying the stationing of troops or, as the case may be, file for a revision of the NATO Status of Forces Agreement (hereafter "SOFA"). Another option is to withdraw the frequencies

granted for the use of the satellite relay station. In any case, a political exchange with the U.S. alone is not enough to comply with its duty to protect.

[9] The plaintiffs request,

[10] to sentence the defendant to prevent the use of Ramstein Air Base, in particular of its satellite relay station, by the U.S. for the operation of unmanned aircraft, which fire rockets at individuals in an attempt to kill, on the territory of the Republic of Yemen (region Hadramout), in particular in the district of Al-Qutn, the village of Khashamer and at the places of residence of Plaintiff 2) and 3), through adequate measures, in particular through the initiation of consultations for the settlement of disputes pursuant to Arts. 35, 60 of the NATO Status of Forces Supplementary Agreement (hereafter "SOFA-SA"), the use of diplomatic means, the initiation of the dispute settlement procedure of the SOFA/SOFA-SA, the withdrawal of the frequencies granted for the radio traffic of the satellite relay station of Ramstein Air Base, the termination of the Agreement on the Use of Ramstein Air Base or the revision of the SOFA/SOFA-SA;

[11] in the alternative,

[12] declare that the omission of adequate measures, in particular of the aforementioned nature, to prevent the use of Ramstein Air Base, in particular of its satellite relay station, by the U.S. for the operation of unmanned aircraft, which fire rockets at individuals in an attempt to kill, on the territory of the Republic of Yemen (region Hadramout), in particular in the aforementioned places, is unlawful.

[13] The defendant request,

[14] to dismiss the action.

[15] It is of the opinion that the action is inadmissible. The plaintiffs do not have a legitimate interest in bringing proceedings [Rechtsssschutzbedürfnis] as they are effectively seeking diplomatic protection although the conditions under which such protection can be awarded are evidently not fulfilled. They certainly have no right to bring proceedings

pursuant to sect. 42 para. 2 Verwaltungsgerichtsordnung [Code of Administrative Court Procedure, hereafter "VwGO"] analog. It does not have secure knowledge of the use of Ramstein Air Base for drone operations. It is engaged in an intensive dialogue with the U.S. government, which has at all times assured that drones are neither commanded nor piloted from Germany and that Germany is not the point of origin of drone attacks. The U.S. has repeatedly affirmed that all actions on German soil are in accordance with existing law. Thus, there is duty to protect. This assessment would not change even if the satellite relay station were being used for the operation of drones because the legal framework underlying the stationing of troops does not provide for an instrument that could prevent its use. The station has been constructed in accordance with applicable law under the so-called Direct Procedure [Truppenbauverfahren] and without a German building permit. German supervisory powers do not cover the surveillance of communications data. The defendant is not obliged to act as a global state attorney vis-à-vis other sovereign States. In fact, the U.S. and Yemen are the only actors and therefore solely responsible. Art. 25 GG does not provide for anything else. It does not create an obligation of the defendant to behave as if he were the defender of an international legal order. In the alternative, and contrary to the opinion of the plaintiffs, the U.S. and AQAP are parties to a domestic armed conflict in Yemen, which is why the use of drones is subject to international humanitarian law. The defendant is under no international obligation to do more than what it has already done to investigate the situation. According to the Draft Articles on State Responsibility of the International Law Commission, a German international responsibility for aiding or assisting requires positive knowledge of the assisting State and purposefully directed 'aid or assistance' [zweckgerichtete

Unterstützungshandlung]. None of these requirements are fulfilled.

[16] Further details are contained in the court records.

Legal Reasoning

[17] The action is dismissed

A.

[18]The principal claim is admissible as general action.

[19] The plaintiffs have a right to bring proceedings under sect. 42 para. 2 VwGO analog. The tribunal adheres to the jurisdiction of the Bundesverwaltungsgericht [Federal Administrative Court; hereafter "BVerwG"], which has clarified that in order to exclude popular actions [Popularklagen] a general action is admissible only where it is possible that one's personal rights have been violated.

[20] see BVerwG, judgement of 28 October 1970 – 6 C 48.68 – BVerwGE 36, 192 (199); decision of 1 September 1976 – 7 B 101.75 – NJW 1977, 118; judgement of 17 January 1980 – 7 C 42.78 – BVerwGE 59, 319 (326); decision of 5 February 1992 – 7 B 15/92 – NVwZ-RR 1992, 371.

[21] The right to bring proceedings is excluded only where the rights the plaintiff is trying to rely on are obviously non-existent or if there is no way he can avail himself of these rights,

[22] see BVerwGE, judgement of 20 March 1964 – 7 C 10.61 – juris, [21]; for the general action see BVerwG, judgement of 28 October 1970 – 6 C 48/68 – BVerwGE 36, 192 (199).

[23] In the case at hand, it cannot be ruled out in every conceivable that the rights of the plaintiffs have possibly been violated.

[24] To be clear, the defendant did not actively violate the fundamental rights of the plaintiffs. The drone attacks are carried out by the U.S. with the consent of the Yemeni government. Neither the U.S. nor Yemen is bound by the fundamental rights provided for in the Grundgesetz. Even the plaintiffs do no allege that the defendant can be made directly responsible

for U.S. drone operations.

[25] However, it is possible that the defendant has violated his fundamental duty to protect to the plaintiffs, whose existence is – at least as far as the right to life is concerned – commonly accepted,

[26] see only BVerfG, judgement of 25 February 1975 – 1 BvF 1/74 a. o. – BVerfGE 39, 1 (24) und generally Calliess, in: Merten/Papier, Handbuch der Grundrechte volume II, 2006, sect. 44 [5ff.]

[27] which confers upon the individual a legally enforceable right instead of being a merely objective value of fundamental rights [objektiv-rechtliche Dimension der Grundrechte].

[28] see BVerfG, decision of 28 October 1987 – 2 BvR 624, 1080, 2029/83 – BVerfGE 77, 170 (214f.); BVerfG, decision of 30 November 1988 – 1 BvR 1301/84 – BVerfGE 79, 174 (201f.).

[29] The existence of a duty to protect is not precluded by the fact that the protection of fundamental rights is being claimed by a foreigner living abroad.

[30] The tribunal does not adhere to the opinion expressed in some legal publications that fundamental rights can only be relied upon extraterritorially only where the Germany is exercising authority over foreign territory. These opinions allege that otherwise "entirely unacceptable consequences would follow"

[31] see Nettesheim, in: Maunz/Dürig, GG volume IV, Art. 59, [230],

[32] and that it would be "absurd" if Germany were under an obligation to defend fundamental rights whenever it acts abroad,

[33] see Isensee, in Handbuch des Staatsrechts volume V, Allgemeine Grundrechtslehren, sect. 115, [90], note 201.

[34] This view is based on a theoretical model of the State and its constitution which considers fundamental rights to not equally protect every single human being, but instead to be part of a special legal rela-

tionship that is established by the constitution which allows for and limits legitimate governance. Under this concept, duties to protect are derived mainly from the State's monopoly on the use of force. If the State forbids its citizens to a great degree to use force to further their own interests, then it falls upon the State to protect them from all unlawful attacks. Thus, foreign citizens living abroad who are not affected by Germany's limitation on the use of force cannot rely on a duty to protect.

[35] Instead, the tribunal adheres to the prevailing view that fundamental rights must be observed also with regards to legitimate legal interests located abroad provided there is a sufficiently concrete connection [hinreichend konkreter Bezug] with the exercise of sovereign power,

[36] see BVerfG, judgement of 14 July 1999 – 1 BvR 2226/94, 1 BvR 2420/95, 1 BvR 2437/95 – BVerfGE 100, 313 (356); Badura, in: Merten/Papier, Handbuch der Grundrechte volume II, 2006, sect. 47, [21ff.]; Herdegen, in: Maunz/Dürig, GG I, Art. 1 para. 3, [71ff.], Jarass/Pieroth, GG, 12th edition 2012, Art. 1, [44]; Kahl, in: Bonner Kommentar zum Grundgesetz, 2014, Art. 1 para. 3, [210].

[37] According to the established case law of the Bundesverfassungsgericht [German Federal Constitutional Court; hereafter "BVerfG"], fundamental rights are no 'consideration' for the State's monopoly on the use of force, but an essential part of an objective set of values. They are binding upon all German public authorities, regardless of where the effects of their actions or omissions show. And the Grundgesetz does not contain anything which might support a restrictive interpretation. Art. 1 para. 3 GG, which establishes the duty of all State authority to respect fundamental rights, is unlimited in terms of space. Nor is Art. 2 para. 2 sentence 1 GG restricted to specific persons.

[38] The tribunal does not see why the duty of all State authority to respect fundamental rights should lead to "unacceptable consequences". Even when there is a basic duty to respect fundamental rights outside of its own territory, the required intensity of protection will, in each individual case, have to be determined with regards to the political environment and

the provisions of international law, bearing in mind that the options for action on foreign territory are often limited. Albeit those who adhere to the opposing have expressed concerns regarding the difficulties of protecting fundamental rights in an armed conflict, these problems can be solved by a consistent application of the rules of international humanitarian law at the stage of justifying an infraction of a fundamental right.

[39] The existence of an adequate territorial link, as required by the prevailing view, does not impact the right to bring proceedings. It is relevant only for the question whether the action is well-founded in law or not.

[40] Nor does the fact that there have not yet been violations of the right to life of the plaintiffs preclude their right to bring proceedings. It is in the nature of the right to life (Art. 2 para. 2 sentence 1 GG) that a violation, once committed, cannot be undone. An individual cannot be expected to wait until the damage has already occurred

[41] see BVerfG, judgement of 15 February 2006 – 1 BvR 367/05 – BVerfgE 115, 118 (137).

[42] Insofar as the admissibility of the action is concerned, it is sufficient to show that there is reasonable probability of a violation. Given the importance of the right to life, such must not be subjected to stringent requirements.

[43] In the light of the foregoing, a violation is reasonably probable. Plaintiff 2) and 3) are living in the region of Hadramout, Yemen, whereas Plaintiff 1) is visiting on a regular basis. This region is one of the focal points of U.S. drone operations. English media in particular has documented countless attacks. According to the plaintiffs, it was in this region that a drone attack killed two of their relatives in August 2012 while Plaintiff 2) was residing in direct proximity to the explosions. Thus, it cannot be ruled out that there will be other drone attacks in immediate proximity to the plaintiffs.

[44] The right to bring proceedings is not precluded by the defendant's allegation that drone strikes have stopped since the Houthi-rebels

took control over most of the country. According to reports, there have been various U.S. drone strikes in the region of Hadramout in April 2015. The ongoing precarious situation in Yemen does not allow for a safe prediction that there will be no more U.S. drone operations in the future which could endanger the life of the plaintiffs.

[45] Lastly, the action is not framed in terms so vague as to prejudice its admissibility. The plaintiffs have substantiated their claim in the oral hearing in a way that should meet the respective concerns of the defendant.

[46] Besides, although a general action normally requires a claim that is enforceable by law, in those cases where – like the one at hand – a violation of a fundamental duty to protect is alleged the plaintiffs can only file for action in general anyway. The State enjoys a considerable margin of appreciation when fulfilling its duty. The plaintiffs cannot claim the performance of a specific action in particular.

B.

[47] The principal claim of the action is unfounded in law.

[48] The plaintiffs cannot claim that the defendant must prevent the use of Ramstein Air Base, in particular of its satellite relay station, by the U.S. for the operation of unmanned aircraft, which fire rockets at individuals in an attempt to kill, on the territory of the Republic of Yemen (region Hadramout).

[49] Even if one were to assume that Ramstein Air Base is used for the operation of U.S. drones in Yemen (see I.), the requirements of the State's extraterritorial duty to protect (see II.) have been met by the defendant (see III.).

[50] I. The tribunal assumes in favor of the plaintiffs that there is an adequate territorial link which may give rise to the State's duty to protect. The plaintiffs allege that such link results from German authorization and toleration of the use of Ramstein Air Base by U.S. forces on German territory. The defendant, they continue, is sufficiently aware of this. Their alle-

gations are based on numerous media reports and the testimony of an U.S. soldier formerly involved in the drone operations. These coincide in that the drone pilots are located in the U.S. and that the satellite relay station is an integral part of the drone war. Additional support is drawn from the way the U.S. notified the defendant of its construction. This has not been substantially disputed by the defendant, who has simply remarked that it "does not have secure knowledge" of the use of Ramstein Air Base. U.S. government official statements quoted by the defendant in response to respective inquiries only preclude that drones are controlled or piloted directly from Germany. Further inquiries with the U.S. have been to no avail.

[51] However, even if one were to assume that the plaintiffs can invoke a fundamental duty to act, the defendant is under no concrete obligation to perform any of the actions mentioned in the principal claim. The defendant has already taken actions which meet the minimal threshold for complying with its fundamental duty to act.

[52] II. In determining the scope of judicial review of the fundamental duty to act, the tribunal is guided by the following considerations:

[53] 1. Fundamental duties to act generally do not amount to an obligation of specific performance. The protection of a certain right is set out by the constitution as a goal, but it does not specify how to achieve it in each individual case.

[54] see BVerfG, judgement of 28 May 1993 – 2 BvF 2/90 et. al. – BVerfGE 88, 203 (254).

[55] The competent public authority enjoys a great margin of appreciation when determining how to achieve that goal. It is not within the power of the judiciary to substitute the authority's decision of how to best comply with the duty to protect with its own. This limitation on judicial review is owed to the division of power. The doctrine of the duty to act – another facet of fundamental rights – is in itself an extension of judicial review of legislative or executive actions and omissions. If courts were to replace the acting authority's assessment on the expediency of a measu-

re with their own, the judicial review of legality which is provided for by the Grundgesetz, would be turned into a complete review of expediency. It would be for the judiciary to make the final decision. This is irreconcilable with the principle of separation of powers.

[56] The BVerfG has held in continuing legal practice:

[57] "The legislator and the executive power enjoy a wide margin of appreciation when fulfilling their duties to protect, leaving sufficient room to consider the conflicting public and private interests. This wide margin of appreciation is subject only to limited judicial review, whose extent will have to depend on the particularities of the respective area of expertise, whether or not the situation can be assessed with reasonable certainty and with view to the importance of the legal interests at hand (see BVerfGE 50, 290 (332f.)). Thus, the right of the individual arising from a duty to protect is limited. He can only claim that the public authority adopts measures for the protection of the fundamental right which are neither wholly inadequate nor completely insufficient. Only under very special circumstances will there be only a single way to comply with one's duty to act."

[58] See BVerfG, decision of 28 October 1987 – 2 BvR 624, 1080, 2029/83 – BVerfGE 77, 170 (214f.).

[59] Later, it refined its jurisprudence towards a prohibition of insufficient actions [Untermaßverbot]:

[60] "It is for the legislator to define the nature and extent of the protection of the individual. The protection of a certain right is set out by the constitution as a goal, but it does not specify how to achieve it in each individual case. However, the legislator must observe the prohibition of insufficient actions (for the terminology see Isensee in: Handbuch des Staatsrechts, volume V, 1992, sect 111, [165f.]); to that extent, it is subject to constitutional review. Taking into account the conflicting legal interests, the protection must be adequate; it must be effective as such. The measures adopted by the legislator must rest on a carefully established factual basis and reasonable assessments and provide for an adequate and effec-

tive protection."

[61] See BVerfG, judgement of 28 May 1993 – 2 BvF 2/90 and others – BVerfGE 88, 203 (254).

[62] Later, it combined both approaches into a single one:

[63] "The State has to adopt measures of both statutory and factual nature which, taking into account the conflicting legal interests, provide for an adequate and effective protection (prohibition of insufficient actions; see BVerfGE 88, 203 <254>). In the fulfillment of his duty the legislator enjoys a wide margin of appreciation, leaving sufficient room to consider conflicting public and private interests. The BVerfG can find a violation of the duty to protect only when the public authorities have remained completely inactive or when the measures adopted gave proved to be evidently inadequate (BVerfGE 56, 54 <80 f.>; 77, 170 <214 f.>; 79, 174 <201 f.>)."

[64] See BVerfGE, decision of the tribunal of 29 November 1995 – 1 BvR 2203/95 – NJW 1996, 651.

[65] The tribunal interprets this jurisprudence in the sense that public authorities enjoy a considerable margin of appreciation when deciding how to fulfill their duty to protect and that this decision is subject only to basic judicial review [Evidenzkontrolle]. To be considered wholly inadequate or completely insufficient, the measure of choice must either be not in the slightest adequate to achieve the desired objective or have, compared to all other measures available and considering the interests they affect, a significantly lower chance of protecting the fundamental right.

[66] 2. Moreover, it must be taken into account that the – already considerable – margin of appreciation of public authorities is even greater when, like in the case at hand, the protection of fundamental rights has to be afforded abroad. As a matter of principle, the executive enjoys great freedom when dealing with foreign matters, given that options for action are often significantly limited. Provided there is any possibility for influence at all, an individual can only claim that the public authorities exercise

their influence duly within their competence and political responsibilities,

[67] see, for example, BVerfG, decision of 16 December 1980 – 2 BvR 419/80 – BVerfGE 55, 349 (360); BVerfG, decision of 16 December 1983 – 2 BvR 1160/83 a.o. – BVerfGE 66, 39 (60 ff.); BVerfG, judgement of 10 January 1995 – 1 BvF 1/90 a.o. – BVerfGE 92, 26 (47).

[68] Foreign matters normally require that a wide array of factors is considered: the relationships with other States, the obligations under international law, conflicting foreign interests, etc. This is not only true for contractual negotiations, where the contractual consensus is limited to what is politically achievable, but for all foreign actions in general. After all, foreign affairs and events are not exclusively shaped by Germany,

[69] see BVerfG, decision of 4 September 2008 – 2 BvR 1720/03 – BV erfGK 14, 192.

[70] German fundamental rights have binding force only where Germany is able to exert an influence provided for by international law or where such influence has actually been exercised,

[71] see Herdegen, in Maunz/Dürig, Grundgesetz I, Art. 1 para. 3, [72].

[72] Moreover, foreigners living abroad can only rely on the State's fundamental and general duty to protect. They cannot invoke the its constitutional duty to grant diplomatic protection to those of its citizens who live abroad. The level of protection that must be afforded to foreigners who are not connected to Germany in any way whatsoever is thus even more limited, something which public authorities may take into account when deciding how to exercise their wide margin of appreciation,

[73] see Kleinlein/Rabenschlag, Ausslandsschutz und Staatsangehörigkeit, 67 ZaöRV (2007), 1277ff.

[74] The mere fact that the adopted measures failed to achieve the desired aim does not automatically confer upon the individual a right to measures that go beyond what has already been done. It is for the public

authorities to assess and evaluate whether or not they deem other measures to be appropriate and adequate, always considering the fundamental right at stake and other public interests,

[75] see BVerfG, decision of 16 December 1980 – 2 BvR 419/80 – BVerfGE 55, 349 (366).

[76] Lastly, national courts cannot perform full judicial review of the assessments of public authorities in the area of international law. To be clear, it is not generally beyond the power of German courts to review decisions of national authorities made in the area of foreign affairs,

[77] see BVerfG, decision of 13 August 2013 – 2 BvR 2660/06 – juris, [55].

[78] However, regarding assessments of the defendant in the area of international law which constitute the underlying rationale for its attitude towards another State, judicial review is limited. A court may only examine whether the legal stance adopted by the defendant is justifiable or not,

[79] see BVerfG, decision of 16 December 1980 – 2 BvR 419/80 – BVerfGE 55, 349 (367 f.).

[80] This is owed to the fact that in case of dispute the international legal order allows only rudimentarily for the determination of the correct interpretation of international law. Thus, the legal stance taken by public governments is of particular importance. This would be thwarted if actions taken in foreign affairs were subject to full judicial review. Where an individual invokes the State's duty to protect, alleging that another State is violating international law, a court may only review whether the legal stance adopted by the defendant is justifiable or not. If, based on the known facts of the case and in a way legally justifiable, the defendant concludes that there is no violation of international law, the protection of the individual can be limited to attempts to exert consensual influence.

[81] III. Taking into account the limitations on judicial review, the tribunal has examined whether the defendant, acting on the grounds of a

legally justifiable assessment (1.), has remained completely inactive (2.) or whether the measures adopted are evidently inadequate (3.). It cannot find the defendant to be responsible in terms of the action.

[82] 1. This conclusion is supported by the defendant's arguments, who has denied to be able to reach a final conclusion on the international legality of U.S. drone operations in Yemen. Neither does it have enough information nor can it be obtained. The defendant has argued that a violation of international humanitarian law – which it finds to be applicable – is not sufficiently supported by the evidence available. In accordance with aforementioned standard of review, the tribunal considers this assessment of the situation in Yemen to be neither legally unjustifiable nor arbitrary. At the time of the oral hearing, it appears highly likely that in Yemen there is a non-international armed conflict within the meaning of Art. 3 of the Geneva Convention and the Protocol Additional of 8 June 1977 to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). At the time of the decision, troops of the Saudi-Arabian led coalition fight alongside the elected government against the so-called Houthi rebels, who have brought large parts of the country under their control, and AQAP, which is arguably ruling substantial parts of the region Hadramout. There is much to suggest that AQAP is sufficiently organized in order to be a party to a non-international armed conflict within the meaning of international humanitarian law. Not only does it possess significant military force and is able to carry out targeted military operations, but arguably also exercises territorial control over the province of Hadramout. To argue, like the defendant does, that U.S. drone operations against AQAP are helping the Yemeni government, seems justifiable. They are carried out with the consent of and in coordination with the Yemeni government against a common enemy. Whether or not the U.S. is at global war with terror does not prejudice the applicability of international humanitarian law. The applicability of the Geneva Conventions does not depend on the subjective intentions of the actors.

[83] The view adopted the defendant – that international humani-

tarian law is applicable and that U.S. drone operations in Yemen currently do not violate it – is legally justifiable and thus not subject to judicial review. Although drone strikes sometimes cause civilian casualties, this does not automatically result in a violation of international humanitarian law. International humanitarian law is violated only in case of indiscriminate attacks or where an attack on a legitimate military target causes disproportional civilian deaths. In May 2003, the President of the U.S. explained that drone strikes would only be carried out when there is "near certainty" that no civilians are harmed. This approach would be in accordance with the standards of international humanitarian law. The defendant trusts that the U.S. is generally adhering to these standards. In fact, there is no way for the defendant to review the practice of U.S. drone strikes in any particular case, given that the targeting process including the criteria for choosing an objective is top secret. To be clear, some human rights organizations have expressed doubts as to whether the U.S. is consistently following these guidelines,

[84] see, e.g., Open Society Justice Initiative, Death by Drone, Civilian Harm Caused by U.S. Targeted Killings in Yemen, April 2015.

[85] Even these reports, however, have cast doubt only on the legality of a few individual operations, which, for the most part, were carried out before the U.S. President gave his speech in May 2013. Where later drone strikes are concerned, not even the authors of this report dispute or deny the possibility that these attacks have killed AQAP militants. One is to assume that these had been legitimate military targets within the meaning of international humanitarian law which the U.S. targeted on purpose. And although the attacks have also caused civilian casualties, this does not automatically result in a violation of international law.

[86] Nothing different follows from Resolution 2051 (2015) of the Parliamentary Assembly of the Council of Europe, which the plaintiffs have quoted. Neither does it condemn drone strikes in general nor does it discuss the Yemeni situation in particular.

[87] 2. Based on its legal opinion, which, the tribunal reiterates, is

not subject to judicial review, the defendant has not remained completely inactive. It has reminded the U.S in bilateral consultations and numerous inquiries that Ramstein Air Base is to be used only in a way that is consistent with German and international law. The U.S. Federal Government has promised to do so.

[88] 3. The action taken by the defendant is not evidently inadequate. Political consultations with foreign governments is a classic instrument to advance one's foreign interests. While they certainly are not binding upon foreign states, given that international law is based on the conception of formal equality of States, it is not necessary that they are. It is obvious that the defendant is free to pay particular attention to the special importance of his relationship with the U.S. when deciding on how to comply with its duty to protect.

[89] Nor does an evidential inadequacy of political consultations result from a comparison with the actions advanced by the plaintiffs.

[90] In particular, the legal framework underlying the stationing of troops does not allow for an unlimited review of the legality of the actions of foreign troops in Germany. Although foreign troops stationed in Germany must respect German law (Art. II SOFA), there is no general provision that would allow for administrative intervention. Arts. 48, 53 and 53a of the SOFA-SA provide only for a very limited influence of German authorities on how a site is used by foreign troops. To intervene specifically only in that part of the use of the of the satellite relay station which is supposedly illegal is impossible. The same is true regarding the plaintiff's claim to withdraw the frequencies granted for radio traffic. Regardless of whether Art. 60 para. 5 SOFA-SA is applicable to the case at hand or not, it does not allow for an intervention which is directed only at those drone operations that violate international law. And it is immaterial whether or not Art. II SOFA confers upon the plaintiffs an individual right, a question that is disputed among the parties. Art. II SOFA only creates obligations for the dispatching State, but does not confer rights upon the receiving State.

[91] The plaintiffs cannot claim that the defendant must use its in-

fluence on other States party to the SOFA in order to achieve its revision pursuant to Art. XVII SOFA. Notwithstanding the fact that this undertaking would have little chance of success, the right to initiate proceedings lies with the defendant only.

[92] Most of all, the duty to protect does not confer upon the plaintiffs a right to claim the termination of the either the Convention on the Presence of Foreign Forces in the Federal Republic of Germany of 23 October 1954 (Federal Law Gazette [BGBl.] 1955 II, 253), which allows for the stationing of foreign troops in Germany, or of the SOFA pursuant to Art. XIX SOFA. The defendant can and must consider that this termination would not only have serious effects on the use of the satellite relay station. It would also inevitably and seriously affect other legitimate and vital German interests, in particular where its cooperation in defense and foreign policy matters are concerned. Needless to say, this cannot be claimed by the plaintiffs.

[93] Lastly, according to press articles, the U.S. is planning to build a second satellite relay station on an Air Base in Italy,

[94] see Der Spiegel of 18 April 2015.

[95] The purpose of this second satellite relay station is to enable the U.S. to continue its drone war without Ramstein Air Base. Thus, even if the defendant were to terminate the SOFA, the termination becoming effective one year after the U.S. has received the notification (Art. XIX para. 3 sentence 1 SOFA), this would only serve to eliminate the territorial link which is a precondition for the existence of the duty to protect. Effective protection of the fundamental right, however, would not be provided. Because an extraterritorial duty does not require that the territorial link is eliminated, but that the fundamental right itself is protected, to terminate the SOFA would

be inadequate to permanently achieve the desired goal.

C.

[96] The alternative claim of the action is inadmissible.

[97] Regardless of whether there is a legal relationship that is ascertainable by law [feststellbares Rechtsverhältnis], under Art. 43 para. 2 VwGO the declaratory action [Feststellungsklage] is subsidiary to the general action and therefore inadmissible. The fact that the plaintiffs do not have a right to action within the meaning of the general action does make the declaratory action admissible. Besides, the declaratory action would be just as unfounded in law as the general action.

[98] The ruling as to costs is based on sect. 154 para. 1 VwGO.

[99] Given the fundamental significance of the legal matter, the right to appeal is granted (sect. 124a para. 1 and sect. 124 para. 2 sentence 3 VwGO).