Can German Courts Effectively Enforce International Legal Limits on US Drone Strikes in Yemen?

Thomas Giegerich*

Inhalt

* Prof. iur. Dr. Thomas Giegerich LL.M. (Virginia), Chair for European Law, Public International Law and Public Law, Law Faculty of Saarland University and Jean–Monnet Chair for European Integration, Antidiscrimination, Human Rights and Diversity, Co-Director of the Europa-Institut (Law Department).

A. Introduction: The German Link in the Chain of Death

What business is it of the German administrative courts when the US carries out drone strikes to kill suspected terrorists of Al Qaida in the Arabian Peninsula (AQAB) or the Islamic State (IS) in Yemen? It concerns them very much because the US uses Ramstein Air Base in the Palatinate region of Germany with the permission of the German Federal Government as a kind of conduit for those strikes. This was brought home to the German and international audience in March 2019 by a judgment of the Münster Administrative Court of Appeal which condemned the German Federal Government to protect potential Yemeni civilian victims from violations of their rights under international law.[1] The Münster court had local jurisdiction in that case because the defendant Federal Republic of Germany is represented by the Federal Ministry of Defence, given the context of the case. The primary seat of that ministry is still Bonn, so that the Cologne Administrative Court constitutes the competent first-instance court and the Administrative Court of Appeal of North Rhine-Westphalia in Münster the second-instance court.

B. Legal and Factual Background of Targeted Killings by Drones in the US "War on Terror"

I. US Claims regarding Jus ad Bellum, Jus in Bello and International Human Rights

Since the horrifying international terrorist attacks of September 11, 2001, the US considers itself and its allies to be engaged in a global "war" (*i.e.* a single non-international armed conflict with global dimensions) against international terrorists, such as members of Al Qaida, Islamic State, their sub-groups and associated forces. It claims a right of self-defence against those international terrorists as non-state actors, including preventive and preemptive strikes in the absence of an imminent threat, also in the form of "targeted killing". It moreover claims that it can use military force against them

1 Oberverwaltungsgericht (OVG) Nordrhein-Westfalen, judgment of 19 March 2019 (4 A 1361/15), BeckRS 2019, 5666 = DVBl. 2019, 1146 ff. (not final). See *Bothe*, Verfassungsblog, 21/03/2019; *Sauer*, Verfassungsblog, 22/03/2019; *Beinlich*, EJIL Talk!, 08/04/2019; *Dolgowski*, Völkerrechtblog, 15/05/2019, See also: OVG Nordrhein-Westfalen, judgment of 19 March 2019 (4 A 1072/16), DVBl. 2019, 1138 ff.: Action against Germany with regard to US drone strikes in Somalia via Ramstein Air Base dismissed as inadmissible.

wherever they are (*e.g.* in Yemen), if the territorial sovereign either consents or is unwilling or unable to suppress their attacks by law enforcement or other action.

Not all of these US claims have been generally accepted by the international community of States. They can therefore not be considered as definitely forming part of UN law or contemporary customary international law. Thus, the existence of a global war on terror permitting the use of extrajudicial killing under international humanitarian law (IHL) outside clearly defined theatres of war is hotly disputed.[2] The same holds true for the permissibility of preemptive strikes far in advance of any concrete armed attack.[3] According to the famous Caroline Case of 1842/3, the right of anticipatory self-defence is much more limited to instances of 'necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation' (Webster formula).[4]

A right of self-defence against non-state actors capable of launching "armed attacks" on a scale that would undoubtedly meet the standards of Art. 51 UN Charter if attributable to a State is increasingly recognised, but not yet definitely established.[5] In Resolution 1368 that was passed one day after the attacks of September 11, 2001, the UN Security Council invoked the right of self-defence, but only in paragraph 3 of the preamble and not in the operative part of the resolution.[6] The International Court of Justice has so far taken a more cautious approach: In the advisory opinion on "The Legal Consequences of the Construction of a Wall in the Occupied Pales-

2 The International Committee of the Red Cross is opposed to such globalisation: *ICRC*, Report: International humanitarian law and the challenges of contemporary armed conflicts, October 2015, p. 18 f., available at: https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts (02/10/2019). See also *Goodman*, Just Security, 04/10/2017, available at: https://www.justsecurity.org/45613/laws-war-apply-drone-strikes-areas-active-hostilities-a-memo-human-rights-community/ (02/10/2019); *Milanovic*, EJIL:Talk!, 05/10/2017, available at: https://www.ejiltalk.org/on-whether-ihl-applies-to-drone-strikes-outside-areas-of-active-hostilities-a-response-to-ryan-goodman/ (02/10/2019).

3 *Greenwood*, in: Max Planck Encyclopedia, paras 41 ff.

4 *Greenwood*, in: Max Planck Encyclopedia, para. 5.

5 See *Heyns/Akande/Hill-Cawthorne/Chengeta*, ICLQ 2016/65, pp. 791 ff. and the collection of essays on Self-Defence Against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War, ZaöRV 2017/77, pp. 1 ff. See also FCC, Order of 17 Sept. 2019, 2 be 2/16, margin notes 50 f., available at: http:// www.bverfg.de/e/es20190917_2bve000216.html (02/10/2019).

6 See also UNSC Resolution 1373 (2001) of 28 September 2001, preambular paragraph 4. On 12 September 2001, the North Atlantic Council for the first time ever stated "*that if it is determined that [yesterday's] attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.*", available at: https://www.nato.int/docu/pr/2001/p01-124e.htm (02/10/2019). The Ministers of Foreign Affairs of the OAS Member States on 21 September 2001 identified the terrorist attacks against the US as attacks against all American States in the sense of the Inter-American Treaty of Reciprocal Assistance, available at: https://avalon.law.yale.edu/sept11/osce_001.asp (02/10/2019). See also the unanimous statement of the OSCE Permanent Council of 11 October 2001 which referred to Art. 51 UN Charter to support US actions against international terrorism, available at: https://avalon.law.yale.edu/sept11/osce_001.asp (02/10/2019).

tinian Territory", the ICJ denied Israel's right of self-defence against terrorist attacks by non-state actors originating in the Palestinian territory under Israeli occupation.[7] In the "Case Concerning Armed Activities on the Territory of the Congo", the ICJ found "that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces."[8]

Assuming that there is a right of self-defence against non-state actors, defensive military strikes against them will necessarily also affect the State on whose territory they are. Unless their armed attack is attributable to that State[9] or the latter consents, the question arises of how to justify the counter-strike against that State. The "unwilling or unable"-standard[10] suggested by the US for that purpose has not yet been generally accepted.[11] There are also issues concerning the legality specifically of targeted killing under international law, in particular, international humanitarian law (IHL) and international human rights law (IHRL).[12]

The US originally also claimed that international terrorists were "unlawful enemy combatants" beyond the protection of IHL who could be held in custody for an indefinite period without any *habeas corpus* protection, but the US Supreme Court held against this and confirmed that the Geneva Conventions were applicable and in particular that all prisoners in the war on terror were under the protection of common Art. 3.[13] As a matter of fact, nobody is beyond the protection of IHL, either as a combatant or as a civilian; *tertium non datur* – otherwise the protective shield of IHL would become porous and ineffective. Yet, IHL is unclear as to the right of States to detain irregular fighters in a non-international armed conflict and the permissible duration of such detention.[14] The US, in any event, tries to keep IHL protection of suspected international terrorists at a minimum.

The US still asserts that its obligations under IHRL do not apply extraterritorially, specifically invoking the wording of Art. 2 (1) of the International Covenant on Civil and Political Rights (ICCPR) which requires each State Party "to respect and to ensure

7 I.C.J. Reports 2004, p. 136, para. 139. But see the separate opinion of Judge Higgins, para. 33.

8 I.C.J. Reports 2005, p. 168, para. 147.

9 Attribution could be based on Art. 8 ("conduct directed or controlled by a State") of the Articles on State Responsibility for Internationally Wrongful Acts, UNGA Resolution 56/83 (2001), Annex.

10 That standard is codified in Art. 17 of the Rome Statute of the International Criminal Court of 17 July 1998 (UNTS, vol. 2187, p. 3) where it serves another purpose – that of ensuring the complementarity of the ICC to national criminal jurisdiction unless the State which has jurisdiction is unwilling or unable to exercise it effectively.

11 *Sjöstedt*, ZaöRV 2017/77, p. 39.

12 See Legality of Targeted Killing Program under International Law, available at: https://www.lawfareblog.com/legality-targeted-killing-program-under-international-law (02/10/2019).

13 *Hamdan v. Rumsfeld*, 548 US 557 (2006). See below fn. 48.

14 See *Serdar Mohammed v. Ministry of Defence*, [2017] UKSC 2.

to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant".[15] In accordance with the prevailing opinion worldwide, including the ICJ, this claim has been rejected by the Human Rights Committee (HRC), the treaty body of the ICCPR.[16] The position of the HRC is in accordance with the case law of the European Court of Human Rights that the Convention rights apply extraterritorially where a Convention State exercises jurisdiction over foreign territory or persons situated there.[17]

While foreigners outside US territory cannot derive any rights from the US Constitution,[18] the US Supreme Court has confirmed that the Constitution applies to the detention facilities in the US Naval Base in Guantánamo, Cuba where the US exercises complete jurisdiction and control, although it formally remains under Cuban sovereignty.[19] This is cold comfort, however, because the federal courts in the US are reluctant to interfere with executive decisions pertaining to foreign relations and national security.

II. US Drone Strikes in Yemen Conducted via Ramstein Air Base

According to the findings of the Münster Administrative Court of Appeal,[20] the US has since 2009 increasingly used remote-controlled unmanned aerial vehicles (UAVs or drones) equipped with bombs or missiles to eliminate alleged senior leaders of international terrorist organisations by way of "precision strikes" – with hundreds if not thousands of persons killed, including many innocent bystanders. Since 2012, the US allegedly also conducts "signature strikes" against persons identified only by suspicious behaviour patterns or certain external circumstances. In 2018, there were 36 attacks against AQAP and IS in Yemen, most of them also claiming an unknown number of clearly civilian casualties. Specifically, on 29 August 2012, a drone strike in a Yemeni village killed five persons, at least two of them clearly civilians unaffiliated with terrorist organisations and the other three no more than subordinate AQAP members (if at all).

The UAVs used for targeted killings in Yemen are controlled by US personnel located in the US, but because of the earth curvature drone operators there are dependent on the satellite relay station located at the US Air Base at Ramstein (Germany) to conduct their strikes.

15 Of 16 December 1966, UNTS vol. 999, p. 171.
16 General Comment No. 31 (80) of 29 March 2004, para. 10; Concluding observations on the fourth periodic report of the United States of America (CCPR/C/USA/CO/4 – 23 April 2014), para. 4. See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, paras 107 ff.; *Nowak*, CCPR Commentary, 2nd ed. 2005, Art. 2, paras 27 ff.
17 ECtHR, App. No. 29750/09, *Hassan v. UK*, paras 74 ff.
18 *Johnson v. Eisentrager*, 339 US 763 (1950).
19 *Rasul v. Bush*, 542 US 466 (2004); *Boumediene v. Bush*, 553 US 723 (2008).
20 See above OVG Nordrhein-Westfalen, (fn. 1), paras 133 ff. See also *Becker*, DVBl. 2018, p. 619.

C. No Judicial Protection of Potential Victims by US Federal Courts

The estates of the two Yemeni civilian victims of US drone strikes brought suit in the US District Court for the District of Columbia seeking a declaration that (1) the US violated the Torture Victim Protection Act of 1991[21] by carrying out extra-judicial killings and (2) wrongfully caused the two men's deaths in violation of customary international law.[22] In a single-judge memorandum opinion, the Court dismissed the action for lack of subject matter jurisdiction because the claims presented a non-justiciable political question: There was a lack of judicially manageable standards to determine whether the missile strike, based on a decision in the fields of foreign policy and national security committed to the political branches of government, was justified. That was a mixed question of fact and law on which the executive (*i.e.,* the President) could not be second-guessed by the judiciary.[23]

The political question doctrine is "primarily a function of the separation of powers", but also takes account of the susceptibility to judicial handling of certain issues.[24] The opinion of the District Court correctly assumes that the executive has a wide margin of appreciation of facts as well as international legal norms. In both regards, it is important that the US speaks with one voice to the international community. But it seems mistaken in concluding that the judiciary has no role at all to play, not even in the sense of a deferential plausibility test. Such a far-reaching decision avoidance strategy is incompatible with the judicial function in a system of checks and balances, as it was most famously paraphrased by Chief Justice John Marshall in the seminal US Supreme Court case Marbury v. Madison: "It is emphatically the province and duty of the judicial department to say what the law is."[25] It is also incompatible with the IHRL obligation to provide an effective remedy to victims of human rights violations.[26]

Perhaps US federal courts are reluctant to get involved in the foreign policy and national security decision-making because they know that they would be unable to enforce their decisions against a defiant executive, at least unless they could muster the support of a clear majority of the voters in which case executive defiance would be politically risky. There are indeed examples both of executive defiance that left

21 Publ. Law 102-256, 106 Stat. 73.

22 The second claim falls under the Alien Tort Statute (28 US Code § 1350): "*The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States*".

23 *Ahmed Salim Bin Ali Jaber v. USA*, D.D.C. Feb. 22, 2016, available at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2015cv 0840-18 (02/10/2019).

24 *Baker v. Carr*, 369 US 186, 210-11 (1962).

25 5 US 137, 177 (1803).

26 Art. 2(3) lit. a ICCPR. See *Gervasoni*, in: Carpanelli/Lazzerini (eds.), pp. 327 ff.

federal court decisions ineffective,[27] as well as executive acceptance and determined enforcement of controversial judicial decisions.[28] The US Supreme Court decisions on issues arising from the "war on terror" were all accepted by the executive but they concerned general questions and did not relate to individual targeting decisions.[29]

D. Significance of International Law within the German Constitutional System

Before analysing the aforementioned judgment of the Münster Administrative Court of Appeal that is strikingly different from the decision of the US District Court, it is necessary to sketch the significance of public international law within the German Constitutional System.

The German Basic Law of 1949 is distinctly sympathetic to international law, in reaction to the grave violations committed during the Nazi period and World War II. According to Art. 25 BL, the general rules of international law (i.e. primarily the rules of global customary international law) are an integral part of federal law, take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory. Art. 59 (2) sentence 1 BL sets forth that treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. Such treaties then apply within Germany with the force and rank of a federal statute, and their provisions are self-executing when concrete enough to enable judicial decisions of individual cases.

From these and other articles of the BL, the Federal Constitutional Court (FCC) has derived a general constitutional principle of friendly openness towards international law (*Völkerrechtsfreundlichkeit*) obliging the German authorities to respect international law quite generally. But that obligation directly arising from the constitution does not extend to just any provision of international law, but only to those covered by the BL's concept of openness, as it is laid down in Art. 23 – 26, Art. 1 (2) and Art. 16 (2) sentence 2 BL.[30] While this caveat by the FCC is murky, the constitution-based obligation to comply with international law seems to extend to the im-

27 The most important historical example is the Cherokee nation case in which a US Supreme Court decision (*Worcester v. Georgia*, 31 US 515 [1832]) remained ineffective for lack of enforcement: When the US Supreme Court had invalidated laws of the State of Georgia purporting to regulate Native American affairs that was an exclusive federal power, then-President Andrew Jackson allegedly only remarked: "*John Marshall has made his decision; now let him enforce it.*" (See *Miles*, Journal of Southern History 519/39 [1973]).

28 *Cooper v. Aaron*, 358 US 158 (1958) concerning school desegregation; *US v. Nixon*, 418 US 683 (1974) concerning handover of the Watergate tapes.

29 See above fn. 13, 19.

30 FCC, Order of 26 Oct. 2004 (2 BvR 955/00 etc.), BVerfGE 112, 1 (25 f.).

portant rules of international law outlawing acts of aggression[31] and protecting fundamental human rights.[32]

According to the FCC case law, the obligation to respect international law has three distinct elements:[33] (1) German authorities have to observe international legal norms binding on Germany and avoid violations where possible (obligation to comply).[34] (2) The German legislature has to ensure that violations of international law by German governmental bodies can be corrected (obligation to correct). (3) German authorities can on certain conditions even be obliged to implement international law within German jurisdiction, if it is violated by other States (obligation to implement). This third element prevents the German authorities from giving effect in Germany to foreign sovereign acts contrary to international law or "from participating decisively in an act of non-German public authorities which violates the general rules of international law."[35] However, the FCC also recognised that the obligation to implement can 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 such a case, the obligation to implement needs to be balanced with Germany's other international obligations. It is that obligation to implement which comes into play in the drone case of the Münster Administrative Court of Appeal.

E. Analysis of the Judgment of the Münster Administrative Court of Appeal against the Federal Republic of Germany of 19 March 2019

I. Facts of the Case and Holding of the Court

The plaintiffs are close relatives of the two civilians killed by the aforementioned US drone strike of 29 August 2012. Several of them live in a Yemeni province where AQAP is strong, and drone strikes are therefore quite frequent. This is why they consider themselves to be constantly in mortal danger. The plaintiffs lodged a general action for performance *(allgemeine Leistungsklage)* seeking an injunction requiring

31 See the FCC's reference to Art. 26 BL whose para. 1 reads as follows: "(1) Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be criminalised." (See the English translation of the BL available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0143 [02/10/2019]).

32 See the FCC's reference to Art. 1(2) BL which reads as follows: "*The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.*" (*id.*).

33 BVerfGE 112, 1 (25 ff.).

34 The FCC did not explain when it would be "impossible" to comply with international law. Perhaps it had in mind the theoretical case of an international legal obligation whose fulfilment would require German authorities to violate constitutional provisions or the most fundamental rules of the BL protected even from constitutional amendments (Art. 79(3) BL). According to the FCC, provisions of international law rank below constitutional law within the German legal system (BVerfGE 141, 1 [15 ff.]).

35 BVerfGE 112, 1 (27).

the German Federal Government to prevent the US from using their Ramstein Air Base for drone strikes in Yemen. The first-instance court dismissed the action as unfounded because the defendant had reasonably assumed that US drone strikes in Yemen were compatible with international law and had on that basis done what was constitutionally required of it to protect the plaintiffs.[36]

The Münster Administrative Court of Appeal reversed that judgment and decided that the principal motion of the action was admissible and partially well-founded. It ordered the defendant Federal Republic of Germany to ensure by appropriate action that the US, when making use of its Ramstein Air Base for drone strikes in the Yemeni province where the plaintiffs live, fully complied with public international law, as further specified in the grounds of the judgement. The plaintiffs' further claims regarding the prohibition of such use altogether were dismissed.

In the view of the Court, there are substantial indications either generally known or known to the FRG that the US was using Ramstein Air Base and US personnel stationed there for conducting drone strikes in the plaintiffs' home province in Yemen which were at least partly incompatible with public international law. These internationally illegal strikes put the plaintiffs in jeopardy of life and limb to a degree which is relevant from a fundamental rights perspective. This is why the plaintiffs have a right to sue, making their suits admissible pursuant to Sec. 42 (2) of the Code of Administrative Court Procedure.

The judgment was made appealable by order of the Court. The Federal Government has meanwhile lodged an appeal on points of law with the Federal Administrative Court. Perhaps the plaintiffs will do the same to the extent their complaints were dismissed in order to convince the FAC to oblige the Federal Government to prohibit the US from using Ramstein Air Base for drone strikes in Yemen.

It is hard to forecast the approach which the FAC will take. In 2016 that Court held that a local resident who lived in the vicinity of Ramstein Air Base had no right to sue the FRG[37] in order to enforce a potential obligation to closely monitor US drone strikes as to their compatibility with public international law.[38] But the FAC left the question unanswered whether potential victims of drone strikes had such a right to sue and accordingly said nothing with regard to their substantive constitutional claims. It is therefore uncertain whether the FAC will allow the Federal Government's appeal in the instant case. Thus, the instant case is far from being finally settled.[39] Yet, the extensive and thorough reasoning of the Münster Administrative Court of Appeal deserves immediate analysis as an important contribution to hotly debated questions of public international law, primarily IHL and IHRL.

36 VG Köln, judgment of 27 May 2015 (3 K 5625/14), BeckRS 2015, 46138.
37 See Sec. 42(2) of the Code of Administrative Court Procedure.
38 NVwZ 2016, 1176 (1 C 3.15).
39 See below . on possible future developments.

II. Legal Standard Used by the Court for Strict Review of Governmental (In-) Action

1. Extraterritorial Constitutional Duty to Protect the Plaintiffs' Lives and Physical Integrity

The Court used Art. 2 (2) sentence 1 BL as the basis for the plaintiffs' claims against the FRG: "Every person shall have the right to life and physical integrity. … These rights may be interfered with only pursuant to a law."[40] Like other fundamental rights, the right to life and physical integrity has two components: the negative obligation to respect, *i.e.* German authorities' duty of non-interference, and the positive obligation of German authorities to protect fundamental rights holders from interferences by other governments and non-state actors.[41]

The Court held that the negative duty of non-interference was not violated in the instant case because the potentially illegal US drone strikes in Yemen were not attributable to the FRG.[42] The latter could therefore not be made responsible for active interference with the rights guaranteed in Art. 2 (2) sentence 1 BL. The permission given to the USA by the German Government to use Ramstein Air Base was expressly subject to compliance with German law, which included the rules of public international law concerning the use of military force that were made part of federal law by Art. 25 BL or Art. 59 (2) (1) BL. The Court here referred to Art. 53 (1) of the Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany of 3 August 1959, as amended by Art. 27 of the Agreement of 18 March 1993.[43] It also mentioned Art. II sentence 1 of the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces.[44]

The Court further decided that Art. 2 (2) sentence 1 BL imposed a positive duty on the German authorities to protect the plaintiffs from imminent threats to their lives and physical integrity emanating from US drone strikes in Yemen that were incompatible with those rules of public international law which were closely related to the assets protected by that constitutional provision. This limiting condition corresponds

40 See above fn. 30.

41 *Isensee*, in: Ibid./Kirchhof (eds.), § 191, pp. 413 ff.

42 The Court cited Art. 16 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) drafted by the ILC and adopted by the UN General Assembly (Res. 56/83 of 12 December 2001).

43 BGBl. 1994 II 2598: "*Within accommodation made available for its exclusive use, a force or a civilian component may take all the measures necessary for the satisfactory fulfilment of its defence responsibilities. German law shall apply to the use of such accommodation except as provided in the present Agreement and other international agreements, and as regards the organization, internal functioning and management of the force and its civilian component … which have no foreseeable effect on the rights of third parties...*".

44 Of 19 June 1951, UNTS vol. 199, p. 67 (BGBl. 1961 II 1190): "*It is the duty of a force and its civilian component and the members thereof … to respect the law of the receiving State …*".

to the case law of the FCC and the FAC pertaining to Art. 25 BL,[45] according to which individuals can invoke only those rules of public international law that are sufficiently related to high-ranking individual legal interests.[46]

In the view of the Court, that duty to protect extends to foreigners living abroad, if the threats to them emanating from another sovereign involve the use of German territory (as in the instant case). Such an extraterritorial extension of German constitutional law was in accordance with public international law, in view of the sufficiently close link of those threats with Germany.[47] The Court, of course, realised that the extension was subject to the limited ability of Germany to influence foreign events and could also come into conflict with her foreign and defence policy interests. But these potential problems and conflicts were not opposed in principle to the acceptance of an extraterritorial duty to protect. Rather, they had to be taken into account in the determination of the exact scope of that duty that had to be the result of a balancing process.

2. Identifying the Pertinent Rules of Public International Law

The Court identified the following rules of public international law "closely related to the assets protected by Art. 2 (2) sentence 1 BL" so that they are applicable in the instant case:

- The prohibition of arbitrary killings in international human rights law (IHRL), as codified in Art. 6 (1) ICCPR to which both the US and Germany are parties. That prohibition is also part of customary international law, as the Court later expressly recognised.
- The IHL prohibitions of targeting civilians, indiscriminate attacks and the underlying principle of distinction between civilians and combatants in international armed conflicts as well as civilians and fighters in non-international armed conflicts. These prohibitions are codified in Common Art. 3 of the four Geneva Conventions relating to the Protection of Victims of Armed Conflicts,[48] Art. 51 (2) sentence 1, (3) – (5) of Additional Protocol I,[49] Art. 13 (2), (3) of Additional Protocol II[50] and

45 "*The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.*" (See above fn. 31).

46 BVerfGE 112, 1 (21 f.); FAC (fn. 38), pp. 1180 ff.

47 The Court in that context also mentioned Art. 1(2) BL: "*The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.*" (See above fn. 30).

48 Of 12 August 1949, UNTS vol. 75, pp. 31, 85, 135 and 287.

49 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (UNTS vol. 1125, p. 3).

50 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (UNTS vol. 1125, p. 609).

Art. 8 (2) lit. b (i) and lit. e (i) of the Rome Statute of the International Criminal Court[51] and are also part of customary international law.[52]

The Court left the question unanswered whether the prohibition of the use of force under Art. 2 (4) UN Charter and its customary international law counterpart[53] also belong to the rules of public international law "closely related to the assets protected by Art. 2 (2) sentence 1 BL". Because of the consent of the Yemeni government to the US drone strikes, that prohibition was not being violated in the instant case.[54] The Court does not discuss, however, whether the Yemeni government which effectively controls only parts of the territory because of an ongoing non-international armed conflict is able to validly consent to drone strikes in those areas which are subject to rebel control.[55]

In a later part of the judgment, however, the Court included the following extensive *obiter dicta* concerning the *jus ad bellum* issues of US drone strikes which are well referenced and mostly correct:[56]

The inherent right of individual or collective self-defence can also be triggered, if an armed attack is carried out by non-state actors and cannot be attributed to a State according to the attributions standards set forth in Art. 4 – 11 ARSIWA, but only until the UNSC has taken the measures necessary to maintain international peace and security.

The right of self-defence justifies only measures that are necessary and proportionate as regards the nature and extent of the armed attack.[57] In this context, the Court does not address the question of whether targeted killing is proportionate, absent showing that capture would have been impossible. While such a strict standard of proportionality prevails in IHRL, it is not part of IHL and neither of the wide-meshed *jus ad bellum* standards.

The use of force against non-state actors in the territory of another State without the latter's consent is only permissible if that State is unable or unwilling to suppress the attack.[58] Defensive action may only be directed against the non-state actors responsible for the attack and not the institutions and bodies of the unable or unwilling territorial sovereign.[59]

51 Of 17 July 1998 (UNTS vol. 2187, p. 3).
52 The prohibition of indiscriminate attacks in non-international armed conflicts has remained an uncodified part of customary international law (see the judgment [fn. 1], para. 207).
53 See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Jurisdiction and Admissibility, ICJ Reports 1984, p. 392, para. 73.
54 OVG Nordrhein-Westfalen, (fn. 1), paras 128, 234-237.
55 See *O'Connell*, in: Ibid., pp. 206, 212 ff. See also the collection of essays on Intervention by Invitation; Impulses from the Max Planck Trialogues on the Law of Peace and War, ZaöRV 2019/79, pp. 635 ff.
56 OVG Nordrhein-Westfalen, (fn. 1), paras 167-186.
57 ICJ, *Oil Platforms (Islamic Republic of Iran v. US)*, ICJ Reports 2003, p. 161, para. 74.
58 OVG Nordrhein-Westfalen, (fn. 1), para. 180. As was explained above (B.I.), it is questionable whether the "unable or unwilling" standard has been generally accepted by the international community of States as a whole, so that it can be considered to form part of contemporary UN law or customary international law.
59 Ibid., para. 180.

Retaliatory measures which are not suitable to ward off the attack or taken only after the attack was terminated are impermissible.[60]

The extensive right of anticipatory self-defence claimed by the US has no basis in current public international law.[61]

In view of the consent of the Yemeni government, the Court did not directly use these norms as standards of review. It did, however, indirectly refer to exaggerated claims made by the US regarding its right of anticipatory self-defence.[62]

3. Strict Standard of Review

Invoking recent case law of the FCC, the Court expressly states that the Federal Government did not enjoy any margin of appreciation or judgement concerning the legality of the US drone strikes pursuant to the pertinent IHRL and IHL standards. Granting the executive any non-justiciable margins would be incompatible with the constitutional rule that the judiciary was bound by international law[63] and the fundamental right to effective judicial protection.[64] While the relevant norms of international law posed interpretation problems, their solution was not beyond the capacities and functions of the judiciary.[65]

Pursuant to earlier case law of the FCC, which has not been expressly overruled but tacitly abandoned or at least restricted, the political branches of the German Government were accorded a wide margin of appreciation concerning the content of Germany's international legal rights and obligations. The FCC would not intervene if their legal opinion was erroneous but only if it was unreasonable, in order to ensure that Germany spoke with one voice at the international level where mechanisms of compulsory judicial dispute settlement were missing.[66] Apparently, the FCC's standard of review concerning compatibility of governmental decisions with public international law becomes stricter, the more fundamental rights of individuals are at stake. Where governmental decisions involve the taking of lives, such as in the instant case, the FCC seems to consider it its duty to ensure that the requirements of IHL and IHRL are strictly observed.

60 Ibid., para. 181. See Art. 50(1) lit. a ARSIWA which prohibits countermeasures involving the use of force.

61 Ibid., paras 182-185. See above B.I..

62 See below 3.

63 According to Art. 20(3) BL, the judiciary is bound by law, including public international law (FCC [Chamber], order of 13 August 2013 – 2 BvR 2660/06 etc., para. 53).

64 Art. 19(4) BL (see FCC, [fn. 63]).

65 OVG Nordrhein-Westfalen, (fn. 1), para. 297.

66 BVerfGE 55, 349 (363, 367). But see FCC, (fn. 63), paras 53 ff. The FCC later reconfirmed the earlier case law to the extent in which it granted the political branches a wide margin of appreciation with regard to foreign policy issues (BVerfGE 143, 101 [152 f.]). It recently also reconfirmed that it would only review the tenability of the Federal Government´s interpretation of Germany´s rights and obligations deriving from the UN Charter, a system of mutual collective security in the sense of Art. 24(2) BL / FCC, Order of 17 September 2019 (fn. 5), margin notes 46 ff.

4. Jus in Bello Issues Detailed by the Court

a) Existence and Scope of Non-International Armed Conflict in Yemen

The Court correctly states that in order to qualify as a non-international armed conflict in the sense of common Art. 3 of the Geneva Conventions, triggering the application of IHL, a conflict must fulfil two cumulative criteria: a minimum level of intensity and a minimum amount of organisation of the non-state conflict party (*i.e.,* responsible command and capability of meeting minimal humanitarian requirements).[67] An armed conflict does not lose its non-international character if a third State intervenes in it with the consent of the territorial sovereign and fights against the non-state conflict party. The applicability of IHL terminates only when the hostilities have completely stopped and are unlikely to resume. This may be the case when the non-state conflict party has dissolved, although there still are isolated or sporadic acts of violence by its remnants.[68]

In order to trigger the application of the more detailed IHL provisions of Additional Protocol II, the conflict would have to meet the higher standards of Art. 1 (1) of that Protocol. They further require such control by the non-state conflict party over a part of the State territory as to enable it to carry out sustained and concerted military operations and to implement the Protocol. The Court sometimes mixes up the two types of non-international armed conflicts, *e.g.* with regard to the minimum amount of organisation of the non-state conflict party.[69] The conflict in Yemen, where considerable parts of the territory are controlled by the Houthi rebels, meets the stricter standards of Art. 1 (1) of Additional Protocol II, but that is ultimately irrelevant because the US is not a party so that the Protocol does not apply anyway. Moreover, the groups targeted by the US (AQAP and IS) do not meet the standards of Art. 1 (1) of the Additional Prot. II because they do not control any part of Yemeni territory.

The Court also discusses in detail the geographic range of non-international armed conflicts and the co-extensive scope of application of IHL.[70] Non-international armed conflicts have a geographically limited range, usually taking place in the territory of a certain State. "While such NIACs can spill over into neighbouring countries because of the continuity of hostilities, they cannot spread to third countries."[71] Rather, such a spread which will make IHL applicable in the third country presupposes that the two cumulative criteria (intensity and organisation) are fulfilled there, too.[72] But one cannot aggregate individual terrorist attacks in various States to a single global non-international armed conflict, turning the whole world into a battle-field and allowing the use of deadly force everywhere according to the more permissive standards of

67 OVG Nordrhein-Westfalen, (fn. 1), paras 191-195 (with many references).
68 Ibid., para. 203.
69 Ibid., para. 194.
70 Ibid., paras 196-201.
71 ICRC, (fn. 2), p. 19.
72 Ibid.

IHL, instead of the stricter standards of IHRL (that prohibit assassinations, *i.e.* extrajudicial killings).[73]

b) Selection of Legitimate Military Targets and Precautions against Excessive Collateral Damage

While customary IHL does not include a general prohibition on drone strikes in non-international armed conflicts, it prohibits attacks against civilians, unless and for such time as they take a direct part in hostilities,[74] as well as indiscriminate attacks[75] and requires precautionary measures to keep civilian losses at a minimum.[76] While these prohibitions and requirements have been codified only for international armed conflicts, they apply to non-international armed conflicts by virtue of customary international law.[77]

Members of non-state organised armed groups who perform a continuous function for the group involving their direct participation in hostilities ("continuous combat function") are legitimate military targets until they permanently and recognisably give up that function. They are legitimate targets even at times in which they do not actually fight. Direct participation in hostilities includes acts that are likely and specifically designed to directly cause adverse effects for the military capacity or operations of the other conflict party or to the civilian population of the State concerned. However, providing political, ideational, propagandistic, financial or medical support or supplying food is not sufficient to transform civilians into legitimate military targets.[78]

5. International Human Rights Law Standards Involved in the Instant Case

Referring to Art. 4 ICCPR and Art. 15 ECHR and invoking precedents by the ICJ[79] as well as the ECtHR,[80] the Court states that in armed conflicts, IHRL applied in addition (*i.e.,* was complementary) to the specific provisions of international humanitarian law.[81] In the instant case, the right to life as part of customary international law and as codified in Art. 6 ICCPR could be used to assess the legality of the US drone strikes because the US, Yemen and Germany were parties to the ICCPR.[82] It

73 OVG Nordrhein-Westfalen, (fn. 1), margin note 201 (with further references).
74 See Art. 51(2) and (3) of Additional Protocol I for international armed conflicts.
75 See the definition in Art. 51(4) and (5) of Additional Protocol I.
76 See Art. 57 of Additional Protocol I for international armed conflicts.
77 OVG Nordrhein-Westfalen, (fn. 1), paras 205 ff. The Court cites *inter alia* the study by *Henckaerts/Doswald-Beck* (eds.).
78 Ibid., paras 211 ff. The Court refers to *Melzer's* Interpretive Guidance, as well as decisions of the Supreme Court of Israel.
79 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, paras 102 ff.
80 ECtHR (GC), App. No. 29750/09, *Hassan v. UK*, para. 104.
81 OVG Nordrhein-Westfalen, (fn. 1), para. 224.
82 Ibid., para. 128.

applied also in cases of extraterritorial exercise of jurisdiction.[83] While the wording of Art. 2 (1) ICCPR was too narrow in this regard, the object and purpose of the Covenant required the application of its provisions to the exercise of extraterritorial jurisdiction.[84] Surprisingly, the Court does not even mention the longstanding official US position denying any extraterritorial applicability of the ICCPR which cannot be completely ignored because there is no international court or other body having the power to make a decision in that regard legally binding on the US.[85]

In the view of the Court, extraterritorial application of the ICCPR may be called for, in particular, when a State, with the consent of the government of another State, exercises on its territory public powers which are normally exercised by that government.[86] The Court here refers to the *Al-Skeini* case of the ECtHR regarding Art. 1 ECHR,[87] but does not mention the earlier *Banković* case in which the ECtHR had decided that the dropping of bombs on foreign territory killing people on the ground did not amount to an exercise of jurisdiction over the victims.[88] While later cases such as *Al-Skeini* and *Jaloud*[89] have modified its rigour, the *Banković* decision has never been overruled by the ECtHR. The facts of the instant case are very similar to those in *Banković*.

Regarding the substantive standards, the Court refers to Art. 6 (1) sentence 3 ICCPR that prohibits arbitrary deprivations of life. Killings which are permissible according to IHL standards are not arbitrary in that sense. Outside international or non-international armed conflicts killings are only permissible in consequence of a judicially imposed death penalty (Art. 6 (2) ICCPR), whereas extrajudicial killings are arbitrary.[90] Moreover, the obligation to protect life pursuant to Art. 6 (1) sentence 2 read together with Art. 2 (1) ICCPR includes an obligation to officially investigate killings in a prompt and effective manner by an institution independent of those involved in the killings. This obligation to investigate, without which the prohibition of arbitrary killing would in practice become largely ineffective, extends to armed conflicts, although with situational modifications because of difficult security circumstances.[91]

Besides Art. 6 ICCPR, the right to life as guaranteed in Art. 2 ECHR, which the Court does not mention, is also in play.[92] While it binds only Germany and not the US, it still imposes a duty on Germany to protect the plaintiffs from being killed by

83 Ibid., paras 221 ff.
84 See in particular ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, paras 107 ff.
85 See above B.I. The HRC can only express non-binding views and advisory opinions of the ICJ have no binding force either (*argumentum a contrario* resulting from Art. 94(1) UN Charter).
86 OVG Nordrhein-Westfalen, (fn. 1), para. 223.
87 ECtHR (GC), App. No. 55721/07, *Al-Skeini v. UK*, para. 135.
88 ECtHR (GC), App. No. 52207/99, *Banković v. Belgium*, paras 74 ff. (decision as to the admissibility of the applications).
89 ECtHR (GC), App. No. 47708/08, *Jaloud v. Netherlands*, para. 152.
90 OVG Nordrhein-Westfalen, (fn. 1), paras 226 ff.
91 Ibid., paras 230 f. The Court here again refers to the *Al-Skeini* judgement of the ECtHR.
92 See also Art. 15(2) ECHR.

the US in violation of IHL,[93] provided of course that the plaintiffs are within Germany's jurisdiction in the sense of Art. 1 ECHR, even though they live in Yemen where their lives are threatened by US drone strikes. Extending the protective cover of the ECHR to them would require the ECtHR to chip away further on the *Banković* approach or give it up entirely.

III. Subsumption by the Court: Insufficient Fulfilment of Duty to Protect the Plaintiffs

The Court was convinced that there were substantial indications either generally known or known at least to the defendant that not only some of the past US drone strikes in the plaintiffs' home province in Yemen via Ramstein Air Base were incompatible with the requirements of public international law outlined above. Further drone strikes contrary to international law are therefore to be expected in the future.

In the eyes of the Court, US drone strikes were compatible with *jus ad bellum* requirements, in view of the continued consent of the Yemeni government.[94] They were also in principle related to a still ongoing non-international armed conflict in Yemen between AQAP and IS on the one hand and the armed forces of the Yemeni government on the other.[95] However, there were considerable doubts as to whether the general practice of US drone strikes in Yemen took sufficient account of the principle of distinction of IHL, in particular, whether targeted attacks were limited to such persons who either performed a continuous combat function as members of a non-state conflict party or directly participated in the hostilities as civilians.[96] The US assumption of being engaged in one single global non-international armed conflict with numerous terrorist organisations and their broad targeting standards which did not sufficiently ensure that only persons were targeted who directly participated in hostilities were incompatible with IHL.[97] While the Court does not expressly say so, this means that there are serious indications that the US drone strikes in Yemen time and again violate both the IHL prohibition of targeting civilians as well as the IHRL prohibition of arbitrary killing.

The Court argues that the mistaken assumption of one single non-international armed global conflict entailed a considerable structural risk of violations of the principle of distinction and the prohibition of direct attacks on civilians even where – as in Yemen – a non-international armed conflict in the sense of IHL actually existed. It is true that using too broad a brush in one case (relating to the geographic range of the conflict) does not necessarily mean that too broad a brush will also be used in another case (the selection of legitimate targets). However, the US claims the right to target

93 See ECtHR, App. No. 14038/88, *Soering v. UK*.
94 OVG Nordrhein-Westfalen, (fn. 1), paras 234 ff.
95 The Court here refers to several UN Security Council resolutions and reports by UN expert commissions (OVG Nordrhein-Westfalen, (fn. 1), paras 238 ff.).
96 OVG Nordrhein-Westfalen, (fn. 1), paras 251 ff.
97 The Court cites numerous official US documents to prove the overbroad targeting standards.

senior leaders of international terrorist organisations who do not directly participate in the specific hostilities in Yemen but just stay there temporarily although it is unclear in what particular non-international armed conflict with the US they are so deeply involved as to directly participate in the hostilities. IHL and IHRL do not permit such broad targeting standards.

The Court's doubts concerning the legality of US targeting standards are being heightened by the fact that the US invokes its individual right of self-defence to justify armed action in Yemen, including its right to preventive and preemptive strikes, whereas the Court is unable to identify the existence of an imminent threat of an armed attack on the US by AQAP or IS that is required under the *jus ad bellum* standards of public international law. The Court invokes UN Security Council resolutions imposing targeted sanctions in order to demonstrate that the general threats emanating from international terrorist organisations are to be countered by other means than individual military strikes.[98] It is not entirely clear why the Court here again refers to *jus ad bellum* standards. Does it want to argue that since the US launches military strikes far beyond what *jus ad bellum* standards permit, they cannot be trusted regarding their adherence to *jus in bello* targeting standards either? This would repeat the problematic "once too broad a brush, always too broad a brush"-conclusion already used by the Court in the IHL context.

The Court is also unable to discern that the US is sufficiently fulfilling its duty *ex officio* and effectively to investigate the deaths in Yemen caused by its drone strikes. This was contrary to US obligations under Art. 6 (1) sentence 2 ICCPR. Persons killed by US drones in Yemen were subject to US jurisdiction in the sense of Art. 2 (1) ICCPR because by using force with the consent of the Yemeni government, the US assumed responsibilities that were usually exercised by that government within the framework of the state monopoly on the use of force. As was already explained, the Court here ignores the consistent denial by the US of any extraterritorial applicability of the ICCPR. Nor does it mention the narrower *Banković* approach by the ECtHR to defining the extraterritorial scope of the ECHR.

While the US seems to be conducting some investigations as a matter of policy and not a legal obligation, the responsible investigators are not independent of those responsible for the drone strikes, including the competent commander.[99]

In the overall conclusion of the Court, the targeting practice of the US creates a risk for the plaintiffs of suffering harm to body and life by a drone strike involving the use of Ramstein Air Base which is incompatible with public international law. That risk is serious enough to be relevant from the perspective of fundamental rights so that the German State's duty to protect pursuant to Art. 2 (2) sentence 1 BL is triggered.[100]

The Court then determines that the defendant had so far only insufficiently fulfilled its constitutional duty to protect the plaintiffs. In foreign policy matters, the Federal Government enjoyed a broad margin of discretion because Germany could not single-

98 OVG Nordrhein-Westfalen, (fn. 1), paras 268 ff.
99 Ibid., paras 275 ff.
100 Ibid., paras 279 f.

handedly achieve most of its foreign policy goals. Courts could therefore only scrutinise whether the Federal Government had transgressed the wide limits of its broad discretion, taking into consideration other important interests, including trouble-free foreign relations.[101]

Yet, the Court is convinced that the defendant had only insufficiently fulfilled its duty to protect the plaintiffs. This was because the Federal Government had simply assumed that there were no international legal objections against the US practice of drone strikes using Ramstein Air Base. That assumption was erroneous with regard to both the IHL principle of distinction [the IHRL prohibition of arbitrary killing] and the IHRL obligation to investigate deaths.[102] Those international legal obligations of the US were part of German law, pursuant to Art. 25 and Art. 59 (2) sentence 1 BL, and thus to be honoured by it when using Ramstein Air Base, in accordance with Art. II (1) of the NATO Status of Forces Agreement[103] and Art. 53 (1) of the Supplementary Agreement.[104] On the basis of its erroneous assumption, the defendant had done nothing beyond maintaining a "trusting dialogue" with the US, which was utterly insufficient to protect the plaintiffs.

IV. Contents of Defendant's Duty to Protect Plaintiffs as Determined by the Court

But what should the defendant have done instead, and is now required to catch up on? In the Court's opinion, the defendant's fundamental rights duty to protect the plaintiffs encompassed the obligation to pursue doubts as to the conformity of US drone strike practice in Yemen with public international law. The defendant must confront the US with the German understanding of international law that was made part of German law by virtue of Art. 25 and Art. 59 (2) sentence 1 BL and the doubts arising therefrom concerning the conformity of US drone strike practice in Yemen. Where necessary, the defendant was required to work with the US to ensure that German properties used only in conformity with public international law. The Court did not see any reason to fear any disproportionate impairment of the foreign and defence policy interests of Germany, if the defendant exercised its duty to protect the plaintiffs in the aforementioned way: Both Germany and the US were democratic constitutional States committed to the international rule of law and the international protection of human rights, thus having common fundamental values.[105]

The Court did not grant the plaintiffs' further request to oblige the defendant to prohibit the use by the US of Ramstein Air Base for drone strikes in Yemen altogether. This was because those strikes were not *per se* incompatible with international law and because the Federal Government enjoyed a wide margin of discretion which concrete

101 Ibid., paras 281 ff.
102 Ibid., para. 292. The aspect in square brackets was overlooked by the Court.
103 Fn. 44.
104 BGBl. 1994 II 2598, 2632.
105 OVG Nordrhein-Westfalen, (fn. 1), paras 302 f.

measures to take in order to protect the plaintiffs.[106] The Court obviously sought a compromise solution which would not cause serious disruptions in the already strained US-German relationship as NATO partners[107] while taking the plaintiffs' claims seriously. This is an example of prudential judicial restraint.

F. Possible Future Developments

I. The Uncertain Final Outcome of the Case

It is uncertain whether the FAC will allow the defendant's or plaintiffs' appeal in the instant case. The first scenario is more likely than the second one. If it occurs, the plaintiffs will have the right to lodge a constitutional complaint with the FCC, claiming a violation of their right to life (Art. 2 (2) sentence 1 BL), because the FAC judgment denied them the constitutionally required protection against US drone strikes via Ramstein. If their constitutional complaint is unsuccessful, they will have exhausted all available remedies in Germany and must decide on whether to use available international remedies.

Two such remedies are possible, and they are mutually exclusive: The plaintiffs could either lodge an individual application against Germany with the ECtHR pursuant to Art. 34 ECHR, claiming a violation of their right to life under Art. 2 ECHR for failure to protect them.[108] In the alternative, the plaintiffs could lodge a complaint ("communication") with the Human Rights Committee, the treaty body established by the ICCPR, based on the Optional Protocol to the ICCPR.[109] The plaintiffs will in all likelihood opt for Art. 34 ECHR because that can give them a legally binding judgment of the ECtHR[110] whereas the HRC can do no more than forward its recommendatory views to the adversaries.[111] If the case works its way up to the ECtHR, we will ultimately get an opinion by an international human rights court on the legality

106 Ibid., paras 304 ff.

107 In view of Germany´s reluctance to considerably increase defence spending as it had promised in 2014.

108 An application pursuant to Art. 34 ECHR will be inadmissible if it is substantially the same as a matter that has already been submitted to another procedure of international investigation or settlement and contains no relevant new information (Art. 35(2) lit. b ECHR).

109 Of 16 December 1966 (UNTS vol. 999, p. 171). Pursuant to Art. 5(2) lit. a OP-ICCPR an individual communication will be inadmissible only while the same matter is being examined under another procedure of international investigation or settlement. It will be admissible after that other procedure has been terminated. However, Germany, in parallel with the other States parties to the ECHR, made a permissible reservation when ratifying the OP-ICCPR to the effect that "*the competence of the Committee shall not apply to communications … which have already been considered under another procedure of international investigation or settlement …*" (BGBl. 1994 II 311).

110 Art. 46 ECHR.

111 Art. 5(4) OP-ICCPR.

of the US programme of targeted killings by drones which will certainly have a major impact on world public opinion.[112]

II. Enforcement of the Plaintiff's Entitled Claims against Germany

Suppose that the judgment of the Münster Administrative Court of Appeal is upheld by the FAC and thereby becomes final. The Federal Government will then be obliged to confront the US with the doubts formulated in the judgment concerning the legality of US drone strike practice in Yemen and thereby try to ensure that Ramstein Air Base is henceforth used only in conformity with public international law. In confidential talks, the US will probably reject that German understanding of international law and continue its drone strikes in Yemen unaltered. The US will also refuse to explain in detail the secret aspects of its drone programme. It may, however, be willing to compromise by promising more thorough and independent ex post facto investigations of killings.

There is no compulsory dispute settlement mechanism which could produce a determination binding on the US and Germany with regard to their differing interpretations of the relevant rules of international law. Quite the opposite, Art. XVI of the NATO Status of Forces Agreement provides as follows: "All differences between the Contracting Parties relating to the interpretation or application of this Agreement shall be settled by negotiation between them without recourse to any outside jurisdiction. Except where express provision is made to the contrary in this Agreement, differences which cannot be settled by direct negotiation shall be referred to the North Atlantic Council."[113] The North Atlantic Council is the supreme political body of the NATO; it decides by consensus.[114] The US would certainly not be ready to agree to *ad hoc* arbitration or a reference of the dispute to the ICJ pursuant to Art. 36 (1) of the ICJ Statute,[115] in view of the sensitive national security issues involved.

If the required action of the Federal Government thus probably will not have much impact on US drone practice, can the plaintiffs file a new suit and obtain an injunction that Germany must prohibit US use of Ramstein Air Base for drone strikes in Yemen altogether? Or could the Federal Government successfully argue that trouble-free diplomatic and military relations with the US are more important than the possible deaths of a limited number of Yemeni civilians? In all likelihood, such a confrontation would be avoided by a US assurance, given either directly or indirectly through the

112 See the ECtHR case law on Convention States' complicity in the secret detentions and extraordinary renditions of terrorist suspects practiced by the US: ECtHR, App. No. 39630/09, *El-Masri v. "The former Yugoslav Republic of Macedonia"*; ECtHR, App. No. 28761/11, *Al Nashiri v. Poland*; ECtHR, App. No. 7511/13, *Husayn (Abu Zubaydah) v. Poland*; ECtHR, App. No. 44883/09, *Nasr and Ghali v. Italy*; ECtHR, App. No. 46454/11, *Abu Zubaydah v. Lithuania*; ECtHR, App. No. 33234/12, *Al Nashiri v. Romania*.

113 See the dispute settlement provision of Art. 80 A of the Supplementary Agreement which leads to a settlement through diplomatic channels (see Art. 80 A (4) sentence 2).

114 *Marauhn*, in: Max Planck Encyclopedia of Public International Law (OUP online edition), para. 31.

115 Of 26 June 1945 (1 UNTS XVI).

Federal Government, that it will (continue to) comply with international law in its use of Ramstein Air Base. The Court will probably be ready to believe such an assurance and dismiss any new action by the plaintiffs unless they are able to present clear evidence of continuing US violations of international law. Otherwise the Court would place the Federal Government in a difficult situation.

In the unlikely event of a Court decision condemning Germany to prohibit US use of Ramstein Air Base for drone strikes in Yemen altogether, how could the plaintiffs enforce it against an unwilling Federal Government? The Code of Administrative Court Procedure does not give the courts powerful means of enforcement against public authorities beyond the imposition of penalty payments.[116] This is because in a constitutional system based on the rule of law, public authorities can usually be trusted to comply with binding court decisions issued against them. There have, however, been some recent cases in which German public authorities refused to obey binding court decisions.[117]

The most highly publicised case is currently pending before the Court of Justice of the European Union.[118] In a preliminary reference, the Bavarian Administrative Court of Appeal raises the following question: "Are [certain provisions of EU law] to be interpreted to mean that a German court is entitled – and possibly even obliged – to impose detention on public officials of a German Federal *Land* in order thereby to enforce the obligation of that Federal *Land* to update an air quality plan … if that Federal *Land* has been ordered to carry out an update … by way of a final judgment, and – the Federal *Land* has been threatened with and subjected to financial penalties on several occasions without success, … – the Federal *Land* found guilty by way of a final judgment has stated to the courts and publicly … that it will not fulfil the judicially-imposed obligations in connection with air quality planning …?"[119]

It is unlikely that the CJEU will derive a directly applicable rule of EU law empowering German courts to impose coercive detention on German public officials. In any event, such an EU law empowerment would not extend to the Ramstein case that is outside the scope of EU law.

G. Conclusion: The Positive Effects of Judicial Restraint

What does that teach us about judicial ventures into the abysses of high politics in order to sustain the international rule of law? Courts should proceed cautiously, otherwise the judiciary and the international, as well as national rule of law, may suffer.

116 Sec. 172 CACP.

117 See FCC, order of the 3rd Chamber of the First Senate of 24 March 2018 (1 BvQ 18/18) and the press release no. 26/2018 of 20 April 2018, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2018/bvg18-026.html (02/10/2019).

118 Request for a preliminary ruling from the Bayerischer Verwaltungsgerichtshof (Germany) lodged on 3 December 2018 — *Deutsche Umwelthilfe e.V. v. Freistaat Bayern*, case C-752/18, OJ C 54 of 11/02/2019, p. 11.

119 Ibid.

This does not mean that the judicial abstentionism practised by the US courts is appropriate – it betrays the rule of law by giving *carte blanche* to the political branches, is likely to breed lawlessness and also incompatible with the IHRL obligation to provide an effective remedy to victims of human rights violations.[120] The approach of the Münster Administrative Court of Appeal seems preferable: It compelled the German government to defend the compatibility of the US targeted killing by drones practice with international law and suffer public defeat for it. It put a thorough judicial scrutiny of that practice on public record, taking the place of an t international court which is absent for lack of jurisdiction. It increased the pressure of public opinion on the German accomplice and to a lesser extent on the US principal offender toward future compliance with international law. Yet, the Münster Administrative Court of Appeal was wise enough to exercise judicial restraint that makes it difficult for the German Government to openly disregard the judgment (should it become final) while leaving it enough room for manoeuvre to maintain good political and military relations with the US. That is about all a national court can accomplish in such a politically highly sensitive case.

Unsurprisingly, the answer to the question asked in the title of this article thus is: yes, they can – to a certain extent.

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120 See above fn. 26.

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