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CORRESPONDENTS' REPORTS

GERMANY[1]

Contents

Case – Enlistment of a child into an armed group party to a non-international armed conflict and terrorism-related offences under domestic law

☛ 7 StS 4/19 (Düsseldorf Higher Regional Court, 29 April 2020)

In the proceedings before the Düsseldorf Higher Regional Court, a German woman was found guilty at first instance of three counts of membership in a foreign terrorist organisation (the so-called Islamic State of Iraq and Syria or ISIS), two counts of aggravated deprivation of a minor, one count of deprivation of a minor resulting in death, three counts of breach of the duty to care for or bring up a child, a war crime against persons and a violation of the German War Weapons Control Act (*Kriegswaffenkontrollgesetz* or KrWaffKontrG).

The accused had left for Syria in October 2015 together with her three minor children, against the will of her husband and father of the children, to join ISIS in Syria. She divorced her husband with the help of an ISIS 'judge', and married a former ISIS fighter, who was then working in administration and with whom she later had a child. Her second husband granted her access to a hand grenade located in the joint household until his death in an air strike. The accused took the oath of allegiance to ISIS, joined an ISIS women's unit (*Katiba Nusaiba*) and was trained in first aid as well as self-defence. She had her six or seven-year-old son trained militarily, including in the use of firearms, a total of three times in training camps of ISIS's so-called '*Ashbal*'[2] units. Moreover, she attended a public execution conducted by ISIS together with her children.

After the death of her ISIS husband, she married another member of the organisation – this time as a 'secondary wife'. With him and his household, she later fled towards Turkey in order to protect herself and her children from the turmoils of war. While fleeing, the family's house was hit by an airstrike, killing the husband's 'primary wife', one of the husband's children and the accused's son, who was now seven years old. Once in Turkey, the woman and her three

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[2] The unit's full name was "*Ashbal al-Khilafa*", which translates as "*Cubs of the Caliphate*". This unit was used by ISIS to provide military training to children between the ages of ten and 15.

surviving children were taken to Germany, where she was immediately taken into custody. The court was convinced that she only renounced her allegiance to ISIS shortly before the main trial and that she was only motivated to flee due to the danger to life and limb caused by the armed conflict in Syria. The case was based, to a considerable extent, on the statements of the accused, and information provided by her German husband, her mother and the investigating officers, as well as reports of the German Foreign Intelligence Service (*Bundesnachrichtendienst* or BND).

The court argued that ISIS is to be regarded as a foreign terrorist organisation. The organisation intended to establish a hierarchically constituted Islamic state on the territory of Syria and Iraq, subject to the will of a caliph, on the basis of an Islamic order under the application of the Sharia. Catalogue offences under §§ 129a and 129b of the German Criminal Code[3] (*Strafgesetzbuch* or StGB) and manslaughter against members of the Syrian armed forces and other representatives of the regime, the administration, the Yazidi minority and deadly attacks in Europe were committed under the direction of ISIS to further these aims. The accused had actively promoted the aims of the organisation, was accepted as a member and identified herself with the actions and aims of ISIS. She received a monthly allowance of USD 100 and a widow's allowance of USD 1.000 after her first 'ISIS-husband' died. In addition, the court found that agreeing to enrol her son in the *Ashbal* training increased ISIS's fighting capacity and represented another active act of sponsorship.

Furthermore, the transfer of the three children against the will of their father, who was (also) entitled to care and upbringing, constituted a gross violation of the duty of care and upbringing under § 171 of StGB. This violation was aggravated by the life forced upon the children in a war zone where they were subject to the arbitrary rule of ISIS, the attendance of executions and the instruction of the son in a military training camp.

By consenting to the training of her then six-year-old son in an ISIS training camp for child soldiers in May 2016, the accused had fulfilled the elements of the offence of enlisting a child under the age of 15 into an armed group according to § 8 para. 1 no. 5 clause 2 of Germany's Code of Crimes against International Law (*Völkerstrafgesetzbuch* or VStGB) (corresponding to the regulation of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) Rome Statute,[4] which the German legislator uses as an interpretive aid for the VStGB). An armed conflict – a necessary contextual element for a war crime – existed at the time of the crime in Syria in the form of a non-international armed conflict (NIAC). Previous German court decisions affirm the existence of an armed conflict in Syria, at least from 2012 to 2015. The court distinguished the violent clashes at the time of the crime from mere unrest and considered the necessary intensity threshold for the existence of an armed conflict to have been fulfilled. ISIS is classified as a non-state party to the conflict in opposition to the Syrian regime of Bashar al Assad. § 8 para. 1 no. 5 VStGB is applicable to state- and non-state parties in NIACs alike, since the legislature deliberately inserted the concept of an *armed group* into the law alongside that of the *armed forces*. The term 'enlistment' should be interpreted as any (also purely factual, e.g. registering) inclusion into an armed unit. According to the court, the fact that children and youths are trained in the use of weapons in the *Ashbal* units, and that these units are embedded into ISIS's military organisation, shows that they are armed units of a non-state party to the conflict. The court concluded that by handing over her son to a person who took him to a camp of the *Ashbal* units

[3] §§ 129a and 129b StGB criminalise the formation of and membership in foreign terrorist organisations. These sections are frequently applied simultaneously to those of the VStGB in cases of ISIS-returnees (or former ISIS-members in general) in Germany.

[4] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (Rome Statute).

for training purposes, the accused committed the offence of enlistment of a child into an armed group. The fact that she repeated this act three times was considered as an aggravating factor. *Active participation* of the child in hostilities was not necessary, since the *telos* of the penal provision was not (only) to protect children from the actual dangers of a front-line mission, but to counteract all dangers – especially related to the psychological development of a child – associated with military training. Consequently, the court ruled that a nexus between the accused's act and the NIAC in Syria was also given. The court differentiated between acts committed "merely 'on the occasion' of the armed conflict" and those in "functional connection" (*funktionaler Zusammenhang*) with the armed conflict to elaborate the nexus requirement.[5]

In addition to the conviction under § 8 para. 1 no. 5 clause 2 of the VStGB, the court found the accused guilty of the possession of a hand grenade without permission from the German authorities, in violation of § 22a para. 1 no. 6 KrWaffKontrG.

The accused was sentenced to five years and three months imprisonment. The judgement is not yet final as an appeal is still admissible.

Case – Individual right to reparations for war damages due to violations of IHL under International Law and German state liability law

☛ 2 BvR 477/17 (Federal Constitutional Court, 18 November 2020)

The case before the Federal Constitutional Court concerned the so-called 'Kunduz airstrike'[6] of 4 September 2009. Two tankers carrying fuel for ISAF (International Security Assistance Force) troops were hijacked by members of the Taliban near the city of Kunduz on 3 September 2009. During the subsequent onward journey, both vehicles got stuck on a sandbank in the middle of the Kunduz River, rendering them unable to manoeuvre. The commander of a nearby ISAF Provincial Reconstruction Team (PRT) field camp, a German colonel, learned of the hijacking and arranged for the deployment of a reconnaissance aircraft with the aim of determining the location of the vehicles. Shortly past midnight, the vehicles were located. After the aircraft had to abort the mission due to lack of fuel, further air support was requested and granted. This time, two armed US Air Force F-15 fighter aircrafts arrived and began transmitting video footage (infrared) to the field camp's command centre. The PRT commander was simultaneously provided with intelligence from a local informant, from which he (in hindsight) erroneously concluded that all persons in the vehicles' vicinity were Taliban fighters. With the purpose of destroying the hijacked tankers as well as to kill presumably present high-ranking Taliban commanders and fighters, the German colonel gave the order to drop two 500-pound bombs. Both tankers were destroyed, and several people in their vicinity were injured or killed, including numerous civilians, who had gathered to collect fuel from the tankers.[7]

After conducting investigations in the case, the Federal Public Prosecutor General found that no war crimes had been committed by the German colonel and thus decided as early as

[5] Higher Regional Court Düsseldorf, Judgment of 29 April 2020, Case No. 7 StS 4/19, mn. 103 (juris).

[6] For a more comprehensive background on the case see also the report of the parliamentary committee of enquiry in German Bundestag (2011) Printed Matter 17/7400, as well as – regarding the German criminal proceedings – German Federal Public Prosecutor General (2010) Note on the discontinuation of proceedings, Case No. 3 BJs 6/10-4 and ECtHR, *Hanan v Germany*, Grand Chamber Judgment, 16 February 2021, Application No. 4871/16.

[7] See https://www.theguardian.com/world/2009/sep/04/afghanistan-taliban for media coverage on the incident.

April 2010 not to proceed with the case.[8] Relatives of civilian victims filed lawsuits for damages and compensation for pain and suffering against the Federal Republic of Germany before German courts. Two lower courts rejected the claims based on the argument that the plaintiffs were not entitled to a claim against the Federal Republic of Germany. As reparations and claims for damages could only be made in intergovernmental relations, it would be the victim's home state that was entitled to assert these claims, not individuals. In addition, the courts decided that actions of German soldiers within the context of foreign deployments of the Federal Armed Forces (*Bundeswehr*) could not justify individual claims arising from state liability for wrongful acts of officials under § 839 of the German Civil Code (*Bürgerliches Gesetzbuch* or BGB) in conjunction with Article 34 of the Basic Law for the Federal Republic of Germany (*Grundgesetz* or GG). Furthermore, individual claims could not be deduced from a 'sacrifice' (*Aufopferung*)[9] by the victims. In response to these decisions,[10] two claimants appealed to the Federal Constitutional Court.

While the Federal Constitutional Court confirmed most of the previous rulings' merits, its decision deviates in important details. Firstly, the court ruled that despite the progressive subjectification of international law, no individual claim for damages could be derived from general principles of international law,[11] which are part of German federal law via Article 25 GG. The individual may be far less dependent on the representation by its home state nowadays – in this context, reference is made to the guarantees and protections international human rights law affords to individuals also in combination with provisions of international humanitarian law (IHL). Individual liability for violations of international law is increasingly recognised, with the ICJ's Wall Opinion being cited by the court in this regard.[12] Moreover, individuals can also be held accountable for their actions under the principle of individual criminal responsibility in international criminal law. For these reasons, the court stated that the individual is now at least partially recognised as a subject of international law.

Nevertheless, only the injured party's home state in its capacity as the original subject of international law is entitled to claim damages or compensation for state acts in violation of international law against foreign nationals. Also, neither Article 3 Hague Convention IV[13] nor

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[8] Regarding the Federal Constitutional Court's decision on the criminal proceedings – Federal Constitutional Court, Decision, 19 May 2015, Case No. 2 BvR 987/11 – see Dornbusch J (2015) YIHL 18, Correspondents' Reports – Germany, pp 1-2.

[9] These claims were discussed on the basis of an application – very rare in Germany – of customary law derived from §§ 74, 75 of the Introduction to the General State Laws for the Prussian States of 1794 (*Einleitung zum Allgemeinen Preußischen Landrecht* or Einl. PrALR). In the court's opinion, claims on this basis could only be taken into account if the particular act in question was part of ordinary administrative action.

[10] Federal Court of Justice, Decision, 12 January 2017, Case No. III ZR 140/15; Judgment, 6 October 2016, Case No. III ZR 140/15 (see Dornbusch J (2016) YIHL 19, Correspondents' Reports – Germany, pp 2-4); Higher Regional Court Cologne, Judgment, 30 April 2015, Case No. 7 U 4/14; Regional Court Bonn, Judgment, 11 December 2013, Case No. 1 O 460/11.

[11] The court explicitly refers to 'general principles of international law' ('allgemeine[n] Regeln des Völkerrechts'), mn. 17 (juris). It can be assumed that these principles' expression is to be read in accordance with Article 38 para. 1 lit. a to d of the Statute of the International Court of Justice. Article 25 GG has the function of transferring rules of international law to the national level. Article 25 GG reads in official translation: 'The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.'

[12] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 136, mn. 153, in: Federal Constitutional Court, Judgment of 18 November 2020, Case No. 2 BvR 477/17, mn. 18 (juris).

[13] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, opened for signature 18 October 1907 (entered into force 26 January 1910) (Hague Convention IV). Article 3 reads: 'The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.'

Article 91 of Additional Protocol I to the Geneva Conventions[14] established individual claims for compensation under international law. As a result, it must be recognised that individual rights extend further than their protection under compensatory law.

Claims for damages due to a 'sacrifice', on the other hand, had been developed exclusively for everyday administrative actions, which did not cover the consequences of an armed conflict. Therefore, the Federal Constitutional Court upheld the lower courts' decisions on this point.

The Federal Constitutional Court, however, did not fully agree with the lower courts' reasoning regarding the inapplicability of official liability claims under § 839 BGB in conjunction with Article 34 GG to foreign deployments of the Federal Armed Forces. In particular, the comprehensive, spatially unrestricted adherence of German state authority to German constitutional rights speaks in favour of the applicability of the claim. Moreover, liability for wrongful acts of the state is not only a manifestation of the principle of legality but rather an outflow of the respective constitutional rights affected itself: by awarding compensation claims in the form of damages at least a complete idling of interests protected by constitutional rights can be prevented and unjustified and disproportionate curtailments of the protection of said rights can be countered by courts. In addition, linking back liability for wrongful acts to the responsible state is in line with general principles of European legal tradition since liability for administrative acts is recognised in many European legal systems. Lastly, the court argues that a claim for compensation for violations of constitutional rights also has a human rights core, as is obvious from the idea of the obligation to compensate for violations of human rights, which is evident in Article 41 ECHR[15] as well as in the European Court for Human Rights' practice.

On the other hand, agreeing with the lower courts, the Federal Constitutional Court also found that official liability must be *limited* in the case of joint military operations. The Federal Republic of Germany could not risk being held liable for the conduct of other states not bound by German law or subject to German state liability law, i.e. through joint liability for acts of foreign military personnel while conducting joint military missions under NATO-command.[16] Although German state authorities – including the Armed Forces – are always and everywhere bound by constitutional rights, the exact specification of that obligation may differ in cases of (military) actions abroad.

Despite these findings, the Federal Constitutional Court ultimately did not reach a final decision on the fundamental question of the applicability of the law on official liability to *Bundeswehr* missions abroad. Instead, the Federal Court of Justice's view that the German colonel did not breach any official duty was upheld, rendering the question of applicability of official liability law irrelevant to the decision due to the absence of a wrongful act by a German state actor.

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[14] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I). Article 91 reads: 'A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

[15] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (ECHR).

[16] The Federal Constitutional Court specifically refers to §§ 839, 830 BGB in conjunction with Article 34 GG regarding a (possible) joint responsibility for acts of foreign military personnel, Federal Constitutional Court, Judgment of 18 November 2020, Case No. 2 BvR 477/17, mn. 30 (juris). In accordance with German civil law, Germany could thus not only be held accountable for wrongful acts of foreign military personnel but Germany would be obliged to afford compensation for such acts. This would necessarily lead to a significant limitation of Germany's ability to act (militarily) as part of an alliance like NATO.

The specific reasoning is as follows: a breach of official duty by a German soldier must be measured against the yardstick of the German Soldier Act (*Gesetz über die Rechtsstellung der Soldaten* or *Soldatengesetz*) and, above all, against the 'violence-limiting rules of IHL', according to the Federal Constitutional Court. Seen against this background, not every killing of civilians within an armed conflict constitutes a violation of IHL. The burden of proof and presentation of a violation of IHL is, in principle, on the claimant. *In casu*, the applicants had only claimed that the order to attack should not have been given, as it could not have been ruled out that the persons identified in the area of effect of the weapons were civilians, which in the view of the court did not prove a violation of IHL. In the view of the Federal Court of Justice – the preliminary instance – the German colonel had exhausted all the sources of information available to him when issuing the order to attack, thus no wrongful act was identified.

The Federal Constitutional Court did not find any violation of specific constitutional law. As its mandate is not to make a new decision on the facts but merely to review the violation of constitutional law, in absence of such a violation, the constitutional complaint was not accepted for decision on the merits, as it was in any case unfounded.

Case – No violation of fundamental rights of third country nationals by tolerating actions possibly contrary to IHL

☛ 6 C 7/19 (Federal Administrative Court, 25 November 2020)

A case was brought before the Federal Administrative Court as to whether the Federal Republic of Germany was obliged to take "appropriate measures" against the use of the US military base in Ramstein, located in Rhineland-Palatinate, for attacks carried out by US armed unmanned aerial vehicles ("combat drones") in Yemen. At the Higher Administrative Court of North Rhine-Westphalia (preliminary instance) and the Administrative Court Cologne (first instance), the plaintiffs had submitted that transmission of electronic control signals, via a facility on the grounds of the military base in Ramstein, enabled the US armed forces to carry out drone attacks worldwide – and in particular, in Yemen. Furthermore, the drone attacks were – in the plaintiffs' view – illegal under international humanitarian law, as they did not sufficiently distinguish between military and civilian targets (in violation of the principle of distinction under IHL). The illegality of the acts under international law in conjunction with constitutional rights – in particular the state's duty to protect life and physical integrity according to Article 2 para. 2 GG and the guarantee of human dignity according to Article 1 para. 1 GG – obliges Germany to take appropriate measures, because the acts were linked to German territory. The plaintiffs argued these measures could include the initiation of consultations pursuant to Articles 53 and 60 of the Additional Protocol to the NATO Status of Forces,[17] the use of diplomatic means by the Federal Republic of Germany to make the United States comply with international law according to Germany's interpretation thereof, the withdrawal of the granting of telecommunications frequencies or the termination of the agreement on the use of the Ramstein military base. The Federal Government responded that there is no obligation on the Federal Republic of Germany under any circumstance, as that would *inter alia* inadmissibly curtail Germany's leeway in foreign and defence policy. Furthermore the Federal Republic argued that even if Germany was obliged to take appropriate measures, it had already done so by obtaining guarantees by the US government that Ramstein Airbase would not be used to carry out acts in violation of international law.

[17] Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces of 19 June 1995.

The administrative court of first instance ruled that the action was admissible but unsubstantiated,[18] whereas the Higher Administrative Court as the second instance ruled that the action was at least partially substantiated and that Germany had to take appropriate measures to ensure that no breaches of IHL emanated from the US military base, and thus from German territory.[19] In response, the Federal Government appealed to the Federal Administrative Court.

The latter argued as follows: a *direct* attribution to the Federal Republic of Germany of acts committed by the US – possibly in violation of international law – through the use of Ramstein Air Base for drone attacks in Yemen was out of the question; such acts could not be attributed to Germany *directly* as an element of decision or an actual conduct on German soil was necessary for such an attribution. In the case at hand, facilities on Ramstein Air Base were only used to relay electronic signals. However, this also excluded Germany's co-responsibility for possible violations of constitutional rights due to *active* acts (cited here was *inter alia* Germany's approval of the construction of a satellite relay station in Ramstein for the implementation of armed drone missions abroad). The case-law of the ECtHR with regard to Article 1 ECHR did not indicate otherwise. According to ECtHR case law, under Article 1 ECHR, states are only jointly responsible for human rights violations committed by representatives of a third state on their territory if these are carried out with the first state's *tacit or express approval*.[20] The prerequisite for this, however, is the state's knowledge of the danger of human rights violations and acts by the state itself furthering these violations; the provision of military infrastructure in accordance with the NATO Status of Forces[21] does not suffice for that.

In its judgement, however, the Federal Administrative Court assumed that binding obligations for Germany to protect constitutional rights could in principle also exist for the benefit of foreigners abroad.[22] In the present case, however, such an obligation did not arise. In this regard, the decision of the lower court was considered erroneous in three respects: (1) a for the emergence of such an obligation necessary *sufficiently qualified domestic connection* is missing, contrary to the lower court's findings, (2) an obligation cannot be triggered by a third state's action *only possibly* violating international law and (3) the finding that the discretionary power of the executive with regard to the assessment of the respective facts under international law is subject to judicial review *without restriction*.

With reference to (1), the Federal Administrative Court ruled that no *sufficiently qualified domestic connection* exists in the present case. A purely technical transmission process without a decision-making element or active acts on German soil – such as the transmission of control signals in this case – only constitutes a *necessary* condition for a qualifying territorial reference, but not a *sufficient* one. Accordingly, "only those actions or technical processes on German territory that have a relevant decision-making character can trigger a constitutional obligation to protect".[23] Such actions could include e.g. the evaluation of information concerning the drone strikes in Yemen involving Ramstein Air Base. Based on the lower court's factual findings, such actions that go beyond a purely technical process lacking any decision-making elements were not identified by the Federal Administrative Court.

As for (2), a duty to protect based on constitutional rights and therefore an obligation of the Federal Republic of Germany to intervene could arise *only*, if "on the basis of the number and circumstances of violations of international law that have already occurred, it is concretely

[18] Administrative Court Cologne, Judgment, 27 May 2015, Case No. 3 K 5625/14.
[19] Higher Administrative Court North Rhine-Westphalia, Judgment, 19 March 2019, Case No. 4 A 1361/15.
[20] ECtHR, Judgment, 13 December 2012, Case No. 39630/09, El Masri v. Macedonia; Judgment, 24 July 2014, Case No. 28761/11, Al-Nashiri v. Poland; Judgment, 23 February 2016, Case No. 44883/09, Nasr and Ghali v. Italy, in: Federal Administrative Court, Judgment, 25 November 2020, Case No. 6 C 7/19, mn. 33 (juris).
[21] Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces of 19 June 1951.
[22] Federal Administrative Court, Judgment, 25 November 2020, Case No. 6 C 7/19, mn. 42 (juris).
[23] Federal Administrative Court, Judgment, 25 November 2020, Case No. 6 C 7/19, mn. 50 (juris).

to be expected that comparable acts of the other state in violation of international law will also occur in the future".[24] In this context regarding the finding of already occurred violations of international law, the Federal Administrative Court considers the preliminary instance's opinion that the US drone strikes were illegal under international law invalid. The lower court concluded that the US drone strikes in Yemen were illegal based on its own assessment of international law and IHL, mainly derived from Germany's general legal opinion on the matter. The Federal Administrative Court replied that in matters of international law, courts cannot measure foreign states' acts against its own or even the (German) government's interpretation of said law but instead have to consider all justifiable positions regarding the interpretation of specific rules of international law. These positions must especially include the potential perpetrator's legal opinion if this opinion is not evidently unjustifiable. The court derived this position mainly from the structural characteristics of international law: missing an authoritative institution regarding its interpretation, international law is shaped and developed by the expression of legal opinions by states. It also results in a judicial review capacity limited to the assessment of *evident* violations of international law based on legal opinions not justifiable by any means as far as acts of foreign powers are concerned. However, the evidence established by the lower court for the assumed illegality of past US drone attacks involving the Ramstein military base under international law was not sufficient according to these standards as the decision of the preliminary court was based on Germany's legal opinion only and did not take the US's legal opinion into account. Instead, in its own assessment, the Federal Administrative Court could not identify an evident violation of international law.

(3) The Federal Administrative Court further stated that the lower court's findings are based on an erroneous assumption insofar as the lower court fails to recognise the government's discretion in assessing the legality of foreign state's actions under international law. On the contrary, due to the important role of legal opinions expressed by states in the shaping and development of international law, extreme judicial restraint is required to ensure that the German legal opinion is perceived as consistent on the international stage.

Despite these findings, the court ruled that it was ultimately not relevant whether or not a duty to protect the applicants based on constitutional guarantees arose for the Federal Republic of Germany in the case at hand, as Germany would have fulfilled its obligation even in the case of a hypothetically assumed existing duty to protect. The Federal Government held diplomatic consultations with and obtained legal assurances from the US Government. It is precisely this assurance to comply with German law (which includes customary international law[25]) – which the lower court found to be insufficient – that the Federal Government may rely on as appropriate measures, unless it can be shown to contradict the facts to the court's persuasion. A violation of this duty would only be established if protective measures had not been taken *at all*, if measures taken were *completely unsuitable* or *completely inadequate* to achieve the required objective or fell *considerably short* of it.

As *obiter dictum*, the court emphasised that the prohibition of targeted and indiscriminate attacks on civilians in international armed conflict (IAC), derived from Article 51(4) and (5) AP I, constitutes a general rule of customary international law, applicable in IACs as well as in NIACs. The same holds true for the prohibition of attacks with disproportionate collateral damage contained in Articles 51(5)(b) and 57(2)(a)(iii) AP I. In reaching these conclusions, the court relied, *inter alia*, on resolutions of the UN Security Council and the UN Commission on Human Rights, the International Criminal Tribunal for the former Yugoslavia and national rules. The question of the distinction between civilians and combatants of a non-state party to

[24] Federal Administrative Court, Judgment, 25 November 2020, Case No. 6 C 7/19, mn. 51 (juris).
[25] General rules of international law, including those of customary nature, have the status of federal law in Germany according to Article 25 GG.

the conflict, on the other hand, is disputed; the same applies to the applicability of the presumption rule of Article 50(1) AP I in NIACs.

Government Policy – Statehood of Palestine

☛ *Written observation on the Prosecutor's Request of 22 January 2020 for a ruling on the International Criminal Court's territorial jurisdiction in Palestine by Germany in its capacity as State Party to the Rome Statute*, ICC-01/18-103 (16 March 2020)

In this policy brief referring to a request by the Office of the Prosecutor (OTP) at the International Criminal Court (ICC),[26] Germany clarified its position on the question of Palestine's statehood and addressed three decisive points: (1) "The legal effect to be attached to the circulation of Palestine's instrument of 'accession' and Palestine's participation in the work of the Assembly of States Parties to the Rome Statute"; (2) "Whether Palestine is a State and how this is relevant for the Court to exercise jurisdiction"; and (3) "Whether Palestine could validly delegate the exercise of criminal jurisdiction to the Court".

Regarding (1), reference is made to UN General Assembly resolution 67/19,[27] which allows Palestine to accede to all international treaties that use the "all States formula" as a condition of accession and grants Palestine "non-member observer State status" in the United Nations. The UN Secretary-General, as depositary of the Rome Statute, is thereby instructed to follow the practice of the General Assembly as set out in resolution 67/19. In accordance with Article 77 Vienna Convention on the Law of Treaties (VCLT),[28] the Federal Republic considers the depositary's function to be merely administrative. The actions of the depositary could therefore not provide answers to questions of substantive law, which instead would have to be answered by the competent body within the organisation in accordance with Article 77(2) VCLT. Consequently, the Secretary-General has not issued any statement of his own regarding Palestine's status. Rather, he merely *communicated* Palestine's accession to the Rome Statute in his depositary notification.[29]

Similarly, when deciding on Palestine's accession to the Statute, the Assembly of States Parties only acted as a *political body*, not as an organ of the International Court of Justice, as stipulated in Article 34 Rome Statute. Germany has clearly expressed its position with regard to Palestinian participation in the work of the States Parties by repeatedly pointing out that the notion "State of Palestine" used in documents of the Assembly of States Parties should not be read as recognition of a State of Palestine. Accordingly, neither the practice of the Secretary-General of the United Nations nor Palestine's participation in the work of the States Parties to the Rome Statute, nor the circulation of an instrument of accession could be decisive for the question of Palestine's statehood. Instead, Germany did not list "Palestine" as a party to the Rome Statute in the Federal Law Gazette (*Bundesgesetzblatt*), as, in Germany's view, only states can become States Parties to the Statute.

In terms of (2), it is clarified that a clear distinction has to be made between the requirements for *accession* to the Rome Statute and those for the *exercise of jurisdiction* in Article 12(2)(a) Rome Statute. Within Article 12 Rome Statute, the question of Palestine's

[26] ICC PTC-I/OTP, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-12 of 22 January 2020.
[27] UN General Assembly (2012) Resolution adopted by the General Assembly 67/19. Status of Palestine in the United Nations, UN Doc. A/RES/67/19.
[28] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (VCLT).
[29] Depositary notification C.N.13.2005.TREATIES-XVIII.10 of 6 January 2015.

statehood has to be answered consistently; Article 12(3) presupposes the same standards as Article 12(1), which leaves no room for relying on a purely technical act of the depositary. Rather, according to Article 119(1) Rome Statute, the court itself is called upon to answer the preceding question. Germany sees this view confirmed by Article 19(1) Rome Statute, which presupposes that the court itself, as a treaty body, has to be satisfied that every case brought before it falls within its jurisdiction. By adopting resolution 67/19, the UN General Assembly did not – and could not – decide whether Palestine was a state according to international law. Instead, the resolution only represents a "procedural upgrade of the Palestinian representation to non-member observer state status"[30] within the UN system. Accordingly, the court would have to conduct an independent enquiry into the question of Palestine's statehood and examine whether the normative criteria of international law are satisfied. Since there is no legal definition of the term "State" in Article 12 Rome Statute, the basic rule of treaty interpretation from Article 31(1) VCLT must be applied in accordance with Article 21(1)(b) Rome Statute.

As far as statehood is concerned, in Germany's view, the matter is clearly regulated by Article 1 of the Montevideo Convention.[31] According to customary international law, the constituent requirements for statehood are "[1] a permanent population, [2] a defined territory, [3] a government in control of the territory and [4] the capacity to enter into relations with other States".[32] Germany considers it doubtful whether Palestine fulfils these requirements. The argument is mainly based on the disagreement of the UN Security Council on the issue and, in particular, on the Oslo Accords,[33] which did not create a Palestinian state but only paved the way for one. However, numerous unresolved issues remain, which need to be clarified in negotiations between Israel and Palestine – especially the question of full jurisdiction over all the territories in question. Jurisdiction, according to the Oslo Accords, is only partially assigned to the Palestinian Authority.

Consequently, Germany has not recognised Palestine as a state in bilateral relations and has already repeated the remarks above several times *consistently*. Germany predominantly agrees with the Prosecutor's opinion, in particular with regard to the negative effect of Israeli measures – e.g. lack of protection of the population in the occupied territories, the continuing construction of settlements in these territories, which Germany regards as unlawful – on the realisation of a two-state solution. But the fact that Israeli measures impede the realisation of the Montevideo criteria with regard to a Palestinian state could not lead to the conclusion that such a state exists – not even in an isolated consideration for the purposes of the Rome Statute.

Nor could any conclusions be drawn about Palestine's statehood from the meaning and purpose of the Rome Statute itself. That also holds true for the purpose of promoting the global fight against impunity. Germany represents the position that this fight had to be fought *within* the jurisdictional framework of the Statute.

Concerning (3), Germany argued that Article 12 Rome Statute presupposes the existence of a 'State' that has the capacity to delegate *its own jurisdiction* and considers this argument to

[30] ICC PTC-I, Situation in the State of Palestine. Observations by the Federal Republic of Germany (Public), ICC-01/18-103 of 16 March 2020, p. 11, mn. 20.
[31] Montevideo Convention on the Rights and Duties of States, opened for signature 26 December 1933 (entered into force 26 December 1934) (Montevideo Convention).
[32] ICC PTC-I, Situation in the State of Palestine. Observations by the Federal Republic of Germany (Public), ICC-01/18-103 of 16 March 2020, p. 12, mn. 23.
[33] Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993 (Oslo Accords), Annex to UN General Assembly (1993) Report of the Secretary-General on the Work of the Organization, UN Doc. A/48/486.

be generally accepted. It cites the Myanmar/Bangladesh case[34] as an example. The Palestinian Authority, however, lacks such jurisdiction, as shown above.

Furthermore, Oslo II[35] explicitly states that the Palestinians have *no criminal jurisdiction* over Israeli citizens, further specified by the Protocol Concerning Legal Affairs appended to Oslo II.

In addition, the scope of the 'territory' over which the court was to exercise its criminal jurisdiction is unclear. The term 'occupied Palestinian territory' is not congruent with a clearly defined territory over which Palestine may exercise its sovereignty and jurisdiction. Rather, it is precisely the territorial borders of a future state of Palestine that are one of the main points of contention in the negotiations between Palestinians and Israelis, the resolution of which must not be anticipated or pre-empted.

Since any investigation conducted by the Prosecutor has to be based on a solid legal foundation, Germany sees no viable avenue for the court to establish its jurisdiction.

This position should in no way be read as contrary to Germany's view that achieving the goal of a two-state solution with an independent, democratic, sovereign and viable state of Palestine is of paramount importance. While regrettable in the face of possible impunity *in casu*, a decision following Germany's view would overall promote trust in the ICC, and thus the global fight against impunity in the long run.

[34] ICC PTC-I, Bangladesh v. Myanmar. Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-37 of 6 September 2018, p. 41, in: ICC PTC-I, Situation in the State of Palestine. Observations by the Federal Republic of Germany (Public), ICC-01/18-103 of 16 March 2020, p. 14, mn. 26, fn. 21.

[35] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 4 May 1994 (Oslo II), Annex to UN General Assembly (1997) Report of the Secretary-General on the Work of the Organization, UN Doc. A/51/889.