

**War and armed conflict — Non-international armed conflict — Terrorism — Combatant status — Targets — Air strike from unmanned drone — Conflicts in Afghanistan and Pakistan border region — Whether separate conflicts — Status of conflict — “War on terror” — Whether Central Intelligence Agency officers controlling drone combatants — Whether persons attacked by drone combatants or civilians — Necessity and proportionality**

**Jurisdiction — Universal jurisdiction — Passive personality principle — German national killed by United States drone strike in Pakistan — Whether killing within jurisdiction of German authorities — The law of Germany**

AERIAL DRONE DEPLOYMENT ON 4 OCTOBER 2010  
IN MIR ALI/PAKISTAN

(TARGETED KILLING IN PAKISTAN CASE)

(Case No 3 BJs 7/12-4)

*Decision to Terminate Proceedings*

*Germany, Federal Prosecutor General. 23 July 2013*

SUMMARY:<sup>1</sup> *The facts:*— On 4 October 2010, a German citizen was killed by a drone strike in North Waziristan in the “Federal Administered Tribal Areas” (the “FATAs”) on the Pakistan side of the border between Pakistan and Afghanistan. After US and allied forces overthrew the Taliban regime in Afghanistan in November 2001, the Pakistan border region became the most important haven and staging area for Islamist militants fleeing from Western Afghanistan. As cross-border attacks by militant groups against the international troops stationed in Afghanistan (“ISAF”) intensified, the United States and Pakistan began military operations in the FATAs. The US employed unmanned aerial vehicles known as “combat drones”. The bulk of these aerial drone deployments targeted leading members of the Taliban, Al Qaeda, the Haqqani network, and the Islamic Movement of Uzbekistan (IMU)/Islamic Jihad Union (IJU), as well as these groups’ strongholds and training centres. All of these groups were united in their opposition to the presence of US and ISAF troops in Afghanistan and there were extensive overlaps in their respective personnel.

<sup>1</sup> Prepared by Professor Claus Krefß.

On 4 October 2010 an aerial drone fired a rocket at a building in the town of Mir Ali in North Waziristan killing five people, including an Iranian national and three were unidentified local people. The Iranian national was a member of the so-called “Hamburg Group”, as was his wife. They had left Hamburg on 4 March 2009 bound for Pakistan to join up with insurgent organizations in Pakistan and to take part in the fighting there. The German national had left Germany in late July 2010. During his stay in North Waziristan, he had joined a number of insurgent groups in succession and by mid-September he was involved with Al Qaeda, or at least the outer circles thereof. He participated in combat training and was taught how to handle weapons. The purpose of the meeting being held at the time of the drone strike was to discuss and expedite plans for a suicide-bombing attack to be carried out by the German national against a military installation of the ISAF forces. The planning of the mission was so advanced that a date had already been set for the operation.

On 10 July 2012, the Federal Prosecutor General opened a criminal investigation against persons unknown in respect of the death of the German national.

*Held:*—The criminal proceedings were terminated pursuant to section 170(2) of the German Code of Criminal Procedure for want of sufficient reasons to believe that a crime was committed.

(1) The German Code of Crimes Against International Law (VStGB) was applicable pursuant to its section 1 of the Code (principle of universal jurisdiction). The German Criminal Code (StGB) was applicable pursuant to its section 7(1) (principle of passive personality) (p. 740).

(2) At the time of the drone strike, there existed at least two separate non-international armed conflicts. One was between the government of Pakistan and non-State armed groups operating in the FATAs (including Al Qaeda). Another one was between the Afghan Taliban and affiliated groups and the government of Afghanistan, as supported by ISAF forces, a conflict which spilled over into the territory of Pakistan (pp. 741–4).

(3) It was impossible to attribute the aerial drone deployment under examination to just one of these two armed conflicts (p. 744).

(4) Both the internal Pakistani conflict as well as the military clashes in Afghanistan constituted a non-international armed conflict, since they were not being carried out between States but between government forces on the one hand and organized groups on the other. The conflict classification did not change because of the support that the governments of Pakistan and Afghanistan received from other States as co-participants in the conflict (pp. 744–5).

(5) The determination of the existence of armed conflicts was limited to the situation in the Pakistani FATA region during the years 2009 and 2010. It was neither appropriate nor necessary to rely on the notion of a “War on Terror” under which the rules of armed conflict applied to any and all anti-terror operations without any territorial limitation whatsoever (pp. 745–6).

(6) The drone strike in question occurred in connection with the identified armed conflicts (p. 746).

(7) The drone strike was not directed against the civilian population as such or against individual civilians (section 11(1) first sentence number 1 VStGB). In a non-international armed conflict, those are civilians who are not part of government armed forces or of an organized armed group. A person was to be regarded as a member of such group if his sustained and/or permanent function consists of the direct participation in hostilities (“continuous combat function”). Such a person could be targeted also at a time when he or she was not directly taking part in hostilities (pp. 746–7).

(8) The persons killed through the drone attack were not civilians under the law of non-international armed conflict in light of their continuous combat function and the same was true for the male survivors of the attack (pp. 748–9).

(9) The attack did not violate the principle of military necessity which might have required that capture take precedence over killing so long as this would not increase the risk for the military units involved or the civilian population (p. 749).

(10) The attack did not violate the principle of proportionality under the law of non-international armed conflict (section 11(1) first sentence number 3 VStGB) (pp. 749–50).

(11) The applicability of the StGB was not completely superseded by the VStGB, because of the connection of the attack with an armed conflict (pp. 750–2).

(12) The Federal Public Prosecutor General was competent to apply the StGB to the case at hand because it involved conduct in connection with an armed conflict (pp. 752–4).

(13) The drone attack satisfied the objective and subjective elements of the crime of murder (section 211 of the StGB). It was, however, permissible under the law of non-international law conflict and therefore justified as a matter of German criminal law (pp. 754–5).

(14) International humanitarian law did not provide for any general prohibition of the deployment of aerial drones and the use of drones did also not breach the prohibition of perfidy (pp. 755–7).

(15) US Central Intelligence Agency operatives, who were exercising operational responsibility for the aerial drone deployments, qualified as armed forces for the purposes of the law of non-international armed conflict (pp. 757–60).

(16) International humanitarian law did not provide for any general prohibition of the targeted killing of persons in an armed conflict (pp. 760–1).

The following is the text of the decision of the Prosecutor:

Pursuant to the directions of 10 July 2012, investigation proceedings were launched against persons unknown based on the suspicion of a criminal offence having been committed in violation of the Code of

Crimes Against International Law (*Völkerstrafgesetzbuch*, VStGB) along with other offences; these proceedings have been terminated pursuant to section 170(2) of the Code of Criminal Procedure (*Strafprozessordnung*, StPO) in light of the findings and the legal arguments set out below in further detail.

## A. FACTUAL SOURCES

On 11 October 2010, the Federal Prosecutor General initiated a monitoring and verification procedure in response to press reports about a military operation involving the deployment of an aerial drone<sup>1</sup> on 4 October 2010 in North Waziristan/Pakistan, in which German citizens, amongst others, were alleged to have been killed. In order to further clear up the matter, various factual enquiries were first addressed to the Federal Criminal Police Office (*Bundeskriminalamt*, BKA) and to the Federal Intelligence Service (*Bundesnachrichtendienst*, BND). The reports received in response to these enquiries confirmed that B.E., a German citizen from the town of Wuppertal born on . . . in . . . had in fact died during said military operation. In order to verify that armed conflict was taking place in the affected region—which would confirm the Federal Prosecutor General’s jurisdiction with regard to prosecuting possible criminal offences under the Code of Crimes Against International Law (VStGB)—analyses of the situation in Pakistan were commissioned from the Heidelberg Institute for International Conflict Research (*Heidelberger Institut für Internationale Konfliktforschung*, HIIK) and from the German Institute for International and Security Affairs (*Stiftung Wissenschaft und Politik*, SWP); these were delivered at the end of May 2011. On 5 May 2011, at the request of the Federal Prosecutor General, the Federal Foreign Office (*Auswärtiges Amt*, AA) forwarded its own findings concerning the situation in the Pakistani–Afghan border region. On 30 June 2011, furthermore, the Federal Intelligence Service provided its opinion on this complex of topics, having been commissioned to do so by the Federal Prosecutor General. In order to supplement the aforementioned analyses and reports, the following materials were

<sup>1</sup> The proper technical term for such pilotless aircraft is “unmanned aerial vehicles” (UAVs). Within the UAV group, aircraft deployable exclusively for reconnaissance purposes (“reconnaissance drones”) are distinguished from those that feature the appropriate weaponry for deployment in combat missions (“combat drones” or “unmanned combat air vehicles/UCAVs”). However, the term “aerial drone” has become established in common parlance as well as in scientific literature, and will therefore be used consistently in the present document when referring to a UCAV.

consulted and studied with respect to the situation given in Pakistan at the time of the incident: the corresponding annual publications of the Stockholm International Peace Research Institute (SIPRI); the “Conflict Barometer” published by the Heidelberg Institute for International Conflict Research; and the Armed Conflict Database maintained by the London-based International Institute for Strategic Studies (IISS).

Based on these findings so compiled, the Federal Prosecutor General issued directions on 10 July 2012 to launch investigation proceedings against persons unknown for a suspected breach of the Code of Crimes against International Law (VStGB). On 24 July 2012, the proceedings were extended to subsume criminal charges initially filed with the Hamburg Public Prosecutor’s Office and subsequently forwarded to the Federal Prosecutor General’s Office for purposes of determining the place of jurisdiction pursuant to section 13a of the Code of Criminal Procedure (StPO). By letter of 10 August 2012, a request was filed with the President of the *Bundestag* to allow the inspection of the documentation on the incident in question that had been deposited with the *Bundestag*’s Document Security Office (*Geheimschutzstelle*) in response to interpellations by Members of Parliament. The documents requested were forwarded on 18 September 2012.

By way of gaining insight into the circumstances and purpose of the trip to, and sojourn in, Pakistan on the part of B.E. (the man killed), the case file on record regarding the investigation proceedings against his older brother E.E. (reference number . . .) with the Federal Prosecutor General’s Office was likewise consulted. In these proceedings, the Federal Prosecutor General had filed charges on 14 January 2013 on the grounds of membership in a foreign terrorist organisation, *inter alia* . . . Likewise, the public charges preferred in the legal proceedings pursued by the Federal Prosecutor General against the individuals R.M. . . . and A.S. . . . were evaluated, as were the written rulings handed down in those cases.

E.E. was examined as a witness and testified on the course of events during the military strike of 4 October 2010. E.E.’s wife, who resides in Germany and is also an alleged witness to the incident, initially made a number of statements in the course of the proceedings against her husband, but later refused to submit to further questioning by asserting her legal right to refuse to give evidence. In light of her husband’s risk of prosecution, it is to be assumed that she will also refuse to provide additional, relevant information for the case at hand, again claiming recourse to section 55(1) of the Code of Criminal Procedure (StPO).

All of the aforementioned factual sources having been evaluated, the situation in fact and in law can be set forth as follows:

## B. FACTS OF THE CASE

### I. *The conflict in Northwest Pakistan*

#### 1. *Origins and course of the conflict*

##### (a) *The Federally Administered Tribal Areas (FATAs)*

The incident in question occurred in the North Waziristan region of Pakistan, one of the six “Agencies” making up the so-called “Federally Administered Tribal Areas” (FATAs). For historical reasons, the FATA region enjoys a special constitutional status within Pakistan;<sup>2</sup> over time, this has led to largely autonomous self-government by the local Pashtun tribes forming the majority of the local population. For decades now, the troops of the Pakistani government have maintained only a scattered presence in the FATAs, and are thus not in a position to comprehensively exercise and enforce governmental sovereignty.

##### (b) *The development of the conflict since 2001*

After US and allied forces overthrew the *de facto* regime of the Afghan Taliban in November 2001, the Pakistani border region became the most important haven and staging area for Islamist militants fleeing from neighbouring Western Afghanistan, just as it had been during the period of Soviet occupation.<sup>3</sup> At the same time, radical Islamic political parties and religious fundamentalist groups based in this region were able to mobilise thousands of recruits to fight the foreign military presence in Afghanistan. As cross-border attacks by militant groups against the international troops stationed in Afghanistan intensified, the United States began to put increasing pressure on the Pakistani government to move against the insurgents in the FATAs. The Pakistani military responded by stationing between 70,000 and 80,000 regular and paramilitary troops in the FATAs in 2002, but failed to achieve any decisive results. In fact, the militant groups began to extend their activities into the Pakistani heartland, increasingly targeting the Pakistani government itself; the culmination of this trend, at least thus

<sup>2</sup> German Institute for International and Security Affairs (SWP), authors C.W. and N.W.: *Gutachten zur historischen Entwicklung, ethnischen und politischen Situation sowie zur Frage bewaffneter Auseinandersetzungen in den Federally Administered Tribal Areas (FATA) in Pakistan* (“Analysis of the Federally Administered Tribal Areas (FATAs) in Pakistan: Their Historical Development and Ethnic/Political Situation, Including the Issue of Armed Conflict”) (hereinafter: “SWP Analysis by W&W”) p. 2.

<sup>3</sup> Heidelberg Institute for International Conflict Research (HIK): *Gewaltsame politische Konflikte in der Islamischen Republik Pakistan* (“Violent Political Conflicts in the Islamic Republic of Pakistan”) (hereinafter: “HIK Analysis”) p. 15.

far, was the militants' occupation of the "Red Mosque" in the capital of Islamabad, which lasted from March to April 2007.<sup>4</sup>

*(c) Attacks on NATO convoys as well as military offensives by the Pakistani Army in the FATAs between 2008 and 2010*

Starting in 2008, the FATAs were the theatre of a rising number of attacks by the Pakistani Taliban against NATO convoys supplying ISAF troops in Afghanistan, a particular hot spot being the stretch of the Khyber Pass between the cities of Peshawar and Jalalabad. In September of 2008, the Pakistani army responded by unleashing a military operation in two of the FATAs, Bajaur and Mohmand, against the Afghan fighters and adherents of the Pakistani Taliban organisation "TTP". According to Pakistani military sources, more than 1,500 insurgents and over 100 soldiers had been killed during this military operation by the end of February 2009.<sup>5</sup> The Taliban reacted to these measures with numerous retaliatory strikes against military and government facilities, both in the FATA region as well as in other provinces.

On 1 September 2009, the Pakistani armed forces launched a further offensive in the Khyber Agency, with the aim of disrupting the renewed flare-up of attacks on NATO convoys in this region. As armed clashes intensified, the Pakistani military began to expand its offensive into South Waziristan as of mid-October 2009. Following preliminary air attacks on positions occupied by the Taliban and their allies, 17 October 2009 marked the start of a ground offensive by roughly 28,000 soldiers, who were opposed by an estimated 8,000 to 9,000 Taliban as well as 1,000 Uzbek fighters from the Islamic Movement of Uzbekistan (IMU).<sup>6</sup> The total number of casualties resulting from this military campaign in the fall of 2009 is estimated at 1,300,<sup>7</sup> while more than 300,000 people fled the region to escape the fighting.

[Redacted remarks on military operations by the Pakistani army in 2010.]<sup>8</sup> In late September of 2010, the Pakistani army carried out another military operation in Peshawar, killing over 50 Taliban and

<sup>4</sup> HIIK Analysis p. 16.

<sup>5</sup> HIIK Analysis p. 24.

<sup>6</sup> HIIK Analysis p. 32.

<sup>7</sup> German Institute for International and Security Affairs (SWP), author C.S.: *Teilgutachten zur völkerrechtlichen Dimension des Konflikts in den FATA und angrenzenden Provinzen* ("Partial Report on the International Law Dimension of the Conflict in the FATAs and Adjoining Provinces") (hereinafter, "SWP Analysis by S") p. 7.

<sup>8</sup> Federal Intelligence Service Report [classified inter-departmental information for limited circulation (VS-NfD)]. 30 June 2011, p. 13.

seizing numerous explosive devices intended for suicide bombings and car bombs.<sup>9</sup> Renewed Taliban attacks against NATO and ISAF supply routes on 1 and 3 October 2010—i.e. shortly before the incident addressed in the present report—destroyed over 50 NATO fuel tankers in the capital city of Islamabad as well as in Sindh Province. All told, more than 400 NATO transport vehicles were attacked and destroyed on Pakistani territory between 2009 and 2010.<sup>10</sup>

*(d) Activities of the United States / aerial drone operations*

The burden of combating insurgent groups with ground troops on Pakistani territory has been borne almost entirely by the Pakistani armed forces. [Redacted remarks on cross-border operations staged from Afghanistan.]<sup>11</sup> Nonetheless, the most important tool deployed by the US in the fight against insurgents in Pakistan turned out to be the unmanned aerial vehicles known as “combat drones”, specifically the Reaper and Predator series. The frequency of deployment of these drones surged significantly in tandem with the escalating confrontation between the Pakistani military and insurgent groups in the FATA region during 2009 and 2010. Thus, while only about 25 US military operations involving aerial drones were carried out in the Pakistani Tribal Areas in 2008, they increased to roughly 52 in 2009, and to somewhere between 118 and 135 in 2010.<sup>12</sup> In 2009, drone strikes accounted for anywhere from 368 to 427 deaths; by 2010, they had caused between 607 and 993 deaths.<sup>13</sup> Over time, there was also a marked shift in the regional distribution of these drone attacks: In 2009, drone strikes were more or less equally divided between North and South Waziristan, respectively; in 2010, by contrast, almost 90% of these attacks targeted North Waziristan.<sup>14</sup> In 2011, the number of aerial drone operations in the region fell to about 69 cases, during which between 435 and 672 persons were killed.<sup>15</sup> One multi-year study concludes that a total of 259 aerial drone operations were carried

<sup>9</sup> HIIK Analysis p. 28.

<sup>10</sup> HIIK Analysis p. 28.

<sup>11</sup> Federal Intelligence Service Report [classified inter-departmental information for limited circulation (*VS-NfD*)], 30 June 2011, p. 13.

<sup>12</sup> HIIK Analysis pp. 28 and 44; The SWP Analysis by W&W (p. 50), estimates that 233 aerial drone operations took place between January 2008 and May 2011; the SWP Analysis by S (p. 8) refers to 135 aerial drone operations in 2010 based on data from the 2010 Pakistani Security Report.

<sup>13</sup> HIIK Analysis p. 28.

<sup>14</sup> HIIK Analysis p. 28.

<sup>15</sup> Conflict Barometer issued by the HIIK for 2011, p. 85.



out during the period from January 2009 until December 2011, and that these resulted in 1,900 deaths.<sup>16</sup>

The bulk of these aerial drone deployments targeted leading members of the Taliban, Al Qaeda, the Haqqani network, and the Islamic Movement of Uzbekistan (IMU) / Islamic Jihad Union (IJU), as well as these groups' strongholds and training centres. Accordingly, the victims included many persons identified as leaders of the insurgent factions. On 4 August 2009, for example, the former head of the TTP, Baitullah Mehsud, was killed by an aerial drone.<sup>17</sup> Another victim of a US drone strike in August 2009 was the leader of the IMU, Taher Yuldash.<sup>18</sup> In September of 2009, the leader of the IJU, Najmuddin Jalolov, lost his life in the same way.<sup>19</sup> On 22 May 2010, the purported "number three" in Al Qaeda's leadership, Mustafa Abu al-Yazid, also known as Saeed al-Masri, was killed by an aerial drone strike in North Waziristan. His successor Sheikh al-Fatih was similarly killed in North Waziristan on 26 September 2010.<sup>20</sup> During a drone strike on 8 September 2010, ten members of the Haqqani network lost their lives.<sup>21</sup> These targeted strikes against high-ranking representatives of the insurgent factions continued in the years 2011 and 2012.<sup>22</sup> Thus, on 4 June 2012, Abu Yahya al-Libi, considered to be Al Qaeda's "media chief" and number two commander, fell victim to a US drone strike.<sup>23</sup> This operation occurred in the vicinity of the town of Mir Ali, which is also the location of the incident under examination here.

## 2. *Players in the conflict*

### (a) *Insurgent factions*

The non-state, armed factions operating in the FATA region differ from one another mostly in terms of their key objectives. Thus, while certain factions primarily are fighting government and ISAF forces

<sup>16</sup> Stanford Law School / NYU School of Law: "Living under Drones", September 2012, p. 164: Based on data from the Bureau of Investigative Journalism, this study concludes that said 259 strikes killed a total of 1,932 people, of which anywhere from 297 to 569 were civilians.

<sup>17</sup> SWP Analysis by W&W, p. 28.

<sup>18</sup> SWP Analysis by W&W, p. 36.

<sup>19</sup> SWP Analysis by W&W, p. 38.

<sup>20</sup> International Institute for Strategic Studies / Strategic Comments: "US intensifies drone strikes in Pakistan", Volume 16, Comment 36, October 2010 (hereinafter: "IISS/Strategic Comments internet article from October 2010").

<sup>21</sup> HIIK Analysis p. 29.

<sup>22</sup> See the directions to launch investigation proceedings / disciplinary proceedings dated ... in the ... case.

<sup>23</sup> *Spiegel Online* article dated 12 September 2012; the death of Abu Yahya al-Libi was confirmed in an Al Qaeda video on 10 September 2012.

in Afghanistan and use the FATA merely as a haven and staging area (Afghan Taliban, Haqqani network and Hezb-e-Islami), other factions are targeting their attacks mainly against the Pakistani state within the confines of its sovereign territory (particularly the Pakistani Taliban organisation “TTP”). Although transnational terrorist organisations (Al Qaeda, Islamic Movement of Uzbekistan (IMU), Islamic Jihad Union (IJU)) have also established bases and structures in the FATAs, they operate globally to realise their goals.<sup>24</sup> On the other hand, what all these factions have in common is their opposition to the presence of US and ISAF troops in Afghanistan<sup>25</sup> [redacted remarks on cooperation amongst the factions]<sup>26</sup> as well as the fact that they use the same logistical facilities and havens/staging areas. In addition, there are extensive overlaps in their respective personnel. These close ties amongst the insurgent groups are also reflected by the fact that the UN weapons embargo imposed in December 2000 (and in force ever since) is broadly targeted against “Al Qaeda, the Taliban, and associated individuals and entities”.<sup>27</sup>

(aa) The organisation Tehrik-e-Taliban Pakistan (TTP), which was founded in December 2007 under the leadership of Baitullah Mehsud,<sup>28</sup> is the largest and most potent faction of the anti-government militants operating on Pakistani territory. Depending on various estimates, the group disposes over 10,000 to 50,000 fighters and an annual budget believed to amount to as much as USD 45 million.<sup>29</sup> The weaponry of the TTP fighters consists of automatic and semi-automatic machine pistols, as well as heavy ordinance that includes rocket launchers, anti-tank missiles, anti-aircraft guns, and shoulder-fired rocket launchers. The TTP also boasts its own squadron of suicide bombers. On 5 October 2009, for example, a suicide bomber dispatched by the TTP carried out an attack against the office of the UN World Food Programme in Islamabad, killing five of the organisation’s co-workers. On 28 October 2009, more than 100 people were killed by a car bomb in Peshawar just as then-US Secretary of State Hillary Clinton was paying an official visit to Pakistan. This attack,<sup>30</sup>

<sup>24</sup> Classification follows the SWP Analysis by W&W, p. 12.

<sup>25</sup> HIIK Analysis p. 17.

<sup>26</sup> SWP Analysis by W&W, pp. 19, 25, 30; Federal Intelligence Service Report [classified inter-departmental information for limited circulation (*VS-N/D*)] dated 30 June 2011, p. 10.

<sup>27</sup> UN Security Council Resolutions Nos 1333 and 1390.

<sup>28</sup> HIIK Analysis, p. 16; SWP Analysis by W&W, p. 27.

<sup>29</sup> HIIK Analysis; p. 18.

<sup>30</sup> HIIK Analysis p. 26.

together with the attempted car bombing of New York's Times Square on 1 May 2010,<sup>31</sup> are attributed to the Pakistani Taliban.

(bb) The driving force behind the insurgency in Afghanistan is the Afghan Taliban Movement under the leadership of Mullah Omar. This umbrella group for the Taliban in Afghanistan includes the actual Taliban themselves, the so-called "Haqqani network" headed by Jallaludin Haqqani, and the Hizb-e-Islami of Gulbuddin Hekmatyar. The hierarchical command structures of the Taliban, with their "provincial executive councils", "provincial governors", "district governors" and local commanders translate into parallel, quasi-governmental structures that serve to implement the Taliban's political and military claim to rule those areas which they control. Initially, the Afghan Taliban's military efforts were focused on the provinces Helmand, Kandahar, Oruzgan and Zabol in Southern Afghanistan, but they subsequently expanded systematically into the northern regions as of 2006. In the process, it became clear that the Taliban, thanks to their manpower and heavy weapons, were in a position to mount attacks coordinated across a wide geographical area, while transporting reserves and intermittently performing evasive manoeuvres along with synchronised counterattacks.<sup>32</sup> The Afghan Taliban, together with the TTP, are held responsible specifically for the attacks that have been launched on NATO supply convoys.<sup>33</sup>

(cc) Following the overthrow of the Afghan government in 2001, the FATAs became a major haven and staging area for members of Al Qaeda, most of whom are of Arab origin. [Redacted remarks on the Al Qaeda leadership.]<sup>34</sup> This is evidenced by the fact that most of the locations where the organisation's operational chiefs and field commanders have been killed are situated in the FATAs. Despite its comparatively small size—only a few hundred fighters, commanders, and functionaries—Al Qaeda has ramped up its level of activity significantly since 2005 following a phase of reorganisation. During the period relevant to the case at hand, Al Qaeda's role consisted primarily of supporting both local insurgents as well as other transnational terror groups in training personnel, planning attacks, and importing modern explosives and combat equipment. Besides the attacks on 11 September

<sup>31</sup> International Institute for Strategic Studies: Armed Conflict Database (hereinafter, "IISS/ACD"), Pakistan, Annual Update for 2010.

<sup>32</sup> Cf. directions to terminate investigation proceedings issued by the Federal Prosecutor General in the proceedings 3 BJs 6/10-4 ("Kunduz") dated 16 April 2010, pp. 7 et seq.

<sup>33</sup> HIIK Analysis p. 28.

<sup>34</sup> Federal Intelligence Service Report [classified inter-departmental information for limited circulation (*VS-NfD*)] dated 30 June 2011 p. 9.

2001, the bombings of the London subway and bus system in July 2005 are attributed to Al Qaeda, as are the planned attacks on passenger aircraft in London that were foiled in August of 2006.<sup>35</sup> Moreover, Al Qaeda has taken credit for attacks on Pakistani territory, such as the one on the Danish embassy in Islamabad on 2 June 2008. In an audio message of 24 January 2010, Osama bin Laden claimed responsibility, in the name of Al Qaeda, for the thwarted attempt by a Nigerian man to bring down a Northwest Airlines aeroplane just as it was preparing to land in Detroit on 25 December 2009. Al Qaeda was also involved in the aforementioned attempted bombing of New York's Times Square on 1 May 2010 along with the TTP.

(dd) The other foreign groups that have operated in the FATAs and continue to do so include the Islamic Movement of Uzbekistan (IMU) and its 2002 spin-off, the Islamic Jihad Union (IJU). The IMU's strongest presence has been in South Waziristan, while the IJU—at least as far as 2009 is concerned—had its headquarters in the hamlet of Mir Ali in North Waziristan (the location relevant to the case at hand), whence it maintained close ties to both the Haqqani network and members of Al Qaeda.<sup>36</sup> Taken together, these two organisations comprise an estimated 1,000 to 2,000 fighters, whereby the IMU has a significantly larger membership.<sup>37</sup> In 2008, as part of a process of growing “internationalisation”, the IMU opened its ranks to foreign Jihadis, with its recruitment efforts focusing particularly on Germans.<sup>38</sup> In 2009 alone, roughly 40 persons left Germany to be drilled in Islamist training camps located mostly in North and South Waziristan.<sup>39</sup> The members of the so-called “Sauerland Group”, who were arrested in Germany in 2007, had been trained at an IJU training camp in North Waziristan.

(b) *State actors*

(aa) During the period from 2006 until 2011, Pakistan numbered among the world's leading importers of conventional armaments.<sup>40</sup> In tandem with this upgrade of its armed forces, the Pakistani government gradually increased its military footprint in the FATAs, but was unable to secure the sovereignty of the central government in this part of its territory in any sustained or comprehensive fashion. In 2010, the year relevant to the case at hand, a total of roughly 150,000 army

<sup>35</sup> Cf. SWP Analysis by W&W, p. 32.

<sup>36</sup> HIIK Analysis p. 21.

<sup>37</sup> HIIK Analysis p. 21; the SWP Analysis by W&W mentions “several hundred” fighters (p. 37).

<sup>38</sup> SWP Analysis by W&W, p. 36.

<sup>39</sup> SWP Analysis by W&W, p. 42.

<sup>40</sup> SIPRI Yearbook 2012: “Armaments, Disarmament and International Security”, pp. 269, 272.

and air force regulars were stationed in the border region, along with the paramilitary units known as the “Frontier Corps”.<sup>41</sup> At the same time, auxiliary support in the FATAs was provided above all by the Pakistani secret service, “Inter-Services Intelligence” (ISI).

(bb) By virtue of Resolution number 1386 dated 20 December 2001, the UN Security Council set up an International Security Assistance Force (ISAF), whose mission was to support the elected government of Afghanistan in creating and maintaining a secure environment in the country. Operating under the aegis of NATO, ISAF is authorised to take any and all measures required to fulfil its mission, including the use of armed force. ISAF’s mandate is based on Chapter VII of the UN Charter and by now has been extended several times in terms of both its duration and substantive scope. While ISAF’s territorial scope of operations was initially limited to the city of Kabul and its environs, this was gradually extended, starting in 2003, to other parts of the country as well. All told, the ISAF force currently comprises some 100,000 soldiers from 50 countries; in 2010, the year relevant to the case at hand, the size of the deployed ISAF force was increased by more than 50%. The result was that the size of the ISAF deployment exceeded, for the first time, that of all other multilateral peace missions in 2010 combined.<sup>42</sup> With 68,000 troops, the United States currently provides the biggest single contingent of the ISAF force in Afghanistan. The German armed forces (*Bundeswehr*) also participate in the ISAF mission with 4,400 armed troops as well as reconnaissance aircraft.<sup>43</sup>

(cc) During the period relevant to the present report, US combat drones were deployed over Pakistan’s sovereign territory with the tacit consent of the Pakistani government and military leadership.<sup>44</sup> This conclusion is borne out by the official reactions by the Pakistani government to various military operations carried out in Pakistan by the United States. Thus, an examination of the various communiqués—which were backed up by sanctions for US and ISAF forces only in a smattering of cases—allows the conclusion to be drawn that the Pakistanis were often secretly involved behind the scenes, and that

<sup>41</sup> HIIK Analysis p. 16.

<sup>42</sup> *SIPRI Yearbook* 2011: “Armaments, Disarmament and International Security” (hereinafter, “*SIPRI Yearbook* 2011”), pp. 110 et seq., p. 146.

<sup>43</sup> NATO internet information on the ISAF mission (current as of 5 April 2013).

<sup>44</sup> Seconding this view: HIIK Analysis, p. 45; SWP Analysis by W&W, p. 51; SWP Analysis by S, p. 9; IISS/Strategic Comments internet article of October 2010; *Spiegel Online* articles dated 8 and 14 April 2013; by contrast, a UN investigative team, after conferring with representatives of the Pakistani government, determined that the aerial drone deployments were breaches of sovereignty since they had no Pakistani authorisation (*Spiegel Online* article dated 15 March 2013).

said official statements consistently drew a clear distinction as to whether a given operation had killed solely foreign insurgents inimical to the state, members of other groups, or in fact members of the Pakistani armed forces.

Thus, the US deployment of aerial drones from 2008 to 2010 as described above under 1(d) generally failed to trigger any real sanctions other than *notes verbales* issued in protest, despite the fact that numerous Pakistani citizens were killed in the process.<sup>45</sup> By contrast, the US Special Forces raid which killed Osama bin Laden in his hideout north of Islamabad on 2 May 2011—having been launched without any forewarning to the Pakistanis—gave rise to a much stronger reaction. The Pakistani government condemned the action as an “unauthorised” and “unilateral” move that must not be allowed to set a precedent.<sup>46</sup> If the logic of this official assessment is applied to the numerous aerial drone operations that had gone before, it would seem to follow that the Pakistani government did not regard these activities as comparable, unauthorised breaches of its sovereignty.

That secret understandings were in place is further attested to by the incident of 26 and 27 September 2010, in which a strike by three US combat helicopters in North Waziristan and Kurram killed more than 50 members of the Haqqani network, which is rumoured to have ties to Pakistani intelligence. After being sharply rebuked by the Pakistani Foreign Ministry, ISAF took recourse to the fact that it had acted in accordance with the rules of engagement pre-agreed with Pakistan, to which Pakistan responded by denying the existence of any such arrangement.<sup>47</sup>

Just a few days later, on 29 September 2010, another NATO helicopter strike under US command in the Kurram Agency resulted in the deaths of three Pakistani border guards. Pakistan reacted by closing off all transport routes in the Khyber Agency that were used to supply allied troops in Afghanistan. It was not until the local US ambassador had delivered a formal apology (on 6 October) that Pakistan re-opened the supply routes (on 9 October 2010).<sup>48</sup>

<sup>45</sup> This is also corroborated by documents published by Wikileaks. Thus, Pakistani Prime Minister Gilani supposedly stated the following in August 2008 with regard to aerial drone strikes in the FATA/Khyber Pakhtunkhwa (KPK) region: “I don’t care if they do it as long as they get the right people. We’ll protest in the National Assembly and then ignore it” (source: IISS/ACD, Pakistan, Annual Update 2010).

<sup>46</sup> Government of Pakistan, Press Information Department, 3 May 2011, cited in “Targeted Killing”, an SWP Study by Peter Rudolf/Christian Schaller (hereinafter, “SWP Study by Rudolf & Schaller”).

<sup>47</sup> HIIK Analysis, p. 47.

<sup>48</sup> HIIK Analysis, p. 47.

An even graver incident took place on 26 November 2011, when a NATO air strike launched by mistake on two Pakistani border posts on the Afghan frontier killed 24 Pakistani soldiers. Pakistan retaliated by again cutting off ISAF's supply lines on Pakistani territory, while also forcing the US to vacate the Shamsi airbase in Baluchistan province, which had served as a key base for aerial drone missions.<sup>49</sup> Since apparently, Pakistan's military was even authorised to shoot down US drones over Pakistani airspace, the United States suspended all drone operations in Pakistan's border region in December of 2011, the first time it had done so since 2008.<sup>50</sup> Nonetheless, a resumption of drone deployments in the FATAs was already apparent by mid-January 2012.<sup>51</sup> In April of 2012, the Pakistani Parliament approved a limited re-opening of the supply routes, provided the US accepted responsibility for the serious border incident.<sup>52</sup> The Parliament also demanded a cessation of drone operations over Pakistani territory, without, however, making this an express precondition for re-opening the transit routes.<sup>53</sup> In the wake of a marked upsurge in aerial drone operations in June 2012, the Pakistani government re-opened the transit routes in early July 2012 without limitation; this was after US Secretary of State Hilary Clinton had formally apologised for the incident of November 2011.<sup>54</sup>

It is therefore apparent that the US aerial drone operations against insurgent groups in the Pakistani border region were conducted on the basis of an unofficial arrangement reached by the US and the Pakistani government. After all, Pakistan was perfectly capable of demanding that the US (at least temporarily) suspend its aerial drone operations over Pakistan's sovereign territory—as the above-described sanctions taken after the incident of 26 November 2011 amply demonstrate. However, Pakistan resorted to such measures only in cases in which its own soldiers were killed and even then, the measures were kept in place only until an official apology had been received from United States representatives for the respective incident. Insofar as US military operations exclusively killed insurgents fighting the government, the Pakistanis neither imposed sanctions nor demanded any apology for any corresponding "breach of sovereignty".

<sup>49</sup> HIIK Analysis, p. 45; Article in the *Tagezeitung (TAZ)* newspaper from 13 December 2011; SWP Analysis by W&W, p. 50; IISS/Strategic Comments internet article from October 2010.

<sup>50</sup> Article in *Der Spiegel* magazine dated 14 December 2011;

<sup>51</sup> Tabular compilation in Wikipedia based on data from various media: keywords: "aerial drone strikes in Pakistan/attacks" (current as of: 5 April 2013).

<sup>52</sup> *Spiegel Online* article dated 3 July 2012.

<sup>53</sup> Article in *Faz.Net* (online edition of *Frankfurter Allgemeine Zeitung*) dated 13 April 2012.

<sup>54</sup> *Faz.Net* article dated 3 July 2012.

## *II. The incident*

### *1. Aerial drone deployment on 4 October 2010*

On 4 October 2010, around 7:30 pm local time, an aerial drone fired a rocket at a building in the town of Mir Ali (North Waziristan); eleven people were present in the building at the time. As a result, five persons lost their lives: two of them, B.E. and S.D.S. (an Iranian citizen) were known by name, while the other three were unidentified Pashtun natives.<sup>55</sup> At the time of the strike, the group of persons killed were located in a corner of the roofless inner courtyard of the building.<sup>56</sup> The rocket's impact blew a crater into that part of the courtyard and tore the plaster from the surrounding walls, thereby raising a massive cloud of dust throughout the entire building. Also damaged were the roof of the nearby main entrance to the house as well as the metal entrance door. B.E.'s older brother E.E., who was in another corner of the inner courtyard at the time, was thrown to the ground by the explosion's shock wave, but was not injured.<sup>57</sup> E.E.'s pregnant wife C.A. and her young child by E.E. were in an interior room of the house walled off from the courtyard, while S.S., the wife of S.D.S. (likewise pregnant), was in another such room; they, too, remained physically unharmed (aside from the effects of the dust). Located in yet another room of the house was a leading member of the Tahrir-e Taliban (TTP) by the name of Q.H., as well as a member of Al Qaeda by the name of M. al B. Both of these individuals were able to leave the premises after the strike, apparently unharmed.<sup>58</sup> The building, which belonged to a well-to-do native and which had been occupied by E.E. and his family up to this point, was later torn down.

### *2. Sojourn by S.D.S. in Waziristan*

Born on . . . in . . . S.D.S. was a member of the so-called "Hamburg Group", as was his wife.<sup>59</sup> S.D.S., his wife and three other persons of this group gravitating around Hamburg's Taiba Mosque left Hamburg on 4 March 2009 bound for Peshawar, Pakistan by way of Doha,

<sup>55</sup> Record of intercepted telecommunications of 5 October 2010 (5:40:40 PM) between E. and Y.E., amongst others . . .

<sup>56</sup> Interrogation of E.E., p. 3 (a sketch of the site is attached as an annex to the record of the interrogation).

<sup>57</sup> Interrogation of E.E., p. 3.

<sup>58</sup> Interrogation of E.E., p. 4.

<sup>59</sup> For the term "Hamburg Group," see the indictment preferred on . . . in the proceedings against R.M. . . . p. 39; Indictment preferred on . . . in the proceedings against A.W.S. . . . p. 56.



Qatar; their intention was to join up with insurgent organisations in Pakistan and to fight as Jihadis.<sup>60</sup> Upon arriving in Pakistan, S.D.S. first spent time at a training camp linked to the Islamic Movement of Uzbekistan (IMU) and became a member of this faction.<sup>61</sup> In 2009, he appeared in two videos disseminated by the IMU under the *nom de guerre* “Abu Askar”.<sup>62</sup> In one of these videos, S.D.S. recounts a fire-fight in which he and others allegedly confronted a unit of 300 Pakistani soldiers, killing 15 of them. Presumably in December of 2009,<sup>63</sup> S.D.S. left the IMU and joined Al Qaeda. Here, by no later than May or June 2010, he came into contact with Sheikh Y., a high-ranking member of Al Qaeda responsible for the organisation’s affairs in Europe.<sup>64</sup> According to the latter’s plan, S.D.S. was to return to Germany and form a network with other individuals (including two other members of the “Hamburg Group”); said network was to secure financial support for Al Qaeda and, over the medium term, was to carry out additional “missions”.<sup>65</sup> S.D.S. ultimately failed to return to Germany—presumably due at least in part to the arrest of other potential network members in June and July of 2010.

### 3. B.E.’s departure from Germany and his sojourn in Waziristan

In late July 2010,<sup>66</sup> B.E. left Germany, headed for the Pakistan/Afghan border by way of Turkey and Iran. On 19 August 2010, he reached the town of Mir Ali,<sup>67</sup> where his brother E.E. was living with his family, having left Germany already in April of 2010. B.E.’s departure from Germany had occurred in the context of intense psychological pressure from his brother, who had made numerous telephone calls to Germany

<sup>60</sup> Indictment preferred on . . . in the proceedings against R.M. . . . p. 5, p.38 et seq.; Indictment preferred on . . . in the proceedings against A.W.S. . . . p. 7, pp. 60 et seq.

<sup>61</sup> Directions of the Federal Prosecutor General dated 1 February 2010 to terminate proceedings against D.S. *et al.* . . .

<sup>62</sup> Videotaped message entitled *Fadlul-Jihad* (“The Benefits of Jihad”), secured on 3 October 2009 from the internet portal “Ansar”; German-language videotaped message entitled *Abu Safiyya in Erkam, sah und siegte* (“Abu Safiyya in He Came, Saw, and Conquered”), secured on 24 November 2009 from the internet website YouTube.com.

<sup>63</sup> Indictment preferred on . . . in the proceedings against A.W.S. . . . p. 89.

<sup>64</sup> Indictment preferred on . . . in the proceedings against R.M. . . . pp. 59 et seq.

<sup>65</sup> Indictment preferred on . . . in the proceedings against R.M. . . . p. 61; ruling by the *Oberlandesgericht Frankfurt* (Higher Regional Court of Frankfurt) dated 9 May 2011 . . . pp. 40 et seq.

<sup>66</sup> Memorandum on the evaluation by the German Federal Police Office of conversation No. 253 intercepted from telecommunications connection . . . dated 9 August 2010 . . .

<sup>67</sup> Record of telecommunications intercepted on 19 August 2010 (1:13:39 PM) between E. and YE. . . .

demanding that other relatives and associates join him and that funds be wired to Pakistan, while also offering B.E. logistical assistance for the journey.<sup>68</sup>

During his stay in North Waziristan, B.E. joined a number of insurgent groups in succession. At first he belonged to a group known as the “German Mujahhedin”,<sup>69</sup> and later to the Pakistani Taliban; by mid-September, however, he was involved with Al Qaeda, or at least the outer circles thereof.<sup>70</sup> During this period, B.E. was provided with a Kalashnikov rifle and four magazines holding 30 rounds each;<sup>71</sup> he participated in combat training<sup>72</sup> and was taught how to handle weapons.<sup>73</sup>

The intended purpose of the meeting held on the evening of the aerial drone strike in question (4 October 2010) was to discuss and expedite plans for a suicide-bombing attack by B.E. against a military installation of the enemy ISAF forces, possibly one belonging to the German contingent.<sup>74</sup> This explains why Q.H., a leading member of the Tahrir-e Taliban (TTP) specialised in training suicide bombers,<sup>75</sup> as well as M. al-B., an Al Qaeda operative responsible for finances,<sup>76</sup> were both present at E.E.’s house. The planning for B.E.’s mission was so advanced that a date had already been set for the operation.<sup>77</sup>

<sup>68</sup> Records of telecommunications intercepted on 10 August 2010 (10:45:13 AM) and 17 August 2010 (9:15:15 AM) between E. and YE. . . .

<sup>69</sup> Record of telecommunications intercepted on 20 August 2010 (1:35:31 PM) between E. and YE. . . . this obviously did not involve the organisation *Deutsche Taliban Mujahideen* (DTM), which had already been dissolved in April 2010 (indictment preferred in the proceedings . . . pp. 3, 66).

<sup>70</sup> Memorandum on the evaluation by the Federal Intelligence Service on conversations Nos 1758 and 1579 as well as Nos 90, 91, 93, 114, 116, 127, 131 and 132 from 21 September 2010 . . .

<sup>71</sup> Record of telecommunications intercepted on 12 October 2010 (4:47:12 PM) between E. and S./EE. *et al.* . . .

<sup>72</sup> Record of telecommunications intercepted on 5 September 2010 (5:53:32 PM) between E. and S/EE. *et al.* . . .

<sup>73</sup> Record of telecommunications intercepted on 30 August 2010 (7:01:39 PM) between E. and S/EE. . . .

<sup>74</sup> Record of telecommunications intercepted on 7 September 2010 (7:51:00 PM) between E. and YE. . . . Record of telecommunications intercepted on 12 October 2010 (6:27:27 PM) between E. and YE. *et al.* . . . Federal Intelligence Service memorandum on the “Transcript of the Statement by the Accused, E.E.” dated 18 August 2011. . . . written statement by the . . . M.F., included as an annex to his examination on . . . “He (E.E.) told me that important people from the Taliban had come to see them, and that B. was to be deployed on a mission to attack German soldiers”.

<sup>75</sup> Federal Intelligence Service memorandum on E.E.’s contributions to the acts committed on 16 November 2010 . . .

<sup>76</sup> Federal Intelligence Service memorandum on the “Transcript of the Statement by the Accused, E.E.” dated 18 August 2011 . . . indictment preferred in the proceedings . . . pp. 6, 85.

<sup>77</sup> Record of telecommunications intercepted on 5 October 2010 (5:40:40 PM) between E. and YE. *et al.* . . .

In the months following the drone strike, text messages as well as funeral photos of the deceased B.E. and S.D.S. were published on the relevant internet websites,<sup>78</sup> in which the two men, referred to by the names assigned to them<sup>79</sup> within the insurgent group, were praised as “martyrs for Jihad”.

### C. EVALUATION OF THE EVIDENCE

The above findings of fact regarding the situation in Pakistan are based on the analyses and expert reports compiled as well as on the open-source publications and other data sources evaluated with respect to the local conflict situation prevailing at the time of the incident in question. [Redacted remarks on the aerial drone deployment in question.] The findings made with regard to B.E.’s sojourn in Waziristan leave no doubt as to the fact that he was there as a combatant, fighting on behalf of a non-state actor in the conflict.

[Redacted additional evaluation of the evidence.]<sup>80</sup>

### D. LEGAL ASPECTS OF THE CASE

#### *I. Applicability of German criminal law*

With respect to the potential occurrence of crimes governed by the Code of Crimes Against International Law (VStGB), the applicability of German criminal law to the incident in question results from the principle of universal jurisdiction addressed by section 1 of the Code of Crimes Against International Law as well as from section 7 paragraph 1 of the Criminal Code (*Strafgesetzbuch*, StGB).

#### *II. Liability to punishment under the Code of Crimes Against International Law*

The Code of Crimes Against International Law (VStGB) is applicable to the case at hand given that the common feature shared by the constituent elements of the offences as defined under Chapter 2 of Part 2 of said statute (“War Crimes”)—i.e. the commission of the deed

<sup>78</sup> Publication dated 8 November 2010 from the Turkish-language website *Cihadmedya.net* as well as an eight-page text message published by the Islamic Movement of Uzbekistan (IMU) on 18 January 2011.

<sup>79</sup> “Abu Askar”, alias S.D.S. and “Imran Almani”, alias B.E.

<sup>80</sup> ...

in connection with an international or non-international armed conflict—is given in the case at issue. On the other hand, the killing of B.E. is not liable to punishment under the Code of Crimes Against International Law (VStGB), given that no war crime was committed (sections 8 et seq.), nor any other offence defined under the statute.

### *1. Armed conflict*

With respect to the period relevant to the case at hand, the violent conflict between insurgent groups and state actors in the FATA region represents a “non-international armed conflict” within the meaning of the Code of Crimes Against International Law as well as of international humanitarian law, which conflict is characterised by two overlapping conflictual relations.

#### *(a) The definition of “armed conflict”*

The term “armed conflict”, which is not explicitly defined in the Geneva Conventions, relates solely to the actual facts on the ground and is independent of any declarations (of war)<sup>81</sup> or political statements of intent on the part of the parties to the conflict. Rather, the key precondition is the objective existence of a dispute of a certain intensity and duration, in which both parties to the conflict resort to force of arms.

In view of the increasingly significant role of non-state actors<sup>82</sup> in armed conflicts, the fundamental ability of non-state groups to become party to an armed conflict is undisputed. In this context, it is of no importance that most of the military actions of such groups take the form of terrorist attacks. As a general rule, the methods and means which the actors use to make war are no more relevant than their motives and objectives when it comes to classifying an armed conflict. Thus, terrorist attacks may well exceed the threshold separating them from armed conflicts insofar as their intensity represents a massive and systematic use of force, and insofar as they can be attributed to one of the parties of the conflict.<sup>83</sup>

On the other hand, the concept of an armed conflict involving non-state groups must be distinguished from common and usual crimes,

<sup>81</sup> Cf. Common Article 2 of Geneva Conventions I-IV of 12 August 1949.

<sup>82</sup> Of the 69 armed conflicts identified by the Stockholm International Peace Research Institute (SIPRI) for the period 2001 to 2010, only three involved intra-state conflicts. All the other armed conflicts had non-state actors participating on at least one side (*SIPRI Yearbook* 2012, pp. 66 et seq.).

<sup>83</sup> SWP Analysis by S, pp. 3 et seq.

unorganised and short-lived uprisings, or isolated terrorist activities.<sup>84</sup> Thus, besides a certain intensity and duration of the armed conflict, an additional precondition is a minimum degree of organisation on the part of the parties to the conflict, one that allows them to plan and carry out sustained and focused military operations on the basis of military discipline and factual authority.<sup>85</sup> Features recognised as possible indicators for this include the existence of a headquarters or the ability to recruit, train, and arm one's own fighters.<sup>86</sup>

(b) *Conflictual relations*

The participation in the military conflict in the FATAs by various governmental armed forces (see B.I.2(b) above) and various organised insurgent groups (see B.I.2(a) above), each with their own objectives, is the outward manifestation of a multi-layered matrix of alliances and enmities, which is why the situation addressed in the present report must be described as a conflict situation made up of several, overlapping individual conflicts or conflictual relations. For example, the Afghan Taliban's use of the FATA region as a haven and staging area has evidently caused the Afghan conflict to "spill over" onto this particular part of Pakistan's national territory. On the other hand, the Pakistani government—with support from the US (see B.I.2(b)(cc) above)—is combating insurgent Taliban groups (e.g. the TTP) and their allies on its sovereign territory, if only to protect its own interests, frequently mounting its own cross-border operations.<sup>87</sup> Each of these differing sets of conflictual relations represents a separate "armed conflict" within the meaning of international humanitarian law.

(aa) If one applies the benchmarks set out above in Clause (a), then not only the government forces but also all the resistance groups operating in the FATAs (including Al Qaeda)<sup>88</sup> qualify as parties to an internal Pakistani armed conflict from the standpoint of

<sup>84</sup> Cf. Additional Protocol II to the Geneva Conventions, Article 1 paragraph 2, as well as Article 8 paragraph 2 lit. (d) and (f) first sentence of the Rome Statute of the International Criminal Court: "... internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature".

<sup>85</sup> Munich Commentary on the Criminal Code/Ambos before the commentary on sections 8 et seq. of the Code of Crimes Against International Law (VStGB) at margin numbers 22 and 23.

<sup>86</sup> Criteria as per the SWP Analysis by S, p. 2.

<sup>87</sup> In this same vein: *SIPRI Yearbook* 2011, p. 74: "Government of Pakistan vs. TTP: Fighting Took Place in Afghanistan and Pakistan".

<sup>88</sup> The objection is sometimes raised that Al Qaeda, having re-organised itself as a loose network of globally scattered terror cells, has now lost the status of a quasi-military organisation it previously held until 2001, and thus also its status as party to a non-international conflict (Claus Kress in *Journal of Conflict & Security Law* (2010), Vol. 15 No 2, pp. 245-74: "Some Reflections on the International Framework Governing Transnational Armed Conflicts", p. 261; Kai Ambos/Josef Alkatout in

international law. The attacks and military operations mounted by the parties to the conflict exhibit a high degree of organisation and sufficient capacities with regard to strategy, manpower, and military technology to carry out sustained and coordinated combat operations.<sup>89</sup> During the period under examination, the Pakistani government forces and their allies were ultimately unable to fully conquer the insurgent-occupied FATA areas, much less permanently pacify them, given their opponents' military prowess and tactical orientation.

Also in terms of intensity, duration, and territorial extent, the military confrontation between the parties to the conflict exceeds the threshold for an armed conflict.<sup>90</sup> Thus, the conflict involved not merely isolated or sporadic acts of violence, but rather armed hostilities that have extended over many years and that have affected the entire FATA region.<sup>91</sup> In the process, there has been a heavy toll in human lives.<sup>92</sup> Of the various FATAs, North Waziristan has proved to be a particularly high-intensity theatre with respect to aerial drone operations.

(bb) The military clashes in Afghanistan, too, must also be classified as an armed conflict.<sup>93</sup> By 2005 at the latest, the Afghan Taliban and its affiliated groups had taken up an armed struggle against Afghan

*Juristenzeitung* (JZ, Journal for Legal Experts) 15/16/2011, pp. 759–64: “Der Gerechtigkeit einen Dienst erwiesen? Zur völkerrechtlichen Zulässigkeit der Tötung Osama bin Ladens” (“Was Justice Served? On the Legality under International Law of Killing Osama bin Laden”, p. 759). For the most part, however, the structures and units of Al Qaeda (at least those in Afghanistan and Pakistan) continue to be regarded as quasi-military organisations (Andreas Paulus/Mindia Vashakmadze in *International Review of the Red Cross*, Vol. 91 No 873 March 2009, pp. 95–125: “Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualisation”, p. 119). In any case, Al Qaeda as an organisation continues to be subject to an arms embargo imposed by the UN in December of 2000 (see footnote 27 above).

<sup>89</sup> Cf. Article 1 paragraph 1 of Additional Protocol II to the Geneva Conventions.

<sup>90</sup> According to the “Heidelberg Conflict Model” used by the HIIK—which factors in the weapons and personnel resources deployed as well as the consequences of combat (deaths, destruction, refugees)—the conflict in the FATA region in 2009 and 2010 corresponded to level 5 (war), the highest possible level of intensity; the Stockholm-based SIPRI classified the conflict as one of the 15 “major armed conflicts” worldwide during the period from 2008 to 2010, meaning that the threshold of at least 1,000 combat-related deaths was reached.

<sup>91</sup> The territorial extent of an armed conflict is known as the “region of war”; besides the theatre where a conflict is currently being waged, this also encompasses all areas under the control of the parties to the conflict (i.e. areas to which the conflict could therefore potentially spread).

<sup>92</sup> The SIPRI research institute assumes roughly 4,600 war-related deaths in the Pakistani conflict in 2010 (*SIPRI Yearbook* 2011, pp. 63, 67, 74). The IISS, by contrast, estimates only 1,740 deaths in Pakistan for 2010 (IISS/ACD, Pakistan, Annual Update 2010).

<sup>93</sup> The war in Afghanistan, too, was classified by SIPRI as one of the “major armed conflicts” of 2010: SIPRI estimates there were ca. 6,300 war-related deaths in the Afghan conflict in 2010 (*SIPRI Yearbook* 2011 pp. 67, 74). The IISS, meanwhile, estimates ca. 8,330 deaths in Afghanistan for 2010 (IISS/ACD, Afghanistan, Annual Update 2010).

government troops and ISAF forces.<sup>94</sup> In this context, the area of South-east Afghanistan bordering on Pakistan—the region relevant to the case at hand—became a theatre for repeated military clashes, some of which came close to full-scale battles in the field.<sup>95</sup> Given that the UN Security Council's resolutions to extend the ISAF Mandate since 2007 have been expressly posited on compliance with international humanitarian law, the United Nations, too, are working on the premise that the international laws of war are indeed applicable to the situation in Afghanistan.<sup>96</sup>

(cc) In the real world, it is impossible to attribute a given individual military action—in this case, the aerial drone deployment under examination—to *just one* of the conflictual relations described above. By supporting Pakistani government troops in their fight against insurgents in the FATAs, the United States will generally be concomitantly pursuing its own military goals and interests of security in Afghanistan. One can safely assume that not even the individual decision-makers responsible for certain aerial drone operations draw a distinction as to whether a given measure is intended to improve the security situation in Afghanistan or that in Pakistan. Indeed, making such a distinction is not required in the case at hand, since each of the above-described conflictual relations, taken individually, already exhibit the characteristics of an “armed conflict”.

(c) *Non-international conflict*

Both the internal Pakistani conflict as well as the military clashes in Afghanistan<sup>97</sup> each represent a non-international conflict, since they are not being carried out between national states but rather between government forces on the one hand and armed, organised groups on the other.<sup>98</sup> This classification holds true regardless of the fact that both the Afghan and Pakistani government troops are receiving support from the military units of other nations acting as co-participants in the conflict. Both the ISAF deployment in Afghanistan as well as the aerial drone missions in Pakistan (see B.I.2(b)(cc) above) have occurred with the official and/or unofficial<sup>99</sup> consent of the affected territorial state,

<sup>94</sup> Cf. Directions by the Federal Prosecutor General to terminate the proceedings 3 BJs 6/10-4 (“Kunduz”) dated 16 April 2010, pp. 41, 43 (unclassified version).

<sup>95</sup> Directions by the Federal Prosecutor General to terminate the proceedings 3 BJs 6/10-4 (“Kunduz”) dated 16 April 2010, p. 10 (unclassified version).

<sup>96</sup> Most recently, UN Security Council Resolution 2096 of 19 March 2013.

<sup>97</sup> Cf. Directions by the Federal Prosecutor General to terminate the proceedings 3 BJs 6/10-4 (“Kunduz”) dated 16 April 2010, p. 42 (unclassified version).

<sup>98</sup> Cf. Article 1 paragraph 1 of Additional Protocol II to the Geneva Conventions.

<sup>99</sup> However, it has not been conclusively clarified by whom and in what form such approval must be given in order to be valid under international law (SWP Analysis by S, p. 9).

meaning that none of these states has had its sovereignty breached by another. By the same token, the fact that ISAF forces mount cross-border operations or that combat drones may potentially be launched from Afghani territory does not entail an “internationalisation” of the conflict. As long as a deployment of government troops in the territory of another state is directed against non-state actors, and as long as the latter state has consented to this deployment, even these types of hostilities will in principle qualify as “non-international armed conflicts”, despite their cross-border dimension.<sup>100</sup>

(d) *Territorial limitation of the conflict*

A determination that an armed conflict exists will be valid only where it is made with respect to a specific territorial extent and duration of time. Thus, the present analysis is limited exclusively to the situation given in the Pakistani FATA region during the years 2009 and 2010; its determinations regarding armed conflict, as well as the associated legal ramifications, are made exclusively within this framework. In the case at hand, it is neither appropriate nor necessary to take recourse in any way to the “War on Terror” doctrine<sup>101</sup> developed by then US President George W. Bush, a doctrine which holds that the United States is engaged in a “global war on terror” and that the rules of armed conflict therefore apply to any and all anti-terror operations without any territorial limitation whatsoever.<sup>102</sup> The thinking behind this doctrine is in any case open to the objection that such a blanket justification for acts of war contravenes the underlying spirit of international humanitarian law, namely to place the maximum possible constraints on war *per se*, as well as on the methods by which it is

<sup>100</sup> Cf. SWP Analysis by S, p. 4.

<sup>101</sup> George W. Bush, Jr. first used the term “war on terror” on 21 September 2001 (in an address to a joint session of Congress).

<sup>102</sup> It has since become evident that the Obama Administration is holding fast to at least certain key points of the “War on Terror Doctrine”. Thus, the US Justice Department regards operations against key organised strongholds of Al Qaeda or its allies, especially ones involving aerial drones, to be part and parcel of the non-international conflict between the United States and Al Qaeda, even when they occur outside a “zone of active hostilities”. According to this reasoning, such operations comply with international law if the affected territorial state has either consented to them or is unwilling or unable to confront the threat posed by the person(s) to be targeted (Department of Justice White Paper from 2010/2011, made public by NBC). A similar line of reasoning was proposed by US Counter-Terrorism Advisor John Brennan in a speech given on 30 April 2012 at the Woodrow Wilson International Centre for Scholars (“Ethics and Efficacy of US Counter-Terrorism Strategy”). Besides explaining the process of how persons are selected as potential targets for aerial drone operations, Brennan stated that the use of drones was allowed under international law even outside the “active battlefield”, and that the right of self-defence came into play if the affected state had consented or was unwilling/unable to act on its own.



waged and on the populations which it impacts. This explains why the “War on Terror” doctrine is rejected by the vast majority of scholars of international law,<sup>103</sup> and certainly cannot be regarded as “generally accepted” under customary international law. Based on international law as it currently stands, the application of the international laws of war, with their special prohibitions and empowerments, continue to be limited in territorial scope to actual theatres of war only.

## 2. *Connection to the armed conflict*

The military deployment of the aerial drone in question served the targeted suppression of members of insurgent groups that had taken root in North Waziristan and thus did not occur merely on the occasion of combat. Given this functional context, the military operation in question occurred *in connection with* the identified armed conflict.

## 3. *War crimes pursuant to section 11(1) first sentence number 1 of the Code of Crimes Against International Law*

The objective prerequisites for the commission of a war crime pursuant to section 11(1) first sentence number 1 of the Code of Crimes Against International Law (VStGB) are not met in the case at hand, since the aerial drone operation, even though it represented an attack by military means, was not targeted against the civilian population as such, or against individual civilians. The provisions made under section 11(2) of the Code of Crimes Against International Law in terms of the impact of the incident are not applicable since the basic constituent elements that make an offence a war crime pursuant to subsection 1 are not given.

### (a) *Attack by military means*

Pursuant to Article 49 paragraph 1 of Additional Protocol I to the Geneva Conventions—whose definition of attack is also applicable, by virtue of customary international law, to non-international armed conflict—the term “attack” is to be understood as an offensive or defensive use of force against the adversary. Thus, firing a warhead-armed rocket at a building from an aerial drone in order to kill or injure persons inside qualifies as such a use of force with military means.

<sup>103</sup> Cf. for example Paulus/Vashakmadze, loc. cit., p. 119 with further references: “War on terror is not an armed conflict as such, independently of time and space”; Kress, loc. cit., p. 266; Ambos/Alkatout, loc. cit., p. 759.

(b) *Attack against the civilian population as such or against individual civilians*

The penal statute of section 11(1) first sentence number 1 of the Code of Crimes Against International Law (VStGB) only covers attacks carried out in a targeted manner against the civilian population or against individual civilians. Attacks launched against combatants, enemy fighters, or military targets are not covered by this definition of a crime, regardless of whether so-called “civilian collateral damage” occurred or not.<sup>104</sup> Although we do not know the specifics of the subjective targeting by the persons responsible for planning and executing the aerial drone deployment in question, there are no indications that this was an attack targeted against civilians, given that none of the persons killed was a civilian.

(aa) When it comes to non-international armed conflict, the term “civilian” is not expressly defined in the Geneva Conventions or its Additional Protocols. As far as international armed conflict is concerned, Article 50 paragraph 1 of Additional Protocol I stipulates that a civilian is anyone who is not part of an organised armed unit (militia or volunteer force) of the armed forces of one of the parties to the conflict, or who is not part of a “*levée en masse*”. If this definition is expanded to include the participants of a non-international conflict, it follows that any persons who are not part of government armed forces or of an organised armed group are civilians,<sup>105</sup> and that they therefore enjoy the right of protection from direct attacks so long as they do not take part in hostilities.<sup>106</sup> However, given that the fighters of a non-state party to the conflict cannot be externally distinguished by the uniforms or insignia worn by regular soldiers, any distinction drawn between them and civilians must be made based on real-life, functional aspects. Accordingly, a person is to be regarded as a member of such a group if his sustained and/or permanent function consists of the direct participation in hostilities (“continuous combat function”).<sup>107</sup> An individual will be deemed to have a continuous combat function if he is lastingly integrated into an organised armed group. On the other hand, a person who is recruited, trained, and equipped by

<sup>104</sup> For the definition of “attack” in general and for the applicable scope of the norm, see the Munich Commentary on the German Criminal Code / Dörmann on section 11 of the Code of Crimes Against International Law (VStGB) at margin nos 28, 31.

<sup>105</sup> International Committee of the Red Cross: “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law”, Geneva 2009 (hereinafter, “ICRC Guidance”), p. 27.

<sup>106</sup> Cf. Article 13 paragraph 3 of Additional Protocol I to the Geneva Conventions.

<sup>107</sup> ICRC Guidance p. 27.

such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he has carried out a hostile act.<sup>108</sup> It is legitimate to combat members of organised armed groups directly, even at points in time when they are not directly taking part in hostilities. The members of such a group will not be entitled to re-claim the protected status of a civilian until such time as they cease to assume their continuous combat role in a lasting and conclusive manner.<sup>109</sup>

(bb) Based on this benchmark, it follows that B.E. was not a civilian protected under international humanitarian law, but rather the member of an organised armed group who had a continuous combat function. B.E. had left Germany for Pakistan with the obvious intention of taking part in Jihad. Once in Waziristan, he joined up with a series of insurgent groups, all of which are to be seen as parties to the conflict prevailing in that region. Within this milieu, he was equipped with weapons, was trained for armed combat missions, and was selected (with his consent) for a suicide mission whose “go date” had already been fixed. From the time of his arrival in the region, all of his activities were oriented towards the future performance of combat operations. In such a case—i.e. where a person is recruited, trained, and equipped to carry out combat operations—a continuous combat function may be imputed to that person without his necessarily having to have participated in combat previously. B.E.’s integration into the insurgent groupings is also borne out by the videotaped messages released after his death. In them, B.E. is referred to as a “German brother” and “martyr” who had already been “fighting in the cause of Jihad for several months”.

(cc) S.D.S., for his part, was also a member of an organised armed group—in this case, the IMU and/or Al Qaeda—and likewise exercised a continuous combat function. According to a statement made in a message videotaped in the autumn of 2009, he had already taken active part in combat operations against the Pakistani army. His later affiliation with Al Qaeda was still ongoing at the time of the incident in question. Just a few months before his death, he had been selected for as yet unspecified Al Qaeda operations in Europe; as an evidently trusted person, moreover, he was present at the meeting of high-ranking representatives of the insurgent groups on the evening of 4 October 2010.

<sup>108</sup> ICRC Guidance p. 34.

<sup>109</sup> ICRC Guidance p. 72.

(dd) The other persons killed, i.e. the Pakistani nationals whose names are unknown, were bodyguards<sup>110</sup> and/or protective escorts<sup>111</sup> of the high-ranking TTP representative Q.H. In view of their function, they, too, were not civilians but members of an organised armed group.

(ee) Even in the event that the aerial drone deployment was targeted against one or several of the male survivors, this would still not constitute an attack on civilians. Both Q.H. (in his capacity as a leader of the TTP) as well as M. al-B. and E.E. (as members of Al Qaeda) were members or special officers of their respective organisations; as such, they were legitimate military targets for the adverse party to the conflict. There are no indications whatsoever to suppose that the attack was directed against the women located in the closed-off rooms of the building.

*(c) Military necessity of the attack (proportionality)*

Also if the “principle of military necessity”<sup>112</sup> is applied, the conclusion reached is the same. According to this principle, the degree and scope of military force used should not exceed what is necessary to achieve the intended military goal. In the case of targeted, deadly force, this could mean that physical capture should take precedence over actual killing, so long as this would not generate additional risks for the military units involved or for the civilian population.<sup>113</sup> However, this principle comes to bear mainly in scenarios in which the acting party to the conflict exercises effective territorial control over the territory in which the military operation occurs.<sup>114</sup> Given that the region in question—the town of Mir Ali and its environs in North Waziristan—was not under the control of the Pakistani army or ISAF forces during the period in question, it would have been impossible to perform a military capture and arrest operation without a heightened risk for the soldiers involved or for the civilian population.

4. *War crimes under section 11(1) first sentence number 3 of the Code of Crimes Against International Law*

A constituent element making an offence a war crime pursuant to section 11(1) first sentence number 3 of the Code of Crimes Against

<sup>110</sup> Federal Intelligence Service memorandum on the “Analysis of Exhibit No Böt 1.7.1. 6, image files of a 12-page handwritten letter” dated 28 September 2011 . . .

<sup>111</sup> Examination of E.E. p. 3.

<sup>112</sup> See ICRC Guidance p. 79 and the corresponding references therein (footnote 215) regarding the various national rules of military procedure intended to safeguard and implement the principle of military necessity.

<sup>113</sup> ICRC Guidance p. 82.

<sup>114</sup> Corresponding considerations can be found in the Ruling of the Israeli Supreme Court of 11 December 2005 (*Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. Government of Israel et al.*, HCJ 769/02).

International Law (VStGB) is that the perpetrator intends to attack a military target in the certain expectation that civilian deaths and/or damage to civilian property will occur to an extent disproportionate to any military advantage. In the case at hand, no persons qualifying as “civilians” under the laws of war were killed; thus, there are no grounds to conclude that the decision-makers responsible for the aerial drone operation acted with any such direct intent. Destroying or damaging a house in which several enemy fighters are present at the time of an attack—regardless of whether the building qualifies as a “civilian object” or “military objective”<sup>115</sup>—is in no way disproportionate to the military advantage gained from neutralising these enemy forces. This holds all the more true in the case at hand, given that the aerial drone deployment may well have prevented the planned suicide attack that was to be carried out with the participation of B.E.

5. *War crimes pursuant to section 8 of the Code of Crimes Against International Law*

Section 8(1) number 1 of the Code of Crimes Against International Law (VStGB) makes it a crime to kill a person entitled to protection under international humanitarian law. Pursuant to section 8(6) number 2 of said Code, the persons enjoying such protection include—for purposes of non-international armed conflict—the wounded, the sick, and the shipwrecked, as well as those who are not directly taking part in the hostilities and have fallen into the power of the adverse party to the conflict. In the case at hand, however, the persons killed were not prisoners or in the power of the adverse party to the conflict, nor did they in any other way meet the status defined in the aforementioned statutory provision.

6. *Other crimes pursuant to the Code of Crimes Against International Law*

Given the findings of fact in the case at hand, the potential commission of some other crime pursuant to the Code of Crimes Against International Law (VStGB) can be ruled out from the outset, particularly the crimes defined in Chapter 1 of Part II thereof, namely genocide (section 6 of the Code of Crimes Against International Law) and crimes against humanity (section 7 of said Code).

<sup>115</sup> Cf. Article 52 of Additional Protocol I to the Geneva Conventions (applicable to international armed conflict).

### *III. Liability to punishment under general criminal law*

The Criminal Code (StGB), which is supplementally applicable to the case at hand,<sup>116</sup> provides no grounds for criminal sanctions, either; this is because a military measure's permissibility under the international laws of war constitutes a ground for justification under general criminal law.

#### *1. Applicability of general criminal law*

It cannot be ruled out that the general criminal law could supplementally apply within the scope of application of the Code of Crimes Against International Law (VStGB),<sup>117</sup> since the crimes defined under said Code do not constitute an exhaustive regulation of the offences committed in armed conflicts.

Section 2 of the Code of Crimes Against International Law (VStGB) regulates the relationship between said Code on the one hand and general criminal law on the other. According to this provision, general criminal law shall also be applicable to the crimes set forth in the Code of Crimes Against International Law, unless the latter has made specific provisions in section 1 or sections 3 to 5. According to the legislative reasoning provided for the Code of Crimes Against International Law, the subject matter governed by it thus remains embedded in general criminal law, resulting in the wide-ranging applicability of the General Part and full applicability of the Special Part of the Criminal Code (StGB).<sup>118</sup> The declared intent behind the introduction of the Code of Crimes Against International Law was not to replace the already wide-ranging liability to punishment under the Criminal Code (StGB) of the offences defined under the Rome Statute of the International Criminal Court (ICC), but rather to specifically define the substance and level of wrongfulness of certain offences that make them crimes under international law.<sup>119</sup> Thus, the legislative reasoning furnished for the Code of Crimes Against International Law (VStGB) explicitly provides for scenarios in which the

<sup>116</sup> For the applicability of general criminal law, cf. Directions by the Federal Prosecutor General to terminate the proceedings 3 BJs 6/10-4 ("Kunduz") on 16 April 2010, pp. 52 et seq. (unclassified version).

<sup>117</sup> Munich Commentary to the Criminal Code by Ambos before sections 8 et seq. on the Code of Crimes Against International Law (VStGB) at margin no 45.

<sup>118</sup> Legislative reasoning provided for the Code of Crimes Against International Law (VStGB), Official Bundestag Record 14/8524, p. 14.

<sup>119</sup> Legislative reasoning provided for the Code of Crimes Against International Law, Official Bundestag Record 14/8524, pp. 12 et seq.

killing of civilians might not be liable to punishment under the said Code (given the strongly subjective preconditions defined under section 11(1) first sentence number 1 of the Code of Crimes Against International Law), but might nevertheless be sanctionable under sections 211 et seq. of the Criminal Code (StGB).<sup>120</sup> Only when a given offence fits the definition of crime both under the Code of Crimes Against International Law as well as the Criminal Code are the general provisions ruling out a double liability applied, whereby the special norms of the Code of Crimes Against International Law will generally take precedence.

## 2. *Competence of the Federal Prosecutor General*

It lies within the remit of the Federal Prosecutor General to investigate and subsequently determine whether or not the acts committed in the case at hand are liable to punishment, while also considering the constituent elements of offences as defined in the Criminal Code (StGB).

Pursuant to section 120(1) number 8 of the Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG) in conjunction with section 142a(1) of said Act, competence for prosecuting “crimes under the Code of Crimes Against International Law” lies with the Federal Prosecutor General. With respect to the question of whether or not the case at hand entails war crimes, this wording is to be interpreted to mean that the Federal Prosecutor General is competent for all offences that meet the initial constituent elements of a crime spelled out in Chapter 2 of the Code of Crimes Against International Law (VStGB)—i.e. a connection between the offence and an armed conflict. Thus, his competence also extends to the prosecution under general criminal law of offences committed during armed conflict, in the event that—as in the case at hand—the offence is not liable to punishment under the Code of Crimes Against International Law (VStGB) because no additional constituent elements of a crime are given. This broad an interpretation of his competence derives from the purpose and intent of the rule of jurisdiction provided for by this constitutional act.

According to the consistent practice of the courts, the interpretation of section 120(1) of the Courts Constitution Act (GVG) entails not just the demarcation of substantive areas of competence—it also addresses the safeguarding of the basic separation of powers between

<sup>120</sup> Legislative reasoning provided for the Code of Crimes Against International Law, Official Bundestag Record 14/8524, p. 33.

the respective judiciaries of the Federal Government (*Bund*) and the various *Länder*.<sup>121</sup> The constitutional provision relevant here, Article 96 paragraph 5 of the Basic Law (*Grundgesetz*, GG), grants the Federal Government the authority, as of 2002,<sup>122</sup> to regulate legal jurisdiction for “war crimes” (Article 96 paragraph 5 number 3 of the Basic Law (GG)). The letter of the law is very clear: this constitutionally established jurisdiction is not limited merely to offences that are *punishable* under the Code of Crimes Against International Law (StGB). Rather, the intent of the constitutional amendment is to ensure that the Federal Prosecutor General has the wherewithal to uniformly and consistently process complex cases involving armed conflicts (ones in which foreign policy interests of the Federal Republic of Germany regularly play a key role and in which difficult questions of international law must be clarified), in order to avoid the application of colliding laws and/or divergent discretionary judgments.<sup>123</sup> However, this legislative objective is only attainable if the prosecutorial competence of the Federal Prosecutor General extends beyond the crimes defined under the Code of Crimes Against International Law (VStGB) to also cover the investigation of offences involving armed conflicts under general criminal law, under due consideration of the peculiarities of the international laws of war.

This interpretation of Article 96 paragraph 5 of the Basic Law can be further confirmed by comparing this provision to the rule of jurisdiction set forth in Article 96 paragraph 2 of the Basic Law (GG). According to the latter provision, the Federal Government is empowered to set up courts martial during a domestic state of defence (*Verteidigungsfall*) and/or to try members of the German Federal Armed Forces (*Bundeswehr*) deployed abroad or on board military vessels. This rule of jurisdiction therefore links the Federal Government’s jurisdiction to specific factual framework conditions, such as a state of defence or the deployment of German troops in a foreign country. In giving structure to this competence, the German Parliament has extended the jurisdiction of the courts martial to cases which fall outside the aforementioned special situation and which would normally be subject to general criminal law and thus the jurisdiction

<sup>121</sup> Ruling handed down by the Federal Court of Justice (*Bundesgerichtshof*, BGH), published in *Neue Zeitschrift für Strafrecht* (NSZ, New Journal for Penal Law) 2007, pp. 117 et seq. with further references.

<sup>122</sup> Introduced by the 51st Amending Law of 26 July 2002, Federal Law Gazette Part I (*Bundesgesetzblatt*, BGBl. I) p. 2863).

<sup>123</sup> Cf. Legislative reasoning provided for the Law Amending the Basic Law (GG) dated 8 May 2002 (Official Bundestag Record 14/8994), p. 1.



of the *Länder*. On the other hand, such a special situation—i.e. one legitimising the comprehensive regulatory power of the Federal Government—is equally given in the case of an armed conflict as it is in the cases set forth under Article 96 paragraph 2 of the Basic Law (GG).

By concomitantly revising section 120(1) number 8 of the Courts Constitution Act (GVG), the German legislature intended to fully exploit the power to assign jurisdiction for the prosecution of “war crimes” that had been granted to the Federal Government under Article 96 paragraph 5 number 3 of the Basic Law (GG).<sup>124</sup> Thus, in cases of international or non-international armed conflict, the rule of jurisdiction pursuant to section 120(1) number 8 of the Courts Constitution Act (GVG), in conjunction with section 142a(1) of said Act, is to be interpreted in a manner concordant with the concept of a “war crime” pursuant to Article 96 paragraph 5 number 3 of the Basic Law (GG), in the sense described above.

### *3. Liability to punishment pursuant to section 211 of the Criminal Code (StGB) (murder)*

Both the objective and subjective constituent elements making up a criminal offence under section 211 of the Criminal Code (StGB) are met in the case at hand, since the persons responsible for the aerial drone deployment at the very least condoned the killing of several people by a remote-controlled rocket, i.e. by an instrument dangerous to public safety, and accepted this as inevitable.

Nevertheless, the conduct in question was permissible under international law and thus can be justified under criminal law.

The killing of human beings in the context of an armed conflict is adjudicated in accordance with the international laws of war. If the conduct in question remains within these legal boundaries, then a generally recognised justifiable reason is deemed given and the deed will, as a general principle, not be liable to punishment.<sup>125</sup> This presupposes, however, that the actor complied with the rules of warfare to which he was bound under international law. If the conduct of the actor was prohibited under international law, however, then the act may be punishable under general criminal law, even if international criminal law does not itself stipulate sanctions for said

<sup>124</sup> Cf. Legislative reasoning provided for of the Law Amending the GVG dated 7 May 2002 (Official Bundestag Record 14/8978), p. 1.

<sup>125</sup> Cf. the Leipzig Commentary on the Criminal Code (*LK-Jähnke*), section 212, margin no 16 (11th edition) with further references.

act. In the case at hand, however, no breach of the relevant rules of international law was committed.

(a) *Principle of distinction between civilians and combatants*

The core of international humanitarian law is embodied in the precept that persons participating in hostilities as parties to a conflict must be distinguished from civilians, who are to be protected from the perils emanating from combat actions. Only civilians who themselves take no direct part in the hostilities are to be accorded protection under international humanitarian law, which prohibits indiscriminate attacks. On the other hand, even the rules of international humanitarian law allow the targeting and killing of adverse combatants and/or enemy fighters in the context of an armed conflict.

As presented above (II.3(b)), neither B.E. nor any of the other persons killed in the incident were civilians; each of them was in fact a member of an organised armed group. Thus, a military attack against such individuals by the adverse party to the conflict does not constitute a breach of the principle of distinction between civilians and combatants.

(b) *Do aerial drone deployments raise special issues under international law?*

(aa) How a military strike is treated under international law will depend primarily on the objective of the attack; the classes of weaponry employed will generally be disregarded, so long as these weapons, by their inherent nature, do not infringe against the principle of distinction between civilians and combatants and/or do not cause superfluous injury or needless suffering.<sup>126</sup> On the other hand, it is possible in principle to subject certain weapons<sup>127</sup> or methods of war to international condemnation by means of concluding the corresponding treaties under international law; a number of these have already been entered into in the past.<sup>128</sup> No such agreement exists with respect to

<sup>126</sup> Cf. Article 35 paragraph 2 of Additional Protocol I to the Geneva Conventions which, by virtue of customary international law, also applies to non-international conflicts.

<sup>127</sup> Because it does not itself cause damage to the enemy, an aerial drone does not constitute a weapon, but rather a “vehicle controlling weapons”. However, when combined with the armaments for which they serve as the necessary delivery vehicle—usually missiles and bombs—aerial drones constitute a “weapons system” (cf. Robert Frau: *Unbemannte Luftfahrzeuge im internationalen bewaffneten Konflikt* (Unmanned Aerial Vehicles in International Armed Conflicts) in *Humanitäres Völkerrecht* (Humanitarian International Law) No 2/2011, pp. 60 et seq., p. 63).

<sup>128</sup> The UN Convention on Certain Conventional Weapons (CCW) of 1980 including its appurtenant protocols and, most recently, the Convention on Cluster Munitions (CCM) of 30 May 2008.

aerial drones, however.<sup>129</sup> Thus, international humanitarian law does not provide for any general prohibition against the deployment of aerial drones,<sup>130</sup> nor does it call for aerial drone strikes to be evaluated based on a different legal benchmark relative to other types of combat operations.<sup>131</sup>

(bb) An unusual feature of aerial drone technology is the huge distance between the personnel operating and steering the drone and the observed/attacked target, who can sometimes be continents apart. Leaving aside the purely ethical or psychological aspects of this peculiarity, the legal objection is often raised that this makes it more difficult to comply with the principle of distinction between civilians and combatants. According to this line of argument, the crew steering an aerial drone is unable to communicate with the person(s) being targeted—as would be possible in a ground operation, for example—making the operators unable to opt for some course of action below the threshold of what would normally constitute deadly force against said person(s). Particularly since the attacker himself is not in danger, so the argument goes, this exclusively binary choice between attacking and not attacking may impel him to make an overly hasty decision to strike that cannot be reconciled with the principle of distinction between combatants and civilians.<sup>132</sup>

What this viewpoint fails to consider, however, is that aerial drones are often deployed for military operations that cannot be performed by ground forces due to the poor accessibility of the theatre or because no corresponding troops are available in the region. Moreover, the well-known technical features of aerial drones enable them to reconnoitre unobserved above the target for extended periods; this makes drones a far better instrument than ground troops or other weapon categories when it comes to distinguishing between combatants and civilians on the basis of the broadest available evidence. Add to this the aerial drone's distinct advantage relative to less technically

<sup>129</sup> Frau: loc. cit., p. 62.

<sup>130</sup> Christian Schaller: *Gezielte Tötungen und der Einsatz von Drohnen: Zum Rechtfertigungsansatz der Obama-Administration* ("Targeted Killings and the Use of Drones: On the Justification Strategy Used by the Obama Administration") in *Humanitäres Völkerrecht* No. 2/2011 (hereinafter, Schaller in HR), pp. 91 et seq., p. 96.

<sup>131</sup> This view is shared by UN Special Rapporteur Philip Alston: "However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with international humanitarian law" (UN General Assembly, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions", by Philip Alston, 28 May 2010 (hereinafter, "Alston Report"), p. 24).

<sup>132</sup> The problem is discussed by Frau, for example: loc. cit., p. 64.

advanced weaponry in being able to attack a target in a highly precise manner while avoiding excessive collateral damage. Thus, just like any other category of weapon, aerial drones exhibit certain unique characteristics, some of which may prove problematic when implementing the principle of distinction between civilians and combatants, while others prove advantageous. However, there is no reason to posit that aerial drone technology is *in some general sense* unsuited to compliance with the principle of distinction between civilians and combatants. Rather, compliance with this stipulation of international law must be evaluated case-by-case for each individual aerial drone deployment.

(cc) The deployment of aerial drones also does not breach the prohibition of perfidy established in Article 37 paragraph 1 of the Additional Protocol I to the Geneva Conventions and which, by virtue of customary international law, also applies to non-international conflicts. Pursuant to paragraph 2 of said article, acts of perfidy are ones that falsely lure the enemy into trusting that, in a given situation, he will enjoy protection under international law or will be obligated to extend such protection to his opponent. An attack by means of a drone, which can operate noiselessly and unobserved while acquiring its target, generally strikes the persons targeted without any warning. This does not constitute perfidy, however, since the person targeted in such a case had neither reason nor occasion to develop a certain trust that could be then be abused by the enemy. Instead, the enemy is merely making use of the element of surprise, which falls into the category of the ruses of war expressly permitted under Article 37 paragraph 2 of Additional Protocol I to the Geneva Conventions.

(dd) In view of its technical characteristics, and despite its not being manned, a drone is to be classified as an “aerial vehicle” for purposes of international law, rather than as a rocket or missile.<sup>133</sup> In its general definition of a *military* aerial vehicle, the “Manual on International Law Applicable to Air and Missile Warfare”<sup>134</sup> stipulates that the following conditions must be met: the aerial vehicle must be operated by the armed forces of a state, it must bear the military markings of said state; it must be commanded by a member of the state’s armed forces; and it must be controlled, manned or must have been pre-programmed by a crew subject to regular armed forces discipline.<sup>135</sup> Based on the information available, however, all aerial drone deployments in the Pakistani

<sup>133</sup> Frau: loc. cit., p. 62.

<sup>134</sup> Harvard Program on Humanitarian Policy and Conflict Research: Manual on International Law Applicable to Air and Missile Warfare, 2009 (hereinafter, “HPCR Manual”).

<sup>135</sup> Regulation 1 lit. (x) HPCR Manual.

border regions—along with all comparable operations outside the officially recognised zones of conflict—are attributed to the sphere of responsibility of the US Central Intelligence Agency (CIA),<sup>136</sup> while the armed forces are said to be responsible for corresponding deployments in Afghanistan.<sup>137</sup> On the assumption that this information is accurate, then the fact that CIA operatives exercise operational responsibility for the aerial drone deployments, along with the fact that military markings may therefore have been omitted from the aerial vehicles, could conceivably mean that the drones deployed might no longer qualify as *military* aerial vehicles.

This formal classification can be set aside as a moot point, however. Far more important from an international law standpoint is the fact that CIA operatives working in the aforementioned capacity also qualify as “armed forces” within the meaning of Article 43 paragraph 1 of Additional Protocol I to the Geneva Conventions, which is also applicable to non-international conflicts.<sup>138</sup> According to this provision, the “armed forces” of a party to a conflict comprise the entirety of all organised armed formations, groups, and units falling under the command of a leadership answerable to said party for the conduct of its subordinates. Although the relevant CIA units and their weapons systems are not integrated into the military command structure, they do in fact act under the command of higher-ranking government agencies, which in turn exercise responsibility for military deployments; thus, a “responsible command” answerable to a party to the conflict is indeed given in the case at hand. Given the cross-border reach of the rebel groups, the relevant CIA units are, as a practical matter, forced to continually exchange operational information with the military units in charge of the Afghan border region; this in turn presupposes a certain mirroring and inter-linkage among the various reporting, analysis, and command structures. Thus, the CIA operatives in question are not a fighting group without a commanding or controlling authority; they are a unit comparable to, and closely connected with, the regular military in terms of their objectives, armament, and organisation.

Moreover, the aerial drones deployed in the airspace of the FATAs have an exclusively military function and are thus perceived by the adverse party to the conflict as part of the enemy’s “military machine”.

<sup>136</sup> Alston Report pp. 7 et seq.; IISS/Strategic Comments internet article dated October 2010; Felix Boor: *Der Drohnenkrieg in Afghanistan und Pakistan* (“The Drone War in Afghanistan and Pakistan”), in *Humanitäres Völkerrecht* No 2/2011, pp. 97 et seq., p. 103.

<sup>137</sup> SWP study by Rudolf & Schaller p. 9.

<sup>138</sup> ICRC Guidance p. 30.

Under these circumstances, any confusion between the drones and civilian aircraft can be ruled out. Thus, despite the possibility that national markings potentially may not be displayed, the “open carrying of arms” can still be posited, which Article 44 paragraph 3 of Additional Protocol I to the Geneva Conventions stipulates as a precondition for retaining the status of combatant in an international armed conflict. On the other hand, the fact that the crew steering the drones from remote bases may well wear visible national markings and/or military insignia is of no practical use whatsoever when it comes to distinguishing between civilians and combatants in the conflict theatre itself. It follows that the CIA operatives participating in the counter-insurgency campaign in Pakistan must be regarded as forming part of the “armed forces” of the United States within the meaning of Article 43 paragraph 1 of Additional Protocol I to the Geneva Conventions.

Only this functional definition of the term “armed forces” is aligned with the basic reasoning behind the principle of distinction between civilians and combatants. For civilian co-workers who have been assigned a “continuous combat function” by a party to the conflict thereby become integrated *de facto* into that party’s armed forces, and can no longer be considered “civilians” for purposes of the principle of distinction between civilians and combatants.<sup>139</sup> Also from a historical perspective, third parties taking direct part in hostilities under the authority, and at the behest of, a state actor have invariably been regarded as members of armed forces, and not civilians, from the standpoint of international humanitarian law.<sup>140</sup>

Even if one were to assume that the intelligence operatives commanding and executing the aerial drone deployments are in fact “civilians” and not members of “armed forces” within the meaning of Article 43 paragraph 1 of Additional Protocol I to the Geneva Conventions,<sup>141</sup> this would not automatically mean that the combat operations of such persons were impermissible under international law. There is no general prohibition under international humanitarian law against the participation of civilians in hostilities. On the other hand, the consequences of such participation would be the (temporary) forfeiture of one’s protected status as a civilian, as well as the inability to claim

<sup>139</sup> ICRC Guidance p. 39.

<sup>140</sup> Cf. ICRC Guidance (footnote 71/p. 39 therein) and the reports listed therein on the results of various expert symposia in which historical case studies were evaluated.

<sup>141</sup> This according to the Alston Report, which also makes clear in this context, however, that humanitarian international law cannot be used to derive a prohibition against aerial drone operations by persons who are not armed-forces members (pp. 7, 22 et seq.); also in the same vein: Boor, loc. cit., p. 103.

the immunity from domestic criminal prosecution that is generally accorded to members of national armed forces.<sup>142</sup> A civilian's participation in hostilities will not constitute a breach of international humanitarian law, however, so long as he complies with the rules of war to which he is bound; this latter condition is met in the case at hand, given that the principle of distinction between combatants and civilians was being observed.

(ee) In many cases, aerial drones deployments are carried out for the so-called "targeted killing" of previously identified and localised individuals.<sup>143</sup> Whether this applies to the case at hand is not known, but it is likewise a matter that need not be addressed. International humanitarian law does not provide for any general prohibition against the targeted killing of persons in an armed conflict.<sup>144</sup> A much more important benchmark for the legal evaluation of any aerial drone deployment is whether the status of the person killed in each case is that of a legitimate military target or that of a protected civilian.

The foregoing analysis, which is retrospective and limited to one particular case, must be clearly delineated from another highly contentious topic: What requirements should be imposed under international law, human rights law, and/or the constitutional law of the respective countries when it comes to creating and verifying lists of targeted persons during the selection and prioritisation phase? In his report of 28 May 2010, United Nations Special Rapporteur Philip Alston presented a number of "conclusions and recommendations" urging the relevant countries to promote greater transparency with respect to the legal framework serving as the basis for targeted killings and with respect to the procedural safeguards and other controls they have implemented to ensure that all measures remain strictly legal. In the opinion of the Rapporteur, the refusal by states to disclose their policies violates the framework of international humanitarian law to provide transparency in this regard.<sup>145</sup> On the other hand, Alston's report does not draw the conclusion that the lack of such transparency *ipso facto* makes all the targeted killings carried out thus far illicit under international humanitarian law, which would have implied individual liability to punishment under criminal law on the part of all participants in such killings. Rather, the UN Special Rapporteur

<sup>142</sup> ICRC Guidance p. 83.

<sup>143</sup> In the field of international law studies, the term "targeted killing" is used above all to refer to the government-authorised, planned, and targeted killing of persons who are not being detained in the secure custody of that government's executive entities (SWP study by Rudolf/Schaller p. 8).

<sup>144</sup> Schaller in HR, p. 96.

<sup>145</sup> Alston Report pp. 26 et seq.

takes the view that disclosing the rules and decisional bases for targeted killings is a prerequisite for verifying the compliance of individual measures with international law in the first place, so that any suspected breaches can then be investigated and criminal charges brought as needed.

*4. Other crimes defined under the German Criminal Code.*

The possibility of liability to punishment for some other crime defined under the German Criminal Code (StGB) can be ruled out, since the permissibility under international law of the conduct in question also provides legal justification in this regard.

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