



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

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

The plaintiffs submit that they have lost close relatives during a drone strike in the province of Hadramaut in 2012. They doubt the legality of this attack, which according to their knowledge has not been investigated by independent authorities. A lawsuit against the United States of America was rejected by a court in Columbia in February 2016. The legality of the attack was not examined by the US court because it was considered to be a political question. Due to the primary importance of Ramstein Air Base, which is located in Germany, for ongoing US drone operations including those in Yemen, the plaintiffs, who are concerned about their safety, have taken the Federal Republic of Germany to court to prohibit the use of the Air Base for such operations by taking suitable measures. In contrast to residents living near the Air Base, who have unsuccessfully initiated proceedings against its use for drone operations, the plaintiffs live in a region where people have been targeted and killed by armed US drones for several years. There have also been civilian casualties on a regular basis. The numbers of civilian casualties differ greatly between official statements and media reporting.

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

Beyond fundamental rights to ward off violations by the state, German federal constitutional law recognizes that the fundamental right to life triggers a comprehensive positive obligation for the state to protect, more precisely to put itself protectively and supportively in front of life, which means above all to also protect it from unlawful violations by others. Under the established jurisprudence of the Federal Constitutional Court this applies also with regard to unlawful violations by other states of rights protected by German fundamental rights. The higher the rank of the protected right in question within the order set out by the Basic Law (*Grundgesetz*), the more seriously must be taken the positive constitutional duty to protect it. Human life has the highest value within the Basic Law hierarchy; it is the vital basis of human dignity and the prerequisite for the enjoyment of all other fundamental rights.

Regarding cases with facts pertaining to foreign countries, the Federal Constitutional Court has already decided that it can be set out in the state order prescribed by the Basic Law to allow violations of international law to be asserted as subjective breaches of law regardless of whether claims of individual persons already exist by virtue of international law. That applies

in any case if rules of international law – as in this case – have a close connection to individual high-ranking legally protected interests. Due to their obligation to respect international law, which results from the respect for international law inherent in Germany's Basic Law (*"Völkerrechtsfreundlichkeit"*), German state organs can be obliged to enforce international law in their area of responsibility if other states are in breach of it. German authorities and courts are obliged to refrain from any action that gives effect to actions by non-German public authorities in the domain of the German Basic Law that breach the general rules of international law. This externally directed obligation can, however, lead to tensions with the likewise constitutionally desired international cooperation between the states and other subjects of international law, in particular if a violation can only be ended through cooperation. This manifestation of the duty to respect can only be substantiated in interaction and balance with Germany's other international obligations.

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

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

In detail:

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

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

According to official statements by the US government, the US Congress and US Military,

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

The UN special rapporteurs and UN expert commissions for Yemen have also reported on regular US air- and drone strikes in Yemen.

The Senate is convinced that the USA conducts drone strikes, including in Yemen, using technical facilities at Ramstein Air Base and the personnel stationed there. There is currently every indication that the flow of data used to control the drones remotely is routed in real time from the USA via a satellite relay station in Ramstein that is centrally important for the operations as a necessary link between the pilots in the USA and the drones in the area of operations. This corresponds with the findings of the majority of the first investigation committee in the 18<sup>th</sup> legislative period of the German Federal Parliament, which, after extensive taking of evidence, found the following in its final report at BT-Drs. 18/12850, page 1354:

Accordingly, following the taking of evidence by the committee it can be considered certain that the US Ramstein Air Base with its relay station, which is used to forward data and control signals for US drones as well as data collected by US drones, plays an essential role in the use of US drones – regardless of whether they fly armed or unarmed, for example, for reconnaissance purposes, and also regardless of whether the weapons on armed drones are actually used in individual cases.

These findings are substantiated by official US documents from 2010 and 2011 available to the court in which the prominent importance of the relay station planned at the time on Ramstein Air Base for US deployment of armed drones overseas is emphasized. The respondent was informed by the US side as early as April 2010 and once again in November 2011 about the planned construction of a satellite relay station in Ramstein, which would partly be used to control drones (including armed drones) abroad.

In 2016, US government officials informed the respondent that the USA’s global communication routes for supporting unmanned aircrafts included telecommunications points of presence in Germany from which the signals were forwarded. Officials also said that operations with unmanned aircrafts were flown from various sites using various telecommunications relay systems some of which are run partly in Ramstein. Furthermore, US representatives informed the respondent that a facility for improving the existing telecommunication technology in Ramstein was completed in 2015. Finally, the US side informed the German Federal Government that Ramstein supports a series of other tasks including the planning, monitoring and evaluation of assigned air operations.

In reaction to this new information, Germany’s Federal Foreign Office held high-level talks

in Washington in September 2016. The German Federal Government notified the German parliament about this and declared it will also continue to maintain contact with the US side about this matter (minutes of German parliament plenary proceedings 18/205, page 20452 onwards). In response to several parliamentary queries, the German Federal Government declared that because of the long-standing and trusting cooperation with the USA, there is no reason to doubt the assurance of the USA that activities at US military facilities in Germany complied with the applicable law and that the USA committed itself to this in the stationing treaties entered into with Germany.

All states involved, the USA, Germany and Yemen, naturally operate on the assumption that military armed force is only permissible within the framework of international law. In relation to fighting international terrorism, including in Yemen, the United Nations Security Council has repeatedly highlighted and emphatically appealed several times to all parties to the armed conflict that they must fulfil their obligations under international law, including the applicable international humanitarian law and the applicable international human rights standards (recently for Yemen e.g. resolution no. 2402 of the United Nations Security Council from 26/2/2018).

Under the German Basic Law, international law also applies in Germany and is binding on authorities and courts in accordance with article 20, paragraph 3 of the Basic Law. It must also be adhered to by stationed forces when using German land. This is not disputed. According to the jurisprudence of Germany's Federal Constitutional Court, the German Federal Government has in principle no political margin of discretion that is not subject to judicial control when it comes to the purely international law-related evaluation with regard to the requirement of effective legal protection under article 19, paragraph 4 of the Basic Law.

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

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

The fight against international terrorism, including in Yemen, occurs with the express approval of the United Nations Security Council. The Council has established that the situation in Yemen represents a threat to world peace and international security also because certain areas in Yemen under the control of Al-Qaida in the Arabian Peninsula are experiencing devastating humanitarian effects on the civilian population (resolution 2402 from 26/2/2018).

Within the framework of UN resolution 60/158 for protecting human rights and basic freedoms in the fight against terrorism from 16/12/2005 as approved by numerous countries (including Germany and the USA), which, according to section IV, no. 1 of the United Nations Counter-Terrorism Strategy from 8/9/2006 (resolution 60/288 of the General Assembly), lays down the fundamental framework for human rights protection in the fight against terrorism, the United Nations General Assembly has generally affirmed the following things among others:

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

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

Likewise, in this resolution, the General Assembly deeply deplored the fact that violations of human rights and breaches of international refugee law and international humanitarian law occur in the context of the fight against terrorism.

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

The very complex assessment has shown that the assumption by the German Federal Government that there are no indications of breaches of German law or international law by the USA in its activities in Germany is based on an insufficient investigation of the facts and is ultimately not legally sustainable.

There are weighty indications that at least some of the armed drone operations conducted by the USA in the plaintiffs' home region in Yemen do not comply with international law and that the plaintiffs' right to life is unlawfully endangered. In view of this threat, the respondent wrongly assumed that it had no obligations towards the plaintiffs to engage in

further efforts with the US government beyond the existing contact between them, the substance of which the German Federal Government is silent on. In its decision, the Senate is taking into consideration and upholding the ample margin that the German Federal Government enjoys in relation to positive constitutional obligations of protection, particularly in the area of foreign policy. In fulfilling the positive constitutional obligation of protection, it is the responsibility of the German Federal Government to approach international communication with its ally the United States of America, which is also bound by international law, international human rights law as well as international humanitarian law, in a manner that does not pose a risk to Germany's ability to form alliances.

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

This examination resulted in the following:

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

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

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

Mere internal unrest and tension like riots, single acts of violence and other similar actions do

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

According to a fundamental rule of international humanitarian law, attacks are not permitted against the civilian population as such, against civilian property, or against individual civilians in as far as and for as long as they are not directly participating in hostilities. Regarding protected civilians, under article 3 of the Fourth Geneva Convention from 12/8/1949 (German Federal Law Gazette BGBl. 1954 II page 917), attacks on life and on the person, especially killing of any kind, are prohibited in non-international armed conflicts. Due to the principle of distinction and the prohibition of attacks on civilians who are not directly involved in hostilities, a careful assessment – to the extent that this is possible in a given situation – must always be made see whether a protected civilian person is involved. Under customary international law, to protect the civilian population, in non-international conflicts attacks are prohibited where loss of human life among the civilian population can be expected that is disproportionate to the expected specific and immediate military advantage.

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

This understanding developed by the International Committee of the Red Cross is already laid out in the functional designation (intended for conducting armed hostilities) of non-state conflict parties as “armed forces” (Geneva Conventions Common Article 3, no. 1) and

“organized armed groups” (Additional Protocol II article 1, paragraph 1). The restrictive designation, effected through the functional criterion of the continuous combat function, of the group of people whose members do not enjoy the protected status of civilians is also in line with the focus of international humanitarian law on the effective protection of the civilian population. The question of whether an activity or function amounts to direct participation in hostilities ultimately requires a case-by-case assessment that takes into account the protection of the civilian population on the one hand and military necessities on the other. Members of organized armed groups may also be attacked if they are currently not directly participating in hostilities.

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

Furthermore, the USA has on several occasions as part of its fight against terrorism claimed for itself a right to preemptive self-defense even in situations where there is no immediate danger and instead “uncertainty remains as to the time and place of the enemy’s attack”. This interpretation continues to be regularly disputed and is therefore not recognized under customary international law.

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



military targets even if they are subject to United Nations Security Council sanctions and are to be held criminally accountable for their support including non-military support.

Furthermore, according to article 6 of the International Covenant on Civil and Political Rights, any arbitrary killing is prohibited in armed conflicts. According to the jurisprudence of the International Court of Justice, a killing is not arbitrary if it is directed against a legitimate military target within the context of an armed conflict and the attack avoids disproportionately high numbers of civilian victims. Whether this was the case remained unclear several times in the past even where specific indications were present that civilians could have been specifically targeted. According to the jurisprudence of the European Court of Human Rights and Germany's Federal Constitutional Court, the prohibition of arbitrary killing requires that effective official investigations are conducted if persons are killed due to the use of force in particular by representatives of the state. In his final report in 2014, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism did reach the conclusion that the majority of persons killed during US drone strikes in Yemen were legitimate military targets in the internal armed conflict. Nevertheless, he also listed a series of armed attacks in Yemen carried out with the proven or possible involvement of the USA about which there exists a justified suspicion of illegality that has not been dispelled. Accusations along these lines were also made by the Yemeni minister for human rights in a British newspaper only last year following several attacks in which Yemeni government authorities were unable to find any indications that even one of the victims had connections to Al-Qaida. As early as 2010, a UN special rapporteur complained that the States did not fulfil its obligations under human rights law and international humanitarian law for accountability in relation to targeted killings.

The German Federal Government, according to its representatives in the oral proceedings, has no reliable information as to whether the US authorities have performed or permitted independent investigations – beyond purely internal situation evaluations – in these kinds of cases. No further information on this emerged in the course of the ongoing proceedings. The fact that the plaintiffs were denied a judicial assessment of the killing of their relatives in US courts suggests rather that this was not the case.

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