Judgment of 25 November 2020 - BVerwG 6 C 7.19

ECLI:DE:BVerwG:2020:251120U6C7.19.0

No individual right to demand further action by the Federal Government to prevent US drone operations in Yemen using Ramstein Air Base

Headnotes

1. In principle, duties of protection arising from basic rights on the part of the German state may also exist vis-à-vis foreign nationals living abroad and if, in the event of impairments of or threats to basic rights caused by other states, there is a qualified connection to German territory, provided that, on account of the number and circumstances of breaches of international law that have already occurred, comparable acts of the other state in violation of international law can concretely be expected to also occur in the future.

2. Where actions of another state impair or threaten an interest protected under basic rights abroad, a sufficiently close connection to the German territory for duties of protection to arise from basic rights on the part of the German state only exists, if partial acts of the overall event, which have a relevant decision-making character and are therefore decisive for the legal assessment, take place in Germany.

3. When assessing the actions of other states under international law, the Federal Government has a margin of appreciation within the range of justifiable legal opinions.

4. In cases with a foreign connection, the breach of a duty of protection arising from basic rights can only be established where the Federal Government has remained completely inactive or if the measures taken are obviously completely unsuitable or inadequate.

Sources of law

Basic Law	GG, *Grundgesetz*	articles 1 (2) and (3), 2 (2) first sentence, 19 (4), 24 (2), 25
NATO Status of Forces Agreement		article II
Supplementary Agreement to the NATO Status of Forces Agreement		articles 53 (1), 81
Protocol I Additional to the Geneva Conventions		articles 51, 57

Summary of the facts

The claimants are Yemeni nationals from Hadhramaut province. Claimants no. 2 and no. 3 live in Yemen, claimant no. 1 lives in Canada and Qatar. They demand that the defendant Federal Republic of Germany protect them from imminent impairment of their lives and physical integrity from armed drone missions carried out by the USA in Yemen using technical facilities at Ramstein Air Base.

The Administrative Court (*Verwaltungsgericht*) dismissed the action. On appeal on points of fact and law lodged by the claimants, the Higher Administrative Court (*Oberverwaltungsgericht*) amended the judgment of the Administrative Court and ordered the defendant to take appropriate measures to ensure that Ramstein Air Base is used only in accordance with international law by the USA for the deployment of unmanned aerial vehicles from which missiles are fired to kill people on the territory of the Republic of Yemen, Hadhramaut Province, and, where necessary, to work with the United States of America towards compliance with international law. With regard to all other aspects, it dismissed the action.

In its reasoning, the Higher Administrative Court relied on the right to protection arising from the basic right to life and physical integrity (article 2 (2) first sentence of the Basic Law (GG, *Grundgesetz*)). The necessary close connection to the German state existed if the other state acted substantially from German territory. Therefore, the German state organs were obliged to bring to bear international law. This included the prohibition of random killings as well as the prohibition of targeted or indiscriminate attacks on civilians and the underlying principle of distinction in armed conflicts under international humanitarian law. The duty of protection was already triggered by an imminent risk of impairment of life and physical integrity in violation of international law.

There were weighty factual indications that the USA was carrying out armed drone missions in Yemen, at least in part in violation of international law, using technical facilities at Ramstein Air Base and its own personnel deployed there. For the claimants, this resulted in a considerable risk to life or of injury.

The defendant had only insufficiently complied with her duty of protection arising from basic rights. Her assessment concluding that there was no reason to doubt conformity of the operations in Yemen with international law was incorrect. It was not even recognisable that the Federal Government had formed its own opinion on the question of conformity with international law. In order to fulfil its duties of protection arising from basic rights vis-à-vis the claimants, the Federal Government had to investigate doubts raised as to whether the use of drones in Yemen was in conformity with international law and, if necessary, work specifically with the USA towards ensuring that German properties were used exclusively for missions that comply with international law. To do this, she had to confront the US side with the German understanding of international law. However, the defendant's duty of protection did not require her to prevent the use of Ramstein Air Base for armed drone missions in the claimants' home region.

The appeal on points of law lodged by the Federal Republic of Germany challenges this.

Reasons (abridged)

18 The defendant's appeal on points of law is well-founded. The appeal judgment violates the law that is subject to an appeal on points of law within the meaning of section 137 (1) no. 1 of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*) and does not prove to be correct in its result for other reasons either (section 144 (4) VwGO). Admittedly, the procedural complaint based on section 117 (2) no. 3 VwGO does not meet with success (1.). However, with regard to claimant no. 1, the action is already inadmissible for lack of standing (2.). With regard to the claimants no. 2 and no. 3, the Court of Appeal correctly held that the action for performance (*Leistungsklage*) is admissible (3.). However, insofar as it affirmed the claim asserted by the claimants no. 2 and no. 3 to be well-founded the appeal judgment violates article 2 (2) first sentence GG for basing its decision on incorrect legal standards as regards the duty of protection arising from basic rights on the part of the defendant vis-à-vis the claimants (4.). Whether the duty of protection on the part of the defendant arising from basic rights did in fact arise in accordance with the law that is subject to an appeal on points of law, cannot be decided without the establishment of additional factual findings by the Higher Administrative Court (5.). However, the Senate may decide on the matter itself (section 144 (3) first sentence no. 1 VwGO) because, as is evident from the findings of the Court of Appeal, the defendant has sufficiently complied with any duty of protection that may have been arisen (6.).

19 1. (...)

23 2. In relation to claimant no. 1, the action is inadmissible for lack of standing.

24 In accordance with established jurisprudence of the Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), section 42 (2) VwGO applies *mutatis mutandis* to the general action for performance (*allgemeine Leistungsklage*) lodged here, which alone is admissible for the claimant's request (see, e.g., BVerwG, judgment of 13 December 2017 - 6 A 6.16 [ECLI:DE:BVerwG:2017:131217U6A6.16.0] - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 161, 76 para. 17). Accordingly, the action is only admissible if the claimant asserts that his or her rights have been violated by an administrative action or its omission. It is necessary but also sufficient that, on the basis of the claimant's submissions, the violation of a subjective public-law right appears possible (BVerwG, judgment of 5 April 2016 - 1 C 3.15 [ECLI:DE:BVerwG:2016:050416U1C3.15.0] - BVerwGE 154, 328 para. 16).

25 On this basis, the possibility of a violation of a subjective public-law right of claimant no. 1 is precluded by the fact that the claimant does not live in Yemen, but in Canada and Qatar. As long as he maintains his permanent residence outside Yemen, an increased threat to his life and physical integrity (article 2 (2) first sentence GG) from the armed drone operations of the USA in Yemen, the prevention of which he seeks from the defendant, is excluded from the outset (see BVerwG, judgment of 5 April 2016 - 1 C 3.15 - BVerwGE 154, 328 para. 47). Insofar as he pointed out that he continued to stay in Hadhramaut from time to time, where he had "house and farm", this is not sufficient to assume a possible right of claimant no. 1 to protection against the defendant. Claimant no. 1 failed to provide indications that he cannot reasonably be expected to temporarily refrain from travelling to Yemen, which would expose him to the threats he asserts. This would, however, be necessary, as the assertion of a duty derived from article 2 (2) first sentence GG on the part of the state to protect and promote the life, physical integrity and health of the individual and to protect them from unlawful interference by third parties requires that the holders of basic rights are not themselves able to ensure the integrity of these rights (Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*), chamber decision (*Kammerbeschluss*) of 15 March 2018 - 2 BvR 1371/13 [ECLI:DE:BVerfG:2018:rk20180315.2bvr137113] - (...) para. 31).

26 3. With respect to the claimants no. 2 and no. 3, who live in Yemen, the admissibility of the action for performance is neither precluded by a lack of standing (a) nor by lack of prior involvement of the authorities (b).

27 a) Claimants no. 2 and no. 3 have standing. Unlike claimant no. 1, they are exposed to a direct threat to their legal positions protected under basic rights through armed drone operations by the USA. Since, according to the factual findings of the Higher Administrative Court, which have not been challenged by the defendant with procedural complaints, the USA has for years been carrying out military operations in Yemen and in particular in the province of Hadhramaut, where the claimants no. 2 and no. 3 live, to combat terrorism using armed drones, which on several occasions have also resulted in civilian victims. It is true that the possibility of a violation of a subjective public-law right of claimants no. 2 and no. 3 on the basis of these facts does not arise from a basic right against state interference (aa). However, in principle it appears possible that the claimants no. 2 and no. 3 may be entitled to a right to protection against the defendant under article 2 (2) first sentence GG (bb).

28 aa) The claimants no. 2 and no. 3 cannot derive an individual legal position from a defensive right arising from basic rights against the defendant. This is because the impairments of their legal positions protected under basic rights emanating from the armed drone missions of the USA, the prevention of which the claimants seek, are based neither directly nor indirectly on any acts of interference by the defendant.

29 A direct interference by the defendant is excluded as, according to the facts established by the Higher Administrative Court, the threat to basic rights comes from a third state. The direct cause of the damage to life and physical integrity in Yemen feared by the claimants, are drone attacks in which only members of the US armed forces or US intelligence services are involved, but not German officials (see also BVerwG, judgment of 5 April 2016 - 1 C 3.15 - BVerwGE 154, 328 para. 19). Admittedly, the support of a military action can take place not only through military participation in combat operations, but also through other types of assistance, such as the granting of overflight rights (see BVerwG, judgment of 21 June 2005 - 2 WD 12.04 - BVerwGE 127, 302 para. 216; (...)). However, it is not apparent that the defendant would have agreed to the use of Ramstein Air Base for drone missions in Yemen in violation of international law (see BVerwG, judgment of 5 April 2016 - 1 C 3.15 - BVerwGE 154, 328 para. 19).

30 There is also no indirect interference of the defendant with a basic right. Where the impairment of interests protected by basic rights is subject to the conduct of other persons or is based on a complex sequence of events, affirming an interference requires that the state at least accepts such interference as foreseeable consequence for it (BVerfG, decision of 26 June 2002 - 1 BvR 670/91 [ECLI:DE:BVerfG:2002:rs20020626.1bvr067091] - Rulings of the Federal Constitutional Court (BVerfGE, *Entscheidungen des Bundesverfassungsgerichts*) 105, 279 <300>). If, for legal or factual reasons, it is prevented from influencing the course of events, this cannot be attributed to it under constitutional law as a consequence of its own conduct. The constitutional responsibility of public authority bound by the Basic Law, and thus also the scope of protection of the basic rights, therefore in principle ends where a foreign power determines the essential features of a course of events according to its own free will that is independent of the Federal Republic of Germany (see BVerfG, decisions of 16 December 1983 - 2 BvR 1160, 1565, 1714/83 - BVerfGE 66, 39 <62> and of 15 December 2015 - 2 BvR 2735/14 [ECLI:DE:BVerfG:2015:rs20151215.2bvr273514] - BVerfGE 140, 317 <347>; chamber decision of 15 March 2018 - 2 BvR 1371/13 - (...) para 29).

31 On this basis, the requirements for assuming an indirect interference with basic rights are not met. Since the drone attacks by the USA in Yemen have their cause in decisions and actions of another state which cannot be controlled by the Federal Republic of Germany in law or in fact, the threat to their lives and physical integrity feared by the claimants cannot be attributed to the German state as an interference for which it is responsible. In particular, an indirect interference cannot be seen in the circumstance that the defendant, by agreements under international law, namely the Convention on the Presence of Foreign Forces in the Federal Republic of Germany of 23 October 1954 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) 1955 II p. 253), the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces (NATO Status of Forces Agreement) of 19 June 1951 and the supplementary agreement concluded thereto of 3 August 1959 (Act on the NATO Status of Forces Agreement and on the Supplementary Agreements of 18 August 1961 <BGBl. 1961 II pp. 1183, 1190 et seqq, 1218 et seqq.> partly amended by agreements of 21 October 1971 <BGBl. 1973 II p. 1021>, 18 May 1981 <BGBl. 1982 II p. 530> and 18 March 1993 <BGBl. 1994 II p. 2594>) generally grants the USA military use of the disputed properties belonging to federal territory. The permission of use granted by contract is not sufficient to attribute a specific use not approved by the defendant and not covered by the contracts (BVerwG, judgment of 5 April 2016 - 1 C 3.15 - BVerwGE 154, 328 para. 19). It is derived from article 53 (1) first and second sentence of the Supplementary Agreement to the NATO Status of Forces Agreement and article II first sentence of the NATO Status of Forces Agreement - that it includes, from the very outset, only those uses that are lawful under the German legal system (BVerwG, judgment of 5 April 2016 - 1 C 3.15 - BVerwGE 154, 328 para. 20). Merely granting military use of the property at Ramstein Air Base therefore neither aims at threatening basic rights through drone missions in violation of international law nor does it otherwise approve such use (BVerwG, judgment of 5 April 2016 - 1 C 3.15 - BVerwGE 154, 328 para. 19, 22).

33 Finally, assuming the defendant's co-responsibility for threatening the basic rights of claimants no. 2 and no. 3 by the involvement of Ramstein Air Base in the implementation of drone missions by the USA in Yemen - which may be regarded as an indirect interference with basic rights - does not follow from giving consideration to the European Convention on Human Rights (ECHR) in the interpretation of the Basic Law and the case-law of the European Court of Human Rights (ECtHR) issued in this context. For, the European Court of Human Rights also only holds a state co-responsible under article 1 ECHR for human rights violations committed by representatives of a third state on its territory if such acts of violation are performed with its tacit or express approval. In doing so, the Court relies on the state's knowledge of the risk of human rights violations and on its own actions in support of the acts causing such violation (see BVerwG, judgment of 5 April 2016 - 1 C 3.15 - BVerwGE 154, 328 para. 26 et seq. with reference to ECtHR, judgments of

13 December 2012 - Application no. 39630/09, El Masri/Macedonia - (...), of 24 July 2014 - Application no. 28761/11, Al-Nashiri/Poland - (...) and of 23 February 2016 - Application no. 44883/09, Nasr and Ghali/Italy; see furthermore BVerfG, chamber decision of 15 March 2018 - 2 BvR 1371/13 - (...) para. 30). Making available the infrastructure of a military airport in accordance with the NATO Status of Forces Agreement does not in itself fulfil these requirements (BVerwG, judgment of 5 April 2016 - 1 C 3.15 - BVerwGE 154, 328 para. 27).

34 bb) However, standing of the claimants no. 2 and no. 3 to bring an action is to be affirmed as they may be entitled to a right to protection against the defendant under article 2 (2) first sentence GG. Based on the considerations set out in detail by the Higher Administrative Court and taking into account the Federal Constitutional Court's judgment of 19 May 2020 - 1 BvR 2835/17 - ((...) para. 88 et seqq, 104) on foreign intelligence gathered by the Federal Intelligence Service (*Bundesnachrichtendienst*), which was issued after the decision on the appeal on points of fact and law was made, it does in any case not seem impossible from the outset that the German state may, by virtue of article 2 (2) first sentence GG, in principle be obliged to protect foreign nationals living abroad against impairments of life or physical integrity coming from German territory by another state in a manner contrary to international law and that the requirements for giving rise to such a duty of protection are met here in relation to the claimants no. 2 and no. 3. Despite the broad scope for action that the Federal Government enjoys in the field of foreign and defence policy on the question of how it intends to fulfil its duty derived from basic rights to protect life (see only BVerfG, decision of 16 December 1983 - 2 BvR 1160, 1565, 1714/83 - BVerfGE 66, 39 <61>), having standing to bring an action does not cease on the ground that the defendant's - presumed - duty of protection may already have been fulfilled. (...)

35 b) The admissibility of the action for performance is also not precluded by the fact that the claimants failed in the administrative procedure to lodge an application to have the requested action taken.

38 4. Insofar as it affirmed the claim asserted by the claimants no. 2 and no. 3 to be well-founded, the appeal judgment violates article 2 (2) first sentence GG and thus law that is subject to an appeal on points of law for basing its decision on incorrect legal standards as regards the duty of protection arising from basic rights on the part of the defendant vis-à-vis the claimants.

39 Admittedly, at the outset the Higher Administrative Court correctly found that, under article 2 (2) first sentence GG, the German state was in principle obliged to protect foreign nationals living abroad against impairments of their life or physical integrity coming from German territory by another state in a manner contrary to international law, if there was a sufficiently close connection to the German state, which in any event proved to be the case if the other state carried out its impairing action substantially from German territory (a). However, the further findings of the Higher Administrative Court, that is, that a sufficiently qualified connection to the territory of the German state already existed where the part of the actions of the other state that impaired basic rights relating to the territory of the German state, amounts to nothing more than a purely technical transmission process without decision-making elements (b), that a duty of protection was already triggered by an act of the other state which may only possibly prove to be unlawful (c), and that the executive was, when assessing the respective facts under international law, in principle not granted any margin of appreciation which is subject to limited judicial review only (d) are incompatible with the law that is subject to an appeal on points of law.

40 a) The Higher Administrative Court held, without violating the law that is subject to an appeal on points of law, that under article 2 (2) first sentence GG, the German state was in principle obliged to protect foreign nationals living abroad from impairments of their life or physical integrity coming from German territory by another state in a manner contrary to international law, if the respective provisions of international law had a close connection to the protected interests under article 2 (2) first sentence GG and if there was a sufficiently close connection to the German state, which in any event was the case if the other state carried out its impairing action substantially from the territory of the German state.

41 aa) Derived from the basic rights, in particular from the right to life (article 2 (2) first sentence GG), the Federal Constitutional Court has, in its established jurisprudence, developed duties of protection on the part of the state (see BVerfG, judgments of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 - BVerfGE 39, 1 <41 et seq. >, of 16 October 1977 - 1 BvQ 5/77 - BVerfGE 46, 160 <164>, of 28 May 1993 - 2 BvF 2/90 and 4, 5/92 - BVerfGE, 88, 203 <251>, of 15 February 2006 - 1 BvR 357/05 [ECLI:DE:BVerfG:2006:rs20060215.1bvr035705] - BVerfGE 115, 118 <152> and of 30 July 2008 - 1 BvR 3262/07 and 402, 906/08 [ECLI:DE:BVerfG:2008:rs20080730.1bvr326207] - BVerfGE 121, 317 <356>; decisions of 8 August 1978 - 2 BvL 8/77 - BVerfGE 49, 89 <141 et seq. >, of 20 December 1979 - 1 BvR 385/77 - BVerfGE 53, 30 <57>, of 14 January 1981 - 1 BvR 612/72 - BVerfGE 56, 54 <78, 80> and of 29 October 1987 - 2 BvR 624, 1080, 2029/83 - BVerfGE, 77, 170 <214>). Acknowledging duties of protection arising from basic rights is based on the fact that basic rights provisions not only contain subjective defensive rights of the individual against state interference, but at the same time embody an objective order of values which, as a fundamental decision of constitutional law, applies to all areas of law (see BVerfG, judgment of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 - BVerfGE 39, 1 <41 et seq.>; decision of 29 October - 2 BvR 624, 1080, 2029/83 - BVerfGE, 77, 170 <214>). In addition, article 1 (1) second sentence GG expressly obliges the state to respect and protect human dignity (see BVerfG, judgments of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 - BVerfGE 39, 1 <41>, of 16 October 1977 - 1 BvQ 5/77 - BVerfGE 46, 160 <164> and of 15 February 2006 - 1 BvR 357/05 - BVerfGE 115, 118 <152>). The duty of protection derived from article 2 (2) first sentence GG requires the state to protect and promote life, i.e. above all to protect it from unlawful interference by others (BVerfG, judgment of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 - BVerfGE 39, 1 <42>).

42 bb) Contrary to the opinion expressed by the appeal on points of law a duty on the part of the German state to protect interests arising from basic rights can in principle also exist vis-à-vis foreign nationals living abroad and also in the event that basic rights are impaired by other states.

43 In the meantime, it has been clarified in the jurisprudence of the Federal Constitutional Court that article 1 (3) GG establishes that the German state authority is comprehensively bound by the basic rights of the Basic Law, which does not depend on a territorial connection or on the exercise of specific sovereign powers (BVerfG, judgment of 19 May 2020 - 1 BvR 2835/17 - (...) para. 87 et seqq.). This fact that the German state power is comprehensively bound by basic rights is without prejudice to the fact that the scope of the concrete protective effects derived from the basic rights may differ in Germany and abroad. In particular, a distinction may have to be made between different dimensions of basic rights, for instance the effect of basic rights as rights against state interference, as positive obligations of the state, as decisions on values enshrined in constitutional law or as the basis of duties of protection (BVerfG, judgment of 19 May 2020 - 1 BvR 2835/17 - (...) para. 104). In principle, however, according to the Federal Constitutional Court, the binding effect of the basic rights on the German state power in foreign matters also comprises the dimension of the basic rights that establishes a duty of protection. Finally, in accordance with the jurisprudence of the Federal Constitutional Court, it has to be assumed that duties of protection arising from basic rights can be directed not only against impairments caused by private individuals, but also against acts of other states that impair basic rights (see BVerfG, chamber decisions of 4 September 2008 - 2 BvR 1720/03 [ECLI:DE:BVerfG:2008:rk20080904.2bvr172003] - (...) para. 33 et seqq. and of 15 March 2018 - 2 BvR 1371/13 - (...) para. 31).

44 Contrary to the opinion of the appeal on points of law, the fundamental extension of duties of protection arising from basic rights to extraterritorial matters does not undermine the accepted limits in the jurisprudence on the attribution of interference with basic rights abroad. For one thing, the scope of application of a duty of protection arising from basic rights generally only begins where the impairment of a legal position is no longer covered by the defensive right dimension of the basic right (see BVerfG, chamber decision of 4 September 2008 - 2 BvR 1720/03 - (...) para. 37, 39). For another, the standard for the constitutional permissibility of interferences with basic rights is stricter than the standard for fulfilling a duty of protection arising from basic rights, which leaves broad discretion to the state (BVerfG, see above, para. 38).

45 cc) Furthermore, in its approach, the Higher Administrative Court correctly held that, for a duty of protection under article 2 (2) first sentence GG to arise in the event of impairment of life or physical integrity of holders of basic rights in violation of international law, a sufficiently close connection to the German state is required.

46 For one thing, the principle of non-intervention under customary international law, which follows directly from state sovereignty and which is part of the German legal order via article 25 GG, requires a legitimising connecting factor for the exercise of German sovereign power (see BVerfG, chamber decision of 30 January 2008 - 2 BvR 793/07 [ECLI:DE:BVerfG:2008:rk20080130.2bvr079307] - (...)). For another, the requirement of a sufficiently close connection to the German state for a duty of protection to arise from basic rights, is derived from constitutional law. For, although article 1 (3) GG does not contain a restriction to the national territory (BVerfG, judgment of 19 May 2020 - 1 BvR 2835/17 - (...) para. 89), it nonetheless presupposes a political responsibility for decisions (BVerfG, decision of 6. November 2019 - 1 BvR 16/13 [ECLI:DE:BVerfG:2019:rs20191106.1bvr001613] - BVerfGE 152, 152 para. 42; judgment of 19 May 2020 - 1 BvR 2835/17 - (...) para. 91). An unlimited legislative or executive responsibility of the German state power for the integrity of interests protected under basic rights outside its own jurisdiction is alien to the Basic Law. Rather, giving rise to positive obligations to act in order to prevent impairments of legally protected interests that are not attributable to the state as at least an indirect interference, requires that the threat situation has in any case emerged in a substantial respect within the sphere of responsibility of the German state power, i.e. as a rule, as a result of events on German territory.

47 Insofar as the claimants argue that the increase in the risk of violations of basic rights resulting from opening factual scope for action for the USA at Ramstein Air Base as well as from the defendant's restrained own competence to exercise control under the stationing agreement, had to be sufficient for the specific connection to German public power in the present case, they do not take into account that article 24 (2) GG authorises the German federation to be integrated into a system of mutual collective security and, in this context, also to consent to limitations of its sovereign powers. This fundamental constitutional decision in favour of enabling security policy cooperation with other states would be undermined if restraining its own sovereign powers, which is regularly associated with the stationing of allied armed forces on German territory, were to result in itself in a comprehensive responsibility on the part of the German state for the integrity of all interests protected under basic rights affected by measures taken by the contracting states. The exercise of the far-reaching monitoring obligations resulting from this, would considerably hinder international cooperation, if not make it impossible.

48 The fact that a duty of protection arising from basic rights can be triggered in foreign matters only if there is a sufficiently close connection to the German state, is not called into question by the Federal Constitutional Court's jurisprudence on responsibility with respect to European integration, to which the claimants refer in this context. The duty on the part of the constitutional organs to protect and promote the legal positions of the individual enshrined in article 38 (1) first sentence in conjunction with article 20 (2) first sentence GG where individuals are not themselves able to ensure the integrity of these rights (see BVerfG, judgment of 30 July 2019 - 2 BvR 1685, 2631/14 [ECLI:DE:BVerfG:2019:rs20190730.2bvr168514] - BVerfGE 151, 202 para. 142), concerns the case governed by article 23 (1) second sentence GG regarding the transfer of sovereign powers to the European Union under article 23 (1) second sentence GG, which is thereby granted the legal power to issue binding legal acts conferring rights and duties upon citizens, authorities and courts in Germany. Nothing can be inferred from this for the question of whether the limitation of German sovereign powers regularly associated with the stationing of armed forces of other states within the framework of a system of collective security in a narrowly limited territory results in a comprehensive extraterritorial duty of protection on the part of the German state power.

49 b) However, the appeal judgment violates the law that is subject to an appeal on points of law by establishing the legal proposition that a sufficiently qualified connection to the German state as set out above already exists if the relevant contribution to the creation of the source of threat for the interests protected under basic rights on German territory amounts to nothing more than a purely technical transmission process without decision-making elements. (...)

50 However, the fact that technical facilities located on German territory are involved in an overall process, the conception and implementation of which is otherwise exclusively in the hands of officials of another state working outside German territory, is not sufficient, on the basis of an evaluative assessment, to establish duties of protection arising from basic rights on the part of the German state. Where the actions of the other state, which impair or threaten the interest protected under basic rights, cannot be carried out without using the properties or facilities located on German territory, this merely fulfils a necessary, but not sufficient condition for finding a qualified territorial connection. In order to exclude a dissolution of the responsibility of the German state in the case of extraterritorial matters, which is not inherent to the constitutional text and which is incompatible with the dogmatic concept underlying duties of protection arising from basic rights, it must additionally be established that partial acts of the overall event leading to the impairment of or threat to basic rights, which are decisive for the legal assessment, take place within the boundaries of German territorial sovereignty. Only under the condition that the actions or events, that are decisive for the legal assessment of the impairment of or the threat to the interests protected under basic rights, take place at least partially on German territory, can the fact that the German state power is bound by basic rights not only require it - in accordance with the defensive right dimension inherent to basic rights - to refrain from its own acts of interference, but can also - in the sense of the dimension establishing a duty of protection - create positive obligations to act. Accordingly, only those actions or technical processes on German territory that have a relevant decision-making character can trigger duties of protection arising from basic rights.

51 c) Furthermore, the legal proposition in the appeal judgment establishing that triggering the duty of protection did not require a future impairment of the interests protected under article 2 (2) first sentence GG by the action of another state in Germany and this action to certainly be unlawful under international law, rather, the respective basic rights holder could claim protection even before he or she was threatened with impairment of life and limb in violation of international law, is incompatible with the law that is subject to an appeal on points of law. Contrary to the opinion of the Higher Administrative Court, a duty of protection on the part of the German state can only arise from basic rights if, on account of the number and circumstances of violations of international law that have already occurred, it can concretely be expected that comparable acts of the other state in violation of international law impairing or threatening interests protected by basic rights also occur in the future.

52 It is true that the Federal Constitutional Court has stated with regard to threats to basic rights caused by harmful effects on the environment that the duty of protection under constitutional law may require that the legal provisions be designed in such a way as to contain the threat of basic rights violations; whether and when such design was required and the content of such design required by constitutional law depended on the type, proximity and extent of possible threats, the type and rank of the constitutionally protected interest as well as on the provisions already in place (see BVerfG, decisions of 8 August 1978 - 2 BvL 8/77 - BVerfGE 49, 89 <142> - and of 14 January 1981 - 1 BvR 612/72 - BVerfGE 56, 54 <78>). Following up on this, on the merits, the Higher Administrative Court assumes that the requirement of risk prevention related to threats to basic rights when designing legal provisions, which is comprised by the duties of protection on the part of state organs in the context of national environmental law (see BVerfG, decision of 14 January 1981 - 1 BvR 612/72 - BVerfGE 56, 54 <78>), could be decisive for the question concerning the duties of protection on the part of the German state vis-à-vis foreign nationals living abroad in the event of impairments of basic rights by other states. Moreover, the Higher Administrative Court does not primarily take the precautionary principle, which is tailored to environmental threats, as a basis to assess the threshold of threats required to trigger the duty to act in factual terms on the part of the state, i.e. which probability must exist in the present context that the claimants' lives or physical integrity will actually be impaired by armed drone operations by the USA. Rather, the Higher Administrative Court extends the precautionary principle to the legal assessment of the action resulting in the impairment of the interests protected under basic rights, in this case, therefore, to the question of the unlawfulness of the US drone missions in Yemen under international law. Accordingly, a duty of protection on the part of the German state is supposed to be triggered not only by an act of the other state that is to be qualified as unlawful beyond doubt, but already by an act that merely may possibly prove to be unlawful.

53 With this approach, the Higher Administrative Court fails to meet the standards under federal laws for examining whether, in the case of a violation of basic rights by another state, the German state has a duty of protection vis-à-vis foreign nationals living abroad. Admittedly, duties of protection arising from basic rights are in principle aimed at having a preventive effect. However, the Higher Administrative Court's assumption that the basic rights obliged the German state power to take action based on suspicions with the aim of preventing the actions of other states where there is even the possibility of a violation of international law results in a practically unlimited responsibility of the German state for extraterritorial matters, which has no basis, neither in the constitutional text nor in the legislative history of the Basic Law.

54 In the event of violations of basic rights by other states, the duty of protection vis-à-vis foreign nationals living abroad on the part of the German state arising from basic rights can only be triggered - beyond the requirement of a sufficiently qualified connection to the German territory - if, on account of the number and circumstances of violations of international law that have already occurred, it can concretely be expected that comparable acts of the other state in violation of international law impairing or threatening interests protected by basic rights also occur in the future. It must be possible to establish a practice going beyond isolated individual cases of acts contrary to international law on the part of the other state which, by virtue of its duty to protect, the German state may have to prevent from continuing by way of intervention. Where, for example, armed operations are in principle permissible in the context of an international or non-international conflict within the meaning of international humanitarian law, it can typically only be evaluated on the basis of an overall assessment whether there are continuous or regular violations of the international humanitarian law applicable to such conflicts, in particular the prohibitions of indiscriminate attacks serving the protection of the civilian population and civilian objects (article 51 (4) second sentence of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 [Protocol I] - BGBl. 1990 II p 1551) or of attacks with disproportionate collateral damage (article 51 (5) (b) and article 57 (2) (a) no. iii of Protocol I).

55 d) Finally, the standards applied by the Higher Administrative Court when examining whether the duty of protection on the part of the defendant did arise from basic rights, also violate the law that is subject to an appeal on points of law because the Higher Administrative Court does not recognise that the Federal Government has a margin of appreciation within the range of justifiable legal opinions when assessing the actions of other states under international law.

56 Admittedly, the Federal Constitutional Court, in a chamber decision to which the Higher Administrative Court refers, held that the national effect of international law, which binds the judge by virtue of article 20 (3) GG, as well as the guarantee of effective legal protection under article 19 (4) first sentence GG, are in principle opposed to granting non-justiciable margins of appreciation to the executive with regard to breaches of international law (BVerfG, chamber decision of 13 August 2013 - 2 BvR 2660/06, 487/07 [ECLI:DE:BVerfG:2013:rk20130813.2bvr266006] - (...) para. 53). Referring to the principles developed by it for national law (see in particular BVerfG, decision of 31 May 2011 - 1 BvR 857/07 [ECLI:DE:BVerfG:2011:rs20110531.1bvr085707] - BVerfGE 129, 1 <20>), the Federal Constitutional Court stated that, above all, derived from the requirement of effective legal protection, the courts were regularly under an obligation to fully review contested state measures in factual and legal terms; this in principle means that the judicial power is not bound by the factual and legal findings and assessments made by other powers as to what is lawful in the individual case. Restrictions on the judicial review of decisions of the executive were accepted in particular for the political discretion in the field of foreign affairs and in matters of defence policy (BVerfG, chamber decision of 13 August 2013 - 2 BvR 2660/06, 487/07 - (...) para. 54). However, in the above-mentioned decision, the Federal Constitutional Court had emphasised the narrow limits of political discretion. For instance, unlike the specialised courts before, it has not qualified the drawing up of target lists and the non-exercise of a right to veto against the inclusion of a certain target in these lists as well as the classification of an object as a legitimate military target as political decisions which would be excluded from judicial review from the outset (BVerfG, chamber decision of 13 August 2013 - 2 BvR 2660/06, 487/07 - (...) para. 55).

57 However, these considerations of a chamber of the Federal Constitutional Court, which, moreover, were not relevant for the decision in this specific case, are in tension with the principles from which the Federal Constitutional Court proceeded in an earlier senate decision. Accordingly, even a legal opinion which, in the view of a German court, was incorrect under international law and from which the Federal Government proceeded when examining the conditions under which it may have discretion as well as the requirements to be observed in exercising its discretion when granting protection abroad in an individual case, could not in itself justify any defective exercise of such discretion. As reasoning, the Federal Constitutional Court states that the current international legal order largely lacked institutional arrangements, for instance a compulsory international jurisdiction, which could serve to establish the correctness of legal opinions in a binding manner in the event of a dispute. A state's assertion of its own legal position therefore had a much greater significance at the international level than in a national legal system, in which courts determine the law in a way that is also binding on the state. In view of this situation, it is of considerable importance for the protection of the interests of the Federal Republic of Germany that it speaks with a united voice at the international level, through the competent organs vested with foreign affairs power. In view of this, it is incumbent upon the courts to exercise the utmost restraint in qualifying any incorrect legal opinion in terms of international law formed by these organs as errors of discretion. At most, this would have to be considered where holding the legal opinion in question presented itself as being arbitrary vis-à-vis the citizen, i.e. it could no longer be understood from any reasonable - even any foreign policy - point of view (BVerfG, decision of 16 December 1980 - 2 BvR 419/80 - BVerfGE 55, 349 <367 et seq.>).

58 The deciding Senate follows the latter legal opinion, which the Federal Constitutional Court had reasoned in detail in its decision of 16 December 1980. Admittedly, the statements made there concerned the exercise of the Federal Government's discretion in the context of fulfilling the complainant's right to be granted diplomatic protection. The structural peculiarities of international law emphasised by the Federal Constitutional Court, as a legal system which only knows rudimentary approaches of compulsory jurisdiction or other institutional arrangements for an authoritative interpretation of norms and in which therefore - especially with a view to customary international law - the assertion of the legal position of the individual states is of decisive importance in the creation of law, must however, already be taken into account at the level of the constituent elements, in this case with regard to the question of whether there is an unlawful impairment of or a threat to an interest protected under basic rights as a requirement for giving rise to a duty of protection.

59 In contrast, the considerations of the Federal Constitutional Court in the chamber decision of 13 August 2013 (- 2 BvR 2660/06, 487/07 - (...)) did not relate to the situation involving a duty of protection arising from basic rights that is relevant in the present case and the assessment of the actions of other states under international law required in this context. Whilst such assessment is not *a priori* exempt from an incidental legal review by national courts; for, the principle recognised under customary international law that a state is not subject to any foreign national jurisdiction (principle of state immunity), does not prohibit judicial decision on the lawfulness of sovereign acts of other states within the context of preliminary questions (see BVerfG, decision of 10 June 1997 - 2 BvR 1516/96 - BVerfGE 96, 68 <90>). However, the legal positions taken by other states carry particular weight in assessments under international law. This is because the Basic Law assumes that the state constituted by it is integrated into the system of international law of the international community of states (Preamble, articles 24 to 26 GG). The Basic Law therefore also orders foreign legal systems and legal opinions to be respected in principle (BVerfG, decision of 31 March 1987 - 2 BvM 2/86 - BVerfGE 75, 1 <17>). In addition, provisions of international law are often subject to a dynamic interpretation or are further developed on the basis of a concurring state practice in order to take account of new developments in the international sphere (see BVerfG, judgment of 12 July 1994 - 2 BvE 3/92, 5, 7, 8/93 - BVerfGE 90, 286 <361 et seq.>). Above all, however, the lack of compulsory jurisdiction or of other institutional arrangements for an authoritative interpretation of provisions, as emphasised by the Federal Constitutional Court, requires to proceed from the range of justifiable legal opinions. Whether, against the backdrop of the guarantee of legal protection under article 19 (4) GG, a general restriction of judicial review in relation to holders of basic rights would also be justified when assessing the conformity of interfering acts by German public power with international law, does not need to be decided in the present context.

60 5. The Senate cannot, without additional factual findings by the Higher Administrative Court , decide whether the duty of protection on the part of the defendant vis-à-vis claimants no. 2 and no. 3 did arise from basic rights in accordance with the law that is subject to an appeal on points of law.

61 On the one hand, this concerns the question whether the required qualified connection to German territory exists. Contrary to the opinion of the Higher Administrative Court, it is not sufficient that the data stream to control the drones used in Yemen is transmitted via fibre optic cable from the USA to Ramstein Air Base and from there via radio to the drones by means of a satellite relay station. As stated above, only those actions or technical operations on German territory can trigger a duty of protection arising from basic rights that have a relevant decision-making character. Such a case could exist here if the involvement of Ramstein Air Base in the armed drone operations of the USA in Yemen would additionally include an evaluation of information. (...) Since, in accordance with the legal starting point of the Higher Administrative Court, this was not a decisive issue, the appeal judgment does not contain any conclusive factual findings on which the Senate could base its own legal assessment on this point.

62 On the other hand, on the basis of the factual findings of the Higher Administrative Court, it is also not possible to assess whether the drone missions carried out by the USA in Yemen using Ramstein Air Base regularly violate requirements of international humanitarian law, in particular the prohibitions of indiscriminate attacks or attacks with disproportionate collateral damage. The appeal judgment does not contain sufficient factual findings on the respective attack targets and other circumstances of concrete drone missions carried out by the USA using Ramstein Air Base in the past. In particular, it lacks factual findings established by the competent court as to whether the drone attacks carried out by the USA are limited to such persons who are either organisationally integrated into AQAP or the Yemeni branch of IS as opposing parties to the conflict and fulfil a continuing combat function or to such persons who directly participate as civilians in hostilities in the context of the concrete conflict. The same applies where the distinction between combatants and civilians is made according to other criteria (see below under 6.).

63 The lack of factual findings on the respective attack targets and on other circumstances of the specific drone missions of the USA in Yemen is based on the legal starting point of the Higher Administrative Court - as stated above, in violation of the law that is subject to an appeal on points of law - that a duty of protection on the part of the German state arising from basic rights is not only triggered in those cases, in which the measures of another state that impair basic rights are found to be contrary to international law, but - in the sense of an extremely broadly understood precautionary principle that is not only limited to prognostic uncertainties - already when there is merely the possibility that the actions of the other state in question may prove to be contrary to international law. On the basis of its incorrect legal approach, the Higher Administrative Court essentially relies on the abstract depiction of official pronouncements by the USA, from which it gathers, among other things, that the USA considers the use of unmanned drones in the ongoing armed conflict with AQAP or ISIS to be legally permissible in principle and does not refer to as authoritative whether the targets are actually legitimate under international humanitarian law in the context of the respective armed conflict or whether a target person is organisationally integrated into a specific non-state party to the conflict. However, the basis for examining conformity of the selection of targets and the use of weapons with international law cannot be general political statements, but only the concrete circumstances under which the operations were carried out. Only in cases of doubt, for example when it is clear that civilians were also killed or injured in an attack, can it be appropriate to use such statements as a supplement in order to gain knowledge about whether it was a targeted attack or merely unintentional collateral damage.

64 In addition to official pronouncements by the US government, the US Congress and the US military, the Higher Administrative Court does also mention reports by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, reports by the UN Group of Eminent International and Regional Experts on Yemen, and reports by media and non-governmental organisations. However, the Higher Administrative Court did not form its own conviction pursuant to article 108 (1) first sentence VwGO as to the existence of the facts that can possibly also be inferred from these documents with regard to the circumstances of individual drone operations. Rather, it merely refers in general to the fact that there were "weighty factual indications known to the defendant or at least obvious to her" that armed drone missions carried out in the past by the USA in Yemen under the involvement of Ramstein Air Base, including the province of Hadhramaut, were not only incompatible in individual cases with the stipulations of international law and that further drone missions in violation of international law had therefore to be expected in the future. (...)

65 The Senate does not fail to recognise that the establishment of the facts required for examining the compatibility of the US drone attacks in Yemen with international humanitarian law, which is incumbent on the court responsible for finding the facts by virtue of section 86 (1) VwGO, is complicated by the fact that it concerns facts that typically take place outside the perception of German authorities, and that the willingness of the US armed forces, intelligence services and authorities to provide information and to cooperate can probably be ruled out in view of the requirements of military secrecy. Nevertheless, the Higher Administrative Court's reference to indications for the existence of certain facts, cannot replace the necessary conclusive factual findings on which the Senate could solely rely for its own legal assessment. If certain circumstances cannot be clarified, this must be appropriately assessed in the individual case (see BVerwG, judgment of 30 October 2013 - 6 C 22.12 - (...) para. 18). (...)

66 6. Even though, on the basis of the facts established by the Higher Administrative Court, it cannot be assessed whether a duty of protection on the part of the defendant vis-à-vis the claimants no. 2 and no. 3 had arisen from basic rights, the Senate refrains from setting aside the appeal judgment and from remitting the legal dispute to the Higher Administrative Court (section 144 (3) first sentence no. 2 VwGO). For, it follows from the findings contained in the appeal judgment that the defendant, based on the standard set by the Federal Constitutional Court in this respect (a), has in any case sufficiently fulfilled her duty of protection that may have been arisen (b). The Senate can therefore decide on the case itself (section 144 (3) first sentence no. 1 VwGO) and restore the decision of the Administrative Court dismissing the action.

67 a) Where a duty of protection arising from basic rights is addressed to the legislature, it is entitled, in accordance with the established jurisprudence of the Federal Constitutional Court, to a broad margin of appreciation, evaluation and scope for action (see BVerfG, judgment of 1 December 2009 - 1 BvR 2857, 2858/07 [ECLI:DE:BVerfG:2009:rs20091201.1bvr285707] - BVerfGE 125, 39 <78>; decisions of 29 October 1987 - 2 BvR 624, 1080, 2029/83 - BVerfGE 77, 170 <214>, of 6. May 1997 - 1 BvR 409/90 - BVerfGE 96, 56 <64> and of 26 July 2016 - 1 BvL 8/15 [ECLI:DE:BVerfG:2016:ls20160726.1bvl000815] - BVerfGE 142, 313 <337>. Certain requirements as to the type and degree of protection cannot in principle be inferred from the constitution (BVerfG, judgment of 10 January 1995 - 1 BvF 1/90, 1 BvR 342, 348/90 - BVerfGE 92, 26 <46>). Specifically with regard to the duty of protection deriving from article 2 (2) first sentence GG, the Federal Constitutional Court has emphasised that state organs must in principle decide on their own responsibility on how to fulfil their duty of effectively protecting life. They decide on the appropriate and required protective measures to ensure the effective protection of life (BVerfG, judgment of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 - BVerfGE 39, 1 <44>). The breach of a duty of protection can only be established if the public power has either not taken any protective measures at all or if the regulations and measures taken are completely unsuitable or completely inadequate to achieve the required protective aim or fall considerably short of such aim (see BVerfG, judgments of 28 May 1993 - 2 BvF 2/90 and 4, 5/92 - BVerfGE 88, 203 <251 et seqq, 254 et seq.> and of 10 January 1995 - 1 BvF 1/90, 1 BvR 342, 348/90 - BVerfGE 92, 26 <46>; decision of 29 October 1987 - 2 BvR 624, 1080, 2029/83 - BVerfGE 77, 170 <214 et seq.> with further references). In the present context, it must also be taken into account that the Basic Law affords organs vested with foreign affairs power a wide margin of appreciation in the assessment of important foreign policy matters and of the appropriateness of possible conduct (BVerfG, decisions of 7 July 1975 - 1 BvR 274, 209, 247/72 and 195, 194, 184/73 - BVerfGE 40, 141 <178>), of 16 December 1980 - 2 BvR 419/80 - BVerfGE 55, 349 <365> and of 13 October 2016 - 2 BvE 2/15 [ECLI:DE:BVerfG:2016:es20161013.2bve000215] - BVerfGE 143, 101 <153>).

68 b) It is true that the Higher Administrative Court also avowedly proceeded from the abstract standard set out above. However, it did not, without a legal error, apply this standard to the facts it had established.

69 Contrary to the opinion of the Higher Administrative Court, the measures of the Federal Government cannot be qualified as inadequate, neither because they lacked an own legal assessment (aa), nor because the Federal Government's activities have so far been limited to carrying out consultations (bb) as well as to obtaining a legal assurance from the USA (cc). In particular, the defendant did neither have to "confront" the USA with a certain interpretation of the law (dd), nor did she have to consider further steps such as the denunciation of the international treaty basis for the use of Ramstein Air Base (ee).

70 aa) The Higher Administrative Court's starting point that the Federal Government had not formed its own opinion on the question of conformity of the drone missions at issue with international law which could serve as a basis to make an appropriate decision on its further course of action, is already incompatible with the factual findings contained in the appeal judgment. (...)

71 The assumption that there was no assessment of the permissibility of the drone missions under international law cannot be based on the fact that the Federal Government avoided any clear determination in its answers to parliamentary questions and instead referred to the long-standing and trusting cooperation with the USA and to the fact that the USA, as a state based on the rule of law, has a broadly institutionalised tradition of respecting international humanitarian law and enforcing compliance with it. As already stated above, the Federal Government must take into account the range of justifiable legal opinions when assessing the actions of other states under international law. Therefore, when fulfilling its duty of protection arising from basic rights in relation to foreign countries, it is also entitled to refrain in its public pronouncements from conclusively assessing the actions of other states under international law if the application and the content of the relevant rules of international law are disputed or are subject to change against the background of new developments in the international sphere.

72 This is the situation here. The assessment of the drone operations of the USA in Yemen under international law encounters considerable difficulties, both with regard to the content of the applicable provisions of international law as well as with regard to the investigation of the facts relevant for the decision. In view of these difficulties, it is noteworthy that the Higher Administrative Court itself did not come to a conclusive legal assessment, but, as mentioned, only expressed "doubts" about the conformity of the drone operations in Yemen with international law on the basis of "weighty factual indications" for the existence of certain facts. Since, according to the opinion expressed by the Higher Administrative Court, which does not give rise to objections under the law that is subject to an appeal on points of law, it must be assumed that the drone missions of the USA in Yemen directed against AQAP and ISIS do not breach the prohibition of the use of force under article 2 (4) of the UN Charter due to the consent given by the Yemeni government and since a non-international armed conflict currently exists between AQAP and ISIS and the US-supported Yemeni government, the legal assessment of the drone missions in the present context of a duty of protection on the part of the German state arising from basic rights, depends on whether there are continuous violations of international humanitarian law applicable to such conflicts.

73 As also already mentioned - the prohibitions under customary international law of targeted or indiscriminate attacks on civilians and of attacks resulting in disproportionate collateral damage - are decisive here. It is beyond doubt that the prohibition of targeted and indiscriminate attacks on civilians, as set out in article 51 (4) and (5) of Protocol I, governing international armed conflicts, constitutes a general rule of international law which must also be observed in non-international armed conflicts (see BVerwG, judgment of 5 April 2016 - 1 C 3.15 - BVerwGE 154, 328 para. 46). Moreover, the prohibition of attacks causing disproportionate collateral damage as established for international armed conflicts in article 51 (5) (b) and article 57 (2) (a) no. iii of Protocol I also applies in non-international armed conflicts as customary

international law (...). A legal conviction of the international community to this effect is, *inter alia*, reflected in resolutions of the UN Security Council and the UN Commission on Human Rights (see the overview in Henckaerts/Doswald-Beck [eds.], Customary International Humanitarian Law, 2005, Vol. II: Practice, p. 320 et seq.), in further official documents of the UN (see Report of the UN Special Rapporteur on extra-judicial, summary or arbitrary executions - Philip Alston, 2010, U.N. Doc. A/HRC/14/24/Add.6, para. 30), in decisions of international courts (see ICTY, Prosecutor v. Kupreškić [Case No.: IT-95-16-T], judgment, 14 January 2000, para. 524) as well as in a multitude of national legal and administrative provisions - including those of the USA (see the overview in Henckaerts/Doswald-Beck [eds.], Customary International Humanitarian Law, 2005, Vol. II: Practice, p. 299 et seqq.).

74 Unlike the application under customary international law of the prohibitions of targeted and indiscriminate attacks against civilians and of attacks causing disproportionate collateral damage in non-international armed conflicts, the question of the distinction between combatants of a non-state party to the conflict and civilians is difficult and controversial (...). It cannot necessarily be presumed that the rule set out in article 13 (3) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and ting to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (BGBl. 1990 II p. 1637), whereby civilians enjoy the protection afforded under this part, unless and for such time as they take a direct part in hostilities, applies under customary international law, since, among others, the USA have not signed the Protocol (...). In any event, even then it remains to be clarified under which conditions acts can be deemed to constitute direct participation in hostilities. Finding direct participation in hostilities poses problems especially in unclear conflict situations where state organs do not have precise information on how insurgent groups are organised, which person actually belongs to these groups and on the basis of which external characteristics the persons concerned can be identified (...). Some express the opinion that e.g. communication and logistics experts are also (*de facto*) combatants (...). Furthermore, the question under which conditions a combatant may be killed who temporarily takes part in hostilities only to return to his role as a civilian (...) has not yet been conclusively clarified. The fact that under article 50 (1) of Protocol I the civilian status is maintained in cases of doubt, does not produce any further results, since this presumption rule cannot be proven to apply under customary international law to non-international conflicts.

75 bb) It follows from the factual findings of the Higher Administrative Court, which are also based on the Bundestag printed papers already referred to, that, irrespective of the difficulties described in the assessment under international law of the drone attacks carried out by the USA in Yemen using Ramstein Air Base, the Federal Government decided in 2016 at the latest to enter into consultations with the USA addressing legal questions arising from the use of unmanned aerial vehicles. Subsequently, the Federal Government decided to continue these consultations at different diplomatic and political levels.

76 Contrary to the opinion of the Higher Administrative Court, the ongoing conduct of consultations at various diplomatic and political levels cannot be qualified as a "completely inadequate" instrument to protect the claimants from harm caused by drone attacks that may be in violation of international law. As correctly stated by the appeal on points of law, such political consultations constitute a classic means of foreign affairs power in dealings with other states. From a constitutional law perspective, the alternative of unilateral action by the defendant is opposed by the decision of the Basic Law - which the Higher Administrative Court itself emphasised in another context - in favour of Germany's integration in the international cooperation of states (see articles 23 to 26 GG). Apart from these constitutional law stipulations, elementary foreign, alliance and defence policy interests of the Federal Republic of Germany may also speak against unilateral action by the Federal Government in relation to other states. Finally, account must be taken of the fact that at the level of international law there is no equivalent to the state's monopoly on the use of force and that law enforcement is therefore necessarily tied to cooperation with other states.

77 cc) According to the factual findings in the appeal judgment, the Federal Government also obtained an assurance from the USA that unmanned aircraft for anti-terrorist missions are neither launched nor controlled from Ramstein and that the USA respects German law in its activities at Ramstein - as in Germany as a whole. Nor does obtaining such a general assurance that activities at US military premises in Germany will be carried out in accordance with applicable law constitute a "completely inadequate" means, as the Higher Administrative Court assumes. In principle, the Federal Government, in fulfilling its duty of protection arising from basic rights vis-à-vis foreign nationals living abroad, may rely on such an assurance by another state that it is acting lawfully, provided that this declaration is not based on a legal opinion that exceeds the bounds of what is justifiable or is demonstrably contrary to the facts.

78 dd) Contrary to the opinion of the Higher Administrative Court, the defendant's fulfilment of the duty of protection possibly arising from basic rights vis-à-vis the claimants no. 2 and no. 3, is also not contingent upon the Federal Government "confronting" the US side with the "German interpretation of international law" and the doubts resulting thereof as to the conformity of the drone missions in Yemen with international law.

79 Apart from the fact that assessing actions of other states under international law may - as already stated - due to the structural peculiarities of international law, depend on the range of justifiable legal opinions and in particular on the central and disputed question here of the distinction between combatants of a non-state party to the conflict and civilians, there is nothing to indicate in which way such a "confrontation" is to be realised outside the already existing practice of diplomatic and political consultations with the USA. The appeal on points of law rightly points out that compliance with the requirement to regularly confront another state could furthermore not be adequately documented due to the confidentiality of diplomatic consultations. By essentially demanding that the Federal Government publicly declare that it clearly qualifies the US drone operations in Yemen as violations of international law and the way it has communicated this legal conviction to the USA, the Higher Administrative Court fails to recognise that, according to the jurisprudence of the Federal Administrative Court, it is within the scope for action afforded to the Federal Government in foreign policy to determine the way it wishes to react to actions of other states that are unlawful or in violation of international law. For the sake of foreign policy objectives that are classified important, it may defer its own (public) criticism thereof and may refrain from anything that encourages criticism by others, for instance the press (see BVerwG, judgment of 29 October 2009 - 7 C 22.08 - (...) para. 17). Insofar as the Higher Administrative Court assumes that there is no reason to fear a disproportionate impairment of the foreign and defence policy interests of the Federal Republic of Germany, since Germany and the USA are democratic states governed by the rule of law which have also committed themselves in a legally binding manner to the principles of the rule of law and the protection of human rights at the international level, it fails to recognise the limits imposed by the constitution on the judiciary when assessing foreign policy questions. It is not for the courts to substitute their assessment of the relationship with other states or of the possible effects of certain measures at the international level for the assessment of the organs of the Federal Republic of Germany vested with foreign affairs power (see BVerfG, decision of 13 October 2016 - 2 BvE 2/15 - BVerfGE 143, 101 <153>; BVerwG, judgment of 24 February 1981 - 7 C 60.79 - BVerwGE 62, 11 <18>).

80 ee) The Federal Government did not have to consider further steps to fulfil its duty of protection possibly arising from basic rights vis-à-vis the claimants no. 2 and no. 3.