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Targeted Killing by Combat Drone

**Expert opinion on the decision (File no. 3 BJs 7/12-4) of the Federal
Prosecutor General at the Federal Court of Justice to discontinue
investigatory proceedings into the killing of German national Bünyamin E.
on 4 October 2010 in Mir Ali / Pakistan**

Berlin, October 2013

Introduction

On 4 October 2010 Bünyamin E. was killed in a strike by an unmanned combat air vehicle¹ in Mir Ali, Pakistan. Four other persons also died in the attack. The killing of Bünyamin E. was the first case to come to light of a targeted killing drone strike on a German citizen in Pakistan. This incident was unique in that, unlike with numerous previous attacks on nationals of other countries, the German public prosecution was subsequently under a duty to commence investigatory proceedings.² From the beginning of October 2010 to 10 July 2012, the Federal Prosecutor General at the Federal Court of Justice examined the question of jurisdiction. He has jurisdiction over the case only if there had been an international or non-international armed conflict in the region. The Federal Prosecutor General found that there was a non-international armed conflict consisting of two overlapping conflict relations. Formal investigatory proceedings were subsequently launched against unknown suspects on 10 July 2012.

In a decree from 20 June 2013 the Federal Prosecutor General decided to discontinue the investigatory proceedings in accordance with § 170 (2) of the German Code of Criminal Procedures (StPO) on the basis that there was insufficient grounds to bring charges.³ The Federal Prosecutor General argued that because the suspects, who worked for the CIA, were to be considered as part of American armed forces, they would enjoy immunity from prosecution as long as there had been no violations of international humanitarian law. In the view of the Federal Prosecutor General, Bünyamin E, as a member of an organized armed group, was not a protected person under international humanitarian law. It was thus argued that the act did not represent a war crime and that while the prerequisites for the crime of murder (§ 211 of the German Criminal Code) were fulfilled, the suspects were justified on account of their adherence to international humanitarian law. The Federal Prosecutor General therefore decided against pressing charges on the basis that there was insufficient suspicion that a crime had been committed.

This expert opinion is based on the Federal Prosecutor General's decree from 20 June 2013 which was published by the prosecution authorities on 23 July 2013.⁴ The analysis and evaluation of the case made reference to publicly available reports and articles as well as information gathered through own investigations. As will be discussed in further detail below, the reasons provided as justification in the decree terminating the investigatory proceedings raise doubts about the lawfulness of the decision.

¹ Hereafter “drone” or “combat drone”.

² See § 152 (2) StPO, § 160 StPO, § 7 (1) StGB.

³ The published version of the Federal Prosecutor General's decree terminating the investigatory proceedings from 20 June 2013 is available in German at:

www.generalbundesanwalt.de/docs/drohneneinsatz_vom_04oktober2010_mir_ali_pakistan.pdf; the Federal Prosecutor General's press release from 1 July 2013 is available at:

<http://www.generalbundesanwalt.de/de/showpress.php?themenid=15&newsid=482>

⁴ Idem.

The decree is legally flawed for the following reasons: The Federal Prosecutor General proceeds on the basis that there exists a non-international armed conflict in accordance with the German Code of Crimes against International Law and international humanitarian law, specifically a conflict characterized by two overlapping conflict relations.⁵ The Federal Prosecutor General refers to the internal conflict in Pakistan between the central government – supported by the US – and insurgents as well as to a second conflict spilling over from Afghanistan between the Afghan central government – supported by the ISAF – and non-state actors.⁶ However, the Prosecutor’s legal evaluation fails to convincingly show that the relevant individual non-state parties to the conflict fulfill the legal requirements (degree of organization etc.) needed to be considered a party to the conflict. The decree also omits to clarify which non-state parties to the conflict were, at the time of the incident, in a conflict with one another – a conflict which, depending on its duration and intensity, might be classified as an armed conflict under international humanitarian law. Such questions need to be addressed before establishing whether or not Bünyamin E. could legitimately represent a military target. Furthermore, the Federal Prosecutor General fails to set out to which party to the conflict Bünyamin E. is alleged to have belonged.⁷ The gravest doubt, however, concerns the question of whether Bünyamin E. was in fact a victim of a military attack. It is a widely held view in international law that, in an armed conflict, only members of military forces are entitled to take part in hostilities and subsequently enjoy immunity from prosecution, assuming they have adhered to international humanitarian law. The Federal Prosecutor General fails to recognize that the CIA is not part of the US armed forces and is not embedded in its command structure. Even when CIA agents take part in hostilities, they do not enjoy ‘combatant privilege’. That they may have adhered to international humanitarian law does not change the fact that they are subject to normal criminal liability and are not entitled to rely on combatant status as a justification.

Finally, the arguments made by the Federal Prosecutor General based on the numbers of drone strikes and terrorist suspects presumed to have been killed display a very one-sided understanding of the issue. Between 2009 and 2011 there were reportedly 259 strikes with ca. 1,900 fatalities, of which the Federal Prosecutor General claims a “majority” targeted leaders of the Taliban, al-Qaida, the Haqqani network and the IMU/IJU.⁸ Among the fatalities, it is claimed, were “a large number” of leaders of the non-state groups, including some who were known by name.⁹ The Prosecutor, however, goes on to list just sixteen cases; the name of the victim was known in six instances. The Prosecutor’s claim that the majority of strikes targeted group leaders is does not stand up to scrutiny if, of the 1,900 fatalities, only six of the victims were leaders whose names were known. Current figures from the Pakistani government suggest there were at least 330 drone strikes in Pakistan between 2004 and March 2013,

⁵ Federal Prosecutor General’s decree from 20 June 2013, p. 17.

⁶ Federal Prosecutor General’s decree from 20 June 2013, p. 18.

⁷ Federal Prosecutor General’s decree from 20 June 2013, p. 24.

⁸ Federal Prosecutor General’s decree from 20 June 2013, p. 6.

⁹ Federal Prosecutor General’s decree from 20 June 2013, p. 6.

causing at least 2,200 fatalities.¹⁰ Despite the difficulty in gaining access to the scenes of these crimes, it has been established that the victims included at least 400 civilians as well as 200 other non-combatants. These are conservative figures; the real numbers are likely to be higher.¹¹

Since the investigation has been discontinued, the only avenue that remains open to the relatives of the victims would be to take proceedings to compel public charges in accordance with § 172 (2) StPO which, provided the very strict formal requirements were met, would subject the decision of the Federal Prosecutor General to court scrutiny. Because the Federal Prosecutor General acts as part of the executive branch and is subordinate to the Federal Ministry of Justice, an independent court decision is particularly important in the context of the separation of powers and judicial examination of executive decisions. Yet the only available legal remedy is the taking of proceedings to compel public charges which obliges the survivors to pursue their own investigations and to provide the facts to substantiate preferment of public charges as well as evidentiary material in accordance with § 172 (3) StPO. The provision of this information is intended to enable the court to examine the question without having to refer to the investigation files or other documents.¹²

The five main points of criticism

1. The finding that the USA is involved in an internal Pakistani conflict on the side of the Pakistani government, even though the non-state opponents of these two states do not entirely correspond.

The Federal Prosecutor General characterized the drone strikes as instances of US support for the Pakistani government in an internal Pakistani conflict. The prosecution fails, however, to differentiate between the various non-state actors in terms of their organizational structure and their participation in hostilities. It was not established whether or not the individual groups actually meet the requirements to be considered as parties to a conflict under international humanitarian law. There was also a failure to establish whether the US is also in conflict with groups that are not in conflict with the Pakistani government. By generalizing the various non-state actors, the Federal Prosecutor General is conflating the state use of force by Pakistan and the US against opponent groups, not all of which are involved in an armed conflict with both states. The investigating authorities should have examined this point in further detail and should have at the very least requested official statements from the states

¹⁰ See B. Emmerson, Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 18 Sept. 2013, A/68/389, par. 32.

¹¹ See B. Emmerson, Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 18 Sept. 2013, A/68/389, par. 32.

¹² K.-H. Schmid in *Karlsruher Kommentar zur StPO*, 6th ed. 2008, § 172, marginal no. 34.

involved in order to clearly set out the individual parties to the conflict and to be in a position to accurately characterize the hostilities between the various parties to the conflict.

2. The claim that the non-international armed conflict in Afghanistan between insurgents and the ISAF-supported Afghani government has spread to Pakistani territory without specifying which non-state groups use Pakistani territory as a safe zone and without establishing whether these groups fulfill the requirements to be considered parties to the conflict.

In addition to the US involvement in the internal Pakistani conflict, the Federal Prosecutor General further justified his decision to discontinue the investigation on the grounds that the drone strike was part of the internal conflict in Afghanistan, in which the UN-mandated ISAF is supporting the Afghani government in its conflict with the Afghani Taliban. The Federal Prosecutor General thus sees the CIA-directed drone strikes in Pakistan on the one hand as part of the ISAF mission. This assessment is, however, contradicted by the fact that the UN Security Council resolutions on the ISAF strictly limit that mission to the territory of Afghanistan and prohibit an extension of the mission to Pakistani territory. Furthermore, the ISAF mission, under the leadership of NATO, acts with national contingents of the various armed forces; as such the activities of the US foreign intelligence service – the CIA – cannot be seen as part of the ISAF mission.

On the other hand the Federal Prosecutor General recognizes that the Afghani and Pakistani Taliban are two distinct groups and are separately involved in conflicts in their respective state territories. The Federal Prosecutor General neglects, however, to name the groups that are said to be taking part in the Afghani conflict while based in Pakistan. This would have been necessary in order to examine if these groups fulfill the minimum degree of organization needed to be considered a party to the conflict and thus to establish whether the armed conflict in Afghanistan had spilled over into Pakistan.

3. The finding that it is neither possible nor necessary to categorize the drone strike as a military measure distinctly relating to one of the two conflict situations.

Having established the existence of two armed conflicts, the Federal Prosecutor General declines to attribute the drone strike to one of the two conflicts, claiming that this is “in reality” an impossible task. In this way the Federal Prosecutor General avoids the question of whether the persons present at the site of the drone strike – in particular Bünyamin E. – belonged to a particular group, and if so, which group they/he belonged. Also sidestepped in this context is the question of who the target of the attack was. Furthermore, the Federal

Prosecutor General fails to determine whether, in attacking this group of people, the CIA were intending to aid the Pakistani government as the group was part of a party to the internal Pakistani conflict or whether the group was planning attacks on ISAF troops or facilities in Afghanistan as part of the Afghani conflict, or, indeed, whether the group was involved in both of the conflicts. The failure to establish these facts indicates that the Federal Prosecutor General did not adequately fulfill the comprehensive duty of investigation that applies in right to life cases, particularly since no requests were sent to Pakistani authorities seeking information on the situation in the Western part of the country and no recourse was had to international UN experts or local experts from Pakistan.

4. The categorization of Bünyamin E. and the seven other persons present at the scene of the strike as members of an organized armed group under international humanitarian law and the subsequent finding that they directly participated in hostilities based on a disputed legal framework and insufficiently researched suspicions against those persons present.

If, contrary to the above analysis, an armed conflict did exist, the decisive question is at what point civilians lose their protected status under international humanitarian law through direct participation in hostilities. In addressing this question the Federal Prosecutor General relies on a guideline of the International Committee of the Red Cross (ICRC), the relevant points of which, for the present case, have been criticized by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions. The ICRC extends the definition of direct participation in hostilities to an improper degree, relying not on the particular act of hostility as a defining factor but instead on the element of membership in one of the parties to the conflict. According to this theory civilians who belong to such a group and have a continuous combat function are permanently deprived of protected status, and not just for the duration of their participation in hostilities. As a consequence of this, an increased number of civilians – who are considered to be members of a non-state party to a conflict with combat status on grounds that have not been subject to any independent assessment – are endangered. International humanitarian law, however, is intended to prevent any such dilution of civilians' protected status.

Furthermore, the Federal Prosecutor General fails to set out whether Bünyamin E. purportedly belonged to one or more of the parties to the conflict and, if so, which one(s) he was affiliated with. The finding that he was taking part in hostilities is based solely on the claims of third persons whose telephone calls were intercepted. There are no statements from Bünyamin E. himself on the question of his participation in hostilities; there is, however, a statement from his sister-in-law attesting to his innocence. Assertions are also made relating to the other persons present at the scene and their membership in various groups, without providing any evidence to substantiate these claims. The evidence that is provided in the decree is not

sufficient to establish that the drone strike entailed a concrete and direct military advantage that would justify the scale of civilian deaths as so-called ‘collateral damage’.

5. The finding that CIA agents can be seen as part of the armed forces since both entities are subordinate to the same ultimate command and that CIA agents can therefore rely on so-called ‘combatant privilege’ to provide them with immunity from prosecution for actions covered by international humanitarian law.

In principle, during an armed conflict – if one did exist in this case – only regular army forces may take part in hostilities on the side of the state. All other actors are prevented from relying on international humanitarian law to justify their actions and are therefore subject to prosecution in accordance with general criminal law. Despite this principle, the Federal Prosecutor General finds that the CIA works in cooperation with regular US army forces and that the fact of being subordinate to the same government departments that are responsible for military operations is sufficient to permit an actor to take part in hostilities as a combatant. Yet in almost every country, the military supreme command and the coordination of the secret service are both overseen at the highest state level and are, as such, always subordinate to the same ultimate control. The Federal Prosecutor General’s decision fails to distinguish the various command structures within the US armed forces and within the secret services as well as in relation to the independent activities of the CIA undertaken with the aid of private informants in the region in question in Pakistan. By extending combatant privilege to the CIA the Federal Prosecutor General mischaracterizes the CIA’s role, function and working methods and incorrectly conflates the CIA’s counter terrorism efforts with the US armed forces’ military efforts in Afghanistan.

In-depth analysis of the five main points of criticism

Preliminary issue: armed conflict

Under the German Code of Crimes against International Law (CCIL) (with § 11 (1) no.1 and no. 3 being of particular relevance here) a war crime can only be committed if there exists an international or non-international armed conflict and the act in question was carried out in the context of such a conflict.¹³ In all other cases, the provisions of the German Criminal Code (StGB) are applicable. The use of lethal force through drones fulfills the requirements for the crime of murder (§ 211 StGB).¹⁴

Whether or not an international or non-international armed conflict exists is to be determined in accordance with international law. The applicable Geneva Conventions and their Additional Protocols do not, however, include a definition of armed conflict.¹⁵ It is generally described as prolonged armed activities between states, between a government and an organized armed group or between organized armed groups.¹⁶ International humanitarian law operates on the basis of a conflict between the armed forces of two states.¹⁷ It also sets out rules relating to internal conflicts between a state and non-state actors who exert control over certain parts of the state's territory with armed forces at their disposal, i.e. the 'classic' civil war scenario.¹⁸ The situation becomes trickier when a state employs military means to fight a non-state actor outside of its own territory. That is the situation in the present case in which the US carries out armed drone attacks on non-state actors in Pakistan and elsewhere.

At the time of the attack on 4 October 2010 there was, according to the Federal Prosecutor General, a non-international armed conflict in existence in the affected Afghani-Pakistani border region. This armed conflict was, it is claimed, characterized by two overlapping conflict relations¹⁹: first, the conflict spilling over from Afghanistan between non-state actors operating primarily out of Pakistani border regions and the ISAF-supported Afghani government, and secondly, the internal Pakistani conflict in which an alliance of Pakistani Taliban together with Afghani groups are fighting the Pakistani government, with the latter benefiting from the de facto support of the US.²⁰

¹³ See § 11 (1) CCIL.

¹⁴ This view is also put forward in the Federal Prosecutor General's decree from 20 June 2013, p. 30.

¹⁵ K. Ambos, on §§ 8 ff., in: W. Joecks/K. Mießbach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 6/2 – Nebenstrafrecht III, Völkerstrafgesetzbuch*, 2009, marginal no. 21.

¹⁶ A. Zimmermann/R. Geiß, § 8, in: W. Joecks/K. Mießbach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 6/2 – Nebenstrafrecht III, Völkerstrafgesetzbuch*, 2009, marginal no. 102.

¹⁷ C. Greenwood, Scope of application of humanitarian law, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), marginal no. 201.

¹⁸ C. Greenwood, Scope of application of humanitarian law, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), marginal no. 211.

¹⁹ Federal Prosecutor General's decree from 20 June 2013, p. 11.

²⁰ Federal Prosecutor General's decree from 20 June 2013, p. 18; see also the Federal Prosecutor General's press release from 01.07.2013.

Point 1: The internal Pakistani armed conflict

The Federal Prosecutor General considers the parties to this conflict to consist of all of the non-state groups active in the FATA tribal regions, including al-Qaida, in opposition to the Pakistani government supported by the US.²¹ To generalize the non-state actors in this way, however, is to confuse the different conflicts which involve various parties and interests and must therefore be examined separately in the context of international humanitarian law.²²

In his statement of the facts of the case the Federal Prosecutor General describes very generally how “militant groups” increasingly began to expand their activities into the Pakistani heartland and to direct these activities against the Pakistani government.²³ As an example, reference is made to the occupation of the ‘Red Mosque’ in Islamabad from March to April 2007.²⁴ This rather imprecise description fails to clarify who exactly these “militant groups” are alleged to have been. Furthermore, the Red Mosque in Islamabad in the heartland of Pakistan was not occupied by groups from the tribal regions but by the spiritual leader of the mosque itself.²⁵ The group of Pakistani Taliban listed by the Federal Prosecutor General as one of the parties to the conflict at the time of the drone attack had in fact yet to be formed at the time the Red Mosque was occupied. According to the Federal Prosecutor General, this occurred later, in December 2007; as such it is misleading to refer to the occupation of the Red Mosque in the description of the situation in Pakistan in connection with the drone strike.²⁶

In his description of the rebel groups, the Federal Prosecutor General states that the non-state armed groups in the tribal regions differentiate themselves from one another according to where the main focus of their individual objectives lies.²⁷ He goes on to say that there are groups that are active in Afghanistan against the Afghani government and ISAF troops, other groups fighting the Pakistani state and further groups operating worldwide.²⁸ A general claim is made that the rejection of US and ISAF presence in Afghanistan is common to all groups, that they cooperate on a number of levels and that they use the same logistical facilities and safe zones.²⁹ No evidence is provided for that claim. Furthermore, the published version of the decree does not elaborate on the extent of the group’s cooperation or what this cooperation is alleged to entail.³⁰ In his examination of the various groups, the Federal Prosecutor General refers to the Pakistani Taliban, the Afghani “Taliban movement” (including the Taliban, the Haqqani network and the Hizb-e-Islami), al-Qaida as well as the

²¹ Federal Prosecutor General’s decree from 20 June 2013, p. 18f.

²² On this see also C. Heyns, Report of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, 13 Sept. 2013, A/68/382, par. 63.

²³ Federal Prosecutor General’s decree from 20 June 2013, p. 4.

²⁴ Federal Prosecutor General’s decree from 20 June 2013, p. 4.

²⁵ See e.g. Frankfurter Allgemeine Zeitung, *Pakistans Unruhe-Moschee*, 13 April 2007.

²⁶ Federal Prosecutor General’s decree from 20 June 2013, p. 7.

²⁷ Federal Prosecutor General’s decree from 20 June 2013, p. 6.

²⁸ Federal Prosecutor General’s decree from 20 June 2013, p. 7.

²⁹ Federal Prosecutor General’s decree from 20 June 2013, p. 7.

³⁰ Federal Prosecutor General’s decree from 20 June 2013, p. 7.

Islamic Movement of Uzbekistan (IMU) and the Islamic Jihad Union (IJU).³¹ In the subsequent legal analysis, the Federal Prosecutor General considers that all groups active in the tribal areas are to be categorized as parties to an armed conflict within Pakistan against state forces.³² In establishing the necessary degree of organization of the parties to the conflict, the Federal Prosecutor General attributes all of the attacks and military actions of the rebels – i.e. of all active groups in the region – to “the insurgents” as a single group.³³ At the same time, the Federal Prosecutor General also recognizes that the conflict situation consists of a number of individual overlying conflicts or conflict relations – without further defining these conflicts.³⁴

It is extremely questionable whether a number of actors acting in parallel, with only partially corresponding objectives, may be assessed together for the purposes of establishing the degree of organization required to qualify as a non-state conflict party where it has already been established that there are a number of overlapping conflicts taking place in the relevant region. Two further questions arise, namely whether this loose association of various groups reach the necessary degree of organization and whether each group would fulfill this requirement if considered individually.

It is generally recognized that non-state actors must reach a certain degree of organization before they may be considered parties to a conflict.³⁵ According to the jurisprudence of the International Criminal Court, this requires the existence of an organization that is capable of planning and carrying out sustained and concerted military operations *and* that the group acted under a responsible command and had an internal disciplinary system.³⁶ A group that is considered to be a terrorist organization may be a party to an armed conflict.³⁷ Smaller and more fragmented groups who carry out isolated attacks, while they may share a common ideology, will generally fail to meet the required degree of organization.³⁸

The Federal Prosecutor General recognizes all active resistance groups, including al-Qaida, as parties to the conflict under international law.³⁹ In order to characterize a group as a party to a conflict, however, it is necessary to show that the group possesses a sufficiently organized structure in accordance with the abovementioned criteria. Even if all the groups named by the Federal Prosecutor General all reject the ISAF operation in Afghanistan, the crucial question is whether each individual group is capable of planning and carrying out sustained and

³¹ Federal Prosecutor General’s decree from 20 June 2013, p. 7ff.

³² Federal Prosecutor General’s decree from 20 June 2013, p. 19.

³³ Federal Prosecutor General’s decree from 20 June 2013, p. 19.

³⁴ Federal Prosecutor General’s decree from 20 June 2013, p. 18.

³⁵ See e.g. K. Ambos, on §§ 8, in: W. Joecks/K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 6/2 – Nebenstrafrecht III, Völkerstrafgesetzbuch*, 2009, marginal no. 23 with further references.

³⁶ ICC, Prosecutor v. Katanga and Ngudjolo, Decision on the confirmation of charges, 30 Sept. 2008 (ICC-01/04–01/07), par. 239; see also K. Ambos, on §§ 8, in: W. Joecks/K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 6/2 – Nebenstrafrecht III, Völkerstrafgesetzbuch*, 2009, marginal no. 23 with further references.

³⁷ C. Schaller, *Humanitäres Völkerrecht und nichtstaatliche Gewaltakteure*, SWP Study, 2007, p. 21.

³⁸ C. Schaller, *Humanitäres Völkerrecht und nichtstaatliche Gewaltakteure*, SWP study, 2007, p. 21.

³⁹ Federal Prosecutor General’s decree from 20 June 2013, p. 19.

concerted military operations or, alternatively, if all groups are to be characterized as forming one party to the conflict, whether this alliance has a responsible command and an internal disciplinary system. Even where there is a certain overlap in personnel it will generally be the case that there is no such responsible command within a collection of these groups. The published version of the decree does not address this point, which raises serious doubts about the Federal Prosecutor General's theory that the individual groups or the entire collection of groups can in fact be considered as a unified party to the conflict.

No information is presented in the decree regarding the level of organization of the individual groups mentioned above, and in particular concerning the IMU and the IJU.⁴⁰ In relation to al-Qaida, the document refers to the overall organization and activities since 2001, without further examining the documented⁴¹ decentralized character of this group or investigating the temporal aspects of interruptions following from the global fight against this group that has been ongoing since 2001.⁴²

Furthermore, the only reference offered by the Federal Prosecutor General's in support of its categorization of al-Qaida as a party to the conflict has been incorrectly represented. Footnote 88 refers to a 2009 journal article by Federal Constitutional Court Judge Andreas Paulus together with Mindia Vashakmadze. The German text reads: "*Überwiegend werden (...) die Strukturen und Einheiten der al-Qaida mindestens in Afghanistan und Pakistan nach wie vor als quasi-militärische Organisationen angesehen*". The original English text, however, reads: "Al Qaeda in Pakistan or the Taliban in Afghanistan may qualify [as a geographically defined group with a quasi-military organization], but Al Qaeda's broad network does not."⁴³ The original text refers only to al-Qaida in Pakistan and not in Afghanistan and uses a very careful formulation ("may qualify") which is absent from the German translation. The original text also demonstrates that, contrary to the Federal Prosecutor General's claims, there exists absolutely no prevailing view that al-Qaida is to be qualified as a party to the conflict. The opposite view is, in fact, much more widely represented in academic writing on the subject.⁴⁴

⁴⁰ Federal Prosecutor General's decree from 20 June 2013, p. 9.

⁴¹ See e.g. Council on Foreign Relations, al-Qaeda, Background, updated 6 June 2012, available at: www.cfr.org/terrorist-organizations-and-networks/al-qaeda-k-al-qaida-al-qaida/p9126#p8

⁴² Federal Prosecutor General's decree from 20 June 2013, p. 8f.

⁴³ A. Paulus/M. Vashakmadze, Asymmetrical war and the notion of armed conflict - a tentative conceptualization, *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, p. 119, available at: <http://www.icrc.org/eng/assets/files/other/irrc-873-paulus-vashakmadze.pdf>.

⁴⁴ See the two articles – listed in footnote 88 of the Federal Prosecutor General's decree – by C. Kreß and K. Ambos/J. Alkatout, the latter with further references to opposing views, K. Ambos/J. Alkatout, Has 'Justice been done'? The Legality of Bin Laden's Killing under International Law, *Israel Law Review* 45(2) 2012, p. 341–366, Fn. 64; see also A. Burt/A. Wagner, Blurred Lines, *Yale Journal of International Law Online*, Vol. 38, autumn 2012, p. 1, who cite the US position that al-Qaida are not a party to an armed conflict. Doubt has also been raised recently by two UN Special Rapporteurs, see C. Heyns, Report of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, 13 Sept. 2013, A/68/382, par. 65 and B. Emmerson, Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 18 Sept. 2013, A/68/389, par. 67f.

In his statement of the facts of the case the Federal Prosecutor General states⁴⁵ that Pakistan and the US are pursuing different aims on Pakistani territory and yet are joined together in the same conflict. Pakistan is fighting mainly Pakistani Taliban in the border regions since the latter is attempting to topple the Pakistani government and establish a central Islamic state. The Pakistani government is not, however, fighting rebels who are active in Afghanistan, as demonstrated by the alleged links – alluded to by the Federal Prosecutor General – between the Pakistani state intelligence service ISI and the Haqqani Network, which is active in Afghanistan.⁴⁶ The US, on the other hand, is using drones to fight all rebel groups in the region and categorizes in a blanket fashion all individuals killed as members of al-Qaida or groups associated with al-Qaida.⁴⁷ This categorization has been met with strong criticism, most recently from Special Rapporteurs of the UN.⁴⁸ In this respect, the Federal Prosecutor General’s categorization of an alliance of Pakistani Taliban and Afghani rebels as a party to the conflict fails to reflect reality. While there may be difficulties facing the investigation, these difficulties must not lead to every instance of violence in the region being characterized as forming part of the internal Pakistani conflict. Certain groups, as detailed above, are engaged in conflict with the US but not with Pakistan.⁴⁹ This distinction must be carefully maintained in order to prevent an inappropriately broad application of the rules on international humanitarian law and avoid incorrectly equating US counter terrorism activities with the internal Pakistani fight for control of the central government. The situation involves distinct conflicts, which share only a certain amount of actual overlap, for instance in relation to the fight against the Pakistani Taliban. Pakistan’s silent acquiescence to US military operations on Pakistan’s territory, which is recognized by the Federal Prosecutor General,⁵⁰ does not automatically make the US – subject, indeed, to the debate on who is entitled under international law to give legal permission to military operations of other states on domestic territory –⁵¹ a Pakistan-aligned party to the internal Pakistani conflict.

Furthermore, according to Pakistani media reports, a planned Pakistani army offensive in the region around Mir Ali had yet to be carried out at the time of the drone strike on 4 October 2010.⁵² The Federal Prosecutor General’s decree failed to provide any concrete reference to

⁴⁵ Federal Prosecutor General’s decree from 20 June 2013, p. 6 f.

⁴⁶ Federal Prosecutor General’s decree from 20 June 2013, p. 11; see e.g. BBC News, Analysis: Pakistani links to the Haqqani group, 3. Oct. 2011, available at: <http://www.bbc.co.uk/news/world-south-asia-15149999>.

⁴⁷ J. Johnson, National security law, lawyers and lawyering in the Obama administration, Lecture at Yale Law School, 22 Feb. 2012, available at: <http://www.cfr.org/defense-and-security/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>.

⁴⁸ B. Emmerson, Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 18 Sept. 2013, A/68/389, par. 67; see also C. Heyns, Report of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, 13 Sept. 2013, A/68/382, par. 65.

⁴⁹ See e.g. U.K. Parliament, House of Commons, Armed militant groups based in the Pakistani border areas, Briefing Paper, 18. March 2010, p. 8, available at: www.parliament.uk/briefing-papers/SN05410.pdf.

⁵⁰ Federal Prosecutor General’s decree from 20 June 2013, p. 11.

⁵¹ Federal Prosecutor General’s decree from 20 June 2013, p. 21, fn. 99.

⁵² See e.g. The Express Tribune, N Waziristan operation delayed by six months, 22 November 2010, available at: <http://tribune.com.pk/story/80002/n-waziristan-operation-delayed-by-six-months>; U.K. Parliament, House of

fighting in the region in the days and weeks leading up to the drone strike. The account given of attacks on NATO convoys and Pakistani military offensives in the tribal regions between 2008 and 2010⁵³ in fact relates to regions outside of North Waziristan (Bajaur, Mohmand, Khyber, South Waziristan, Peshawar, Sindh, and Islamabad) where the drone strike took place.⁵⁴ According to the Federal Prosecutor General, only the US was carrying out activities in North Waziristan; in 2010 almost 90% of all drone operations took place in this region.⁵⁵

Point 2: The conflict spreading from Afghanistan

The Federal Prosecutor General recognizes a second non-international armed conflict, namely the conflict between the ISAF-supported Afghani government and non-state groups operating mainly out of Pakistani border regions.⁵⁶

The Federal Prosecutor General sees the non-state party to the conflict as consisting of the Afghani Taliban together with its associated groups. The Federal Prosecutor General fails to detail who these “associated groups” are and whether or not they possess the requisite organizational structure. However, since the Afghani Taliban is not the same as the Pakistani Taliban and since the former does not operate on Pakistani territory in the region where the drone strike occurred, the question arises as to how the conflict could spread from Afghanistan to Pakistan when the groups operating on both sides of the border are not named, and no examination is undertaken to establish whether they fulfill the requirements of a party to the conflict.⁵⁷ Furthermore, the associated groups would need to be involved in fighting with the US with this fighting reaching the intensity necessary to be considered an armed conflict.⁵⁸

The Federal Prosecutor General proceeds on the basis the US are conducting their drone strikes in Pakistan within the framework of the ISAF mission, since the strikes are part of the geographically expanding Afghani conflict.⁵⁹ Yet the ISAF mandate is explicitly limited to Afghani territory; neither Pakistan nor the UN Security Council in accordance with Chapter VII of the UN Charter have consented to the expansion of US military activities to Pakistani

Commons, Armed militant groups based in the Pakistani border areas, Briefing Paper, 18. March 2010, available at: www.parliament.uk/briefing-papers/SN05410.pdf.

⁵³ Federal Prosecutor General’s decree from 20 June 2013, p. 4f.

⁵⁴ See map of tribal areas in Annex 1.

⁵⁵ Federal Prosecutor General’s decree from 20 June 2013, p. 5.

⁵⁶ Federal Prosecutor General’s decree from 20 June 2013, p. 20.

⁵⁷ On the individual criteria that must be met for groups to be considered parties to a conflict under international humanitarian law see “Point 1”.

⁵⁸ See C. Heyns, Report of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, 13 Sept. 2013, A/68/382, par. 63; B. Emmerson, Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 18 Sept. 2013, A/68/389, par. 68.

⁵⁹ Federal Prosecutor General’s decree from 20 June 2013, p. 10.

territory.⁶⁰ In addition, it is very doubtful whether, under the framework of the ISAF mission, the CIA is authorized to carry out attacks in Pakistan, in particular since it is outside the region defined in the mandate. While this point has no direct consequences for the establishment of the existence of an armed conflict as such, it does raise doubts about the Federal Prosecutor General's claim that the non-international armed conflict in Afghanistan has spread to Pakistan and that this is the reason for US attacks on non-state actors in the area (as opposed to the view that these attacks form part of the international counter terrorism efforts).

Furthermore, the Federal Prosecutor General assigns those persons present at the scene of the strike either to no particular group or alternatively to the Pakistani Taliban, al-Qaida, or the IMU. The Pakistani Taliban is not a party to the Afghani non-international armed conflict. In terms of the international humanitarian law criteria that must be met to be considered a party to a conflict, the Federal Prosecutor General does not go into sufficient detail on al-Qaida's and in particular on IMU's levels of organization. He also fails to adequately address the question, should the latter requirements be met, of whether these groups are part of the Afghani or Pakistani conflict. In this respect the document fails to determine the extent to which the individuals attacked were connected with the Afghani conflict and whether those present were part of one or more of those parties operating in the Afghani conflict from Pakistani territory. This is a further aspect in which the investigation was insufficient.

Point 3: Attributing the drone strike to one of the conflicts

It is premature of the Federal Prosecutor General to suggest that it is "in reality" not possible to attribute a particular military measure to one of the two conflicts. The investigation must be continued to further examine this point and, instead of relying on reports from academic institutes and federal agencies, attempts must be made to obtain more precise information to help build a picture of the conflicts by sending requests for assistance to other states and interviews with international experts from the UN and other organizations as well as from Pakistan. A further issue is raised by the fact that the Federal Prosecutor General did not specify which group Bünyamin E. was alleged to have belonged to at the time of the drone strike. The Federal Prosecutor General must be in a position to define the individual parties to the conflicts and distinguish the different conflicts with reference to the case at hand.⁶¹ Until this is rectified, the investigation is deficient and fails to meet the obligation arising from Article 2 of the European Convention on Human Rights to carry out comprehensive investigation in the case concerning the right to life.

⁶⁰ United Nations Security Council Resolution 1510 from 13 October 2003 and Resolution 2069 from 9 October 2012.

⁶¹ On this see also C. Heyns, Report of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, 13 Sept. 2013, A/68/382, par. 63.

Interim conclusion on the ‘armed conflict’ question

There are serious doubts as to whether the US was in fact involved in an armed conflict in Pakistan. There are numerous indications that the drone strike was not carried out within the framework of an armed conflict spilling over from Afghanistan and thus that none of the individuals present at the scene of the strike were members of a party to the conflict in Afghanistan. Furthermore, there are a number of factors suggesting that the US was not part of the internal Pakistani conflict but was instead engaged in independent military actions on Pakistani territory. The absence of an armed conflict involving the US would preclude the possibility that war crimes were committed; the investigation would have to proceed on the basis of regular German criminal law. A local prosecutor would thus have jurisdiction over the case and not the Federal Prosecutor General.

Point 4: Direct participation in hostilities by Bünyamin E.

If, contrary to the view put forward here, it is found that a non-international armed conflict did in fact exist at the relevant time, the decision to discontinue the investigation raises a further question, namely why Bünyamin E. was not considered to be a protected person under international humanitarian law.

First of all, the Federal Prosecutor General fails to specify to which group or groups Bünyamin E. allegedly belonged to. This is absolutely necessary, since the protected status of a person is dependent on, among other things, which group he belonged to and in what function.⁶² Furthermore, a fundamental principle of international humanitarian law is that all persons who do not belong to the official military forces of a state are considered to be civilians and therefore enjoy protected status.⁶³ There is an exception to this protection for civilians who directly participate in hostilities. Such persons, however, only lose their protected status for the duration of their participation and not permanently.⁶⁴ A fundamental rule applies to this exception which states that in cases of doubt the person should be presumed to enjoy civilian status.⁶⁵ Furthermore, all possible precautionary measures must be

⁶² The UN Special Rapporteur on extrajudicial, summary, or arbitrary executions holds the view that “where the individuals targeted are not part of the same command and control structures as the organized armed group or are not part of a single military hierarchical structure, they ought not to be regarded as part of the same group, even if there are close ties between the groups”, see C. Heyns, Report of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, 13 Sept. 2013, A/68/382, par. 62.

⁶³ ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 75.

⁶⁴ ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 34.

⁶⁵ C. Heyns, Report of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, 13 Sept. 2013, A/68/382, par. 109; ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 35, 73, 74ff.

taken when devising such an exception.⁶⁶ Such measures include having regard to all available information, the urgency of the situation and the potential scale of the damage in the case of a mistaken decision. It is also permissible to use violence against persons who pose a grave threat to public security or law and order, even where it is not clear that they are directly participating in hostilities. Use of force in such cases must, however, be governed by the standards of law enforcement or individual self-defense.⁶⁷

In accordance with the guideline developed by the Red Cross (ICRC), the decisive factor is the time at which the direct participation in hostilities begins and ends. According to the ICRC, direct participation in hostilities begins with the first preparatory measures such as deployment to the scene of the participation or the loading of explosives for instance on to an airplane.⁶⁸ Direct participation continues until the participant has physically separated from the operation. This relates not only to geographic displacement but also includes for example laying down and storing a weapon etc.⁶⁹ Irrespective of whether the claims made against Bünyamin E. in the published version of the Federal Prosecutor General's decree are true, these claims are not sufficient to establish direct participation in hostilities. There is nothing in the published version of the decree to suggest behavior that would indicate the occurrence of measures taken in preparation for direct participation in hostilities. For this reason, doubts must be cast on the legal accuracy of the Federal Prosecutor General's decision.

In his analysis, however, the Federal Prosecutor General follows an expanded definition of the concept of "direct participation in hostilities"⁷⁰ which has been developed by the ICRC and which goes much further than the previous definition in terms of the duration of the loss of protected civilian status. In the view of the ICRC, an ongoing exception to the protection of international humanitarian law exists for members of organized armed groups that are parties to a conflict. According to this view, membership in an organized armed group is defined by *de facto* criteria, beginning at the moment when a civilian starts "to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function".⁷¹ This continuous combat function assumed by a civilian in a group must correspond "to that collectively exercised by the group as a whole", namely the conduct of hostilities. Thus, "the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in

⁶⁶ ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 74ff.

⁶⁷ ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 76.

⁶⁸ ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 66, 67.

⁶⁹ ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 67.

⁷⁰ Federal Prosecutor General's decree from 20 June 2013, p. 23.

⁷¹ ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 72.

hostilities”.⁷² Continuous combat function requires, first of all, integration in the group over a long period of time. Second, the continuous combat function must be manifested in some way, such as by involvement in the preparation, execution, or command of acts or operations. A civilian who is recruited, trained and equipped “can be considered to assume a continuous combat function even before he or she first carries out a hostile act”.⁷³ This would not, however, apply to persons who returned to civilian life after their training and simply remain on reserve until called for duty.⁷⁴

The ICRC study has faced criticism from the UN Special Rapporteur on extrajudicial, summary or arbitrary executions in connection with the expansion of the concept of “direct participation in hostilities” to continuous participation in direct participation in hostilities of a group.⁷⁵ The criticism relates in particular to the ICRC’s approach to categorizing a member of an armed group who has a continuous combat function, whereby the ICRC *de facto* focusses on the status of a person as opposed to on their function; this runs contrary to Art. 51 (3) AP I. Here it states that civilians enjoy protection unless and “for such time” (and not for “all the time”) that they take part in hostilities.⁷⁶ The former is based on the individual act of direct participation in hostilities, while only the latter would suffice to fulfill the status of membership in an armed group.

The wording of the German Code of Crimes against International Law differs from that of international humanitarian law in as far as it does not include the term “unless and for such time”. However, as part of customary international law, this term must be read into the wording on direct participation in hostilities.⁷⁷ This wording ensures that civilians are once again *protected from direct attacks as soon as their direct participation in hostilities has ended*.⁷⁸ Thus, the protection of civilians is suspended temporally and not permanently.⁷⁹ This scenario, known as the ‘revolving door’, is the subject of controversial debate, with attention being drawn to the ability of non-state actors to decide for themselves when they wish to give up and retrieve their protection. This leads to a range of uncertainties in

⁷² ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 33.

⁷³ ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 34.

⁷⁴ ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 34.

⁷⁵ P. Alston, Study on Targeted Killings, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 28 May 2010, A/HRC/14/24/Add.6, par. 65.

⁷⁶ P. Alston, Study on Targeted Killings, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 28 May 2010, A/HRC/14/24/Add.6, par. 65.

⁷⁷ Cf. Israel, The Supreme Court Sitting as the High Court of Justice, The Public Committee against Torture in Israel and others v. The Government of Israel and others, 13 December 2006, HCJ 769/02, paras. 23, 29–30 and 41–43; K. Dörmann, § 11, in: W. Joecks/K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 6/2 – Nebenstrafrecht III, Völkerstrafgesetzbuch*, 2009, marginal no. 41; J.-M. Henckaerts/L. Doswald-Beck, Customary International Humanitarian Law, ICRC Study, Vol. I: Rules, 2005, Rule 6.

⁷⁸ K. Dörmann, § 11, in: W. Joecks/K. Miebach (ed.), *Münchener Kommentar zum Strafgesetzbuch, Band 6/2 – Nebenstrafrecht III, Völkerstrafgesetzbuch*, 2009, marginal no. 41; H.-P. Gasser, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), p. 261.

⁷⁹ N. Melzer, Targeted Killing in International Law (2009), p. 347.

determining when a person is and isn't protected. However, international humanitarian law is primarily designed to protect civilians during armed conflict; in cases of doubt, the law gives preference to the wellbeing and protection of civilians over the rights of the attacker. For this reason, the concept of direct participation in hostilities must be interpreted restrictively and must not be extended beyond its wording. Therefore, the ICRC's suggestion that protection is persistently lost, even when the individual is not continually directly participating in hostilities, must be rejected. It is permissible that individuals who are planning to participate in hostilities but who have not yet commenced direct participation be arrested and charged under criminal provisions where such preparatory measures are criminalized; it is not, however, permissible that these individuals be attacked using lethal force.

Addendum: Direct participation in hostilities by the other persons present at the scene of the drone strike

Assuming that, contrary to the doubts raised above, a non-international conflict did exist, and assuming that Bünyamin E. was protected under international law, the perpetrators of the killing could still avoid criminal liability if Bünyamin E. was killed as so-called 'collateral damage'. For this to be the case, in accordance with § 11 (1) no. 3 of the CCIL, it would have to have been certain at the time the attack was carried out that the strike would not result in a number of civilian deaths that was disproportionate to the overall expected concrete and direct military advantage.

The concrete and direct military advantage in this scenario could have been seen to lie in the (attempted) killing of those persons not protected under international humanitarian law. The Federal Prosecutor General's decree reports that apart from Bünyamin E., present at the scene were S.D.S., three bodyguards of Q.H., E.E., Q.H., M. al-B., the wife of E.E, the wife of S.D.S. as well as the one year old son of E.E. and his wife. The first four of these named persons lost their lives in the attack; the last three were undoubtedly protected persons in accordance with international humanitarian law. There was no indication that E.E. and S.D.S. posed any immediate threat. As a result, the killing/attempted killing of these individuals cannot be categorized as an expected concrete and direct military advantage. S.D.S. had appeared in propaganda videos for the Islamic Movement of Uzbekistan. Yet this does not suffice to establish direct participation in hostilities in accordance with the abovementioned criteria. Similarly, there are no adequate indications of direct acts in preparation for combat on the part of E.E. There is no further information on the three bodyguards and it must therefore be presumed that these were also not taking part in hostilities and that their deaths could not have been expected to result in a concrete and direct military advantage. The existing information on Q.H. and M. al-B. is insufficient; further investigatory efforts should have been made to increase the available knowledge. The Federal Prosecutor General states that Q.H. was a leader of the Pakistani Taliban specialized in training suicide attackers and M.

al-B. was responsible for the finances of al-Qaida⁸⁰, without providing any evidence for these claims. The claims presented are insufficient to examine whether or not selecting one of these persons as the target of a drone strike could be legally justified. Thus, based on the information provided in the decree terminating the investigatory proceedings, no concrete and direct military advantage could have been anticipated to result from the attack that would have justified the scale of the civilian deaths. The investigation should have been extended to further examine this point.

Point 5: Combatant privilege for CIA agents

While the Federal Prosecutor General proceeds on the assumption that the CIA could have been responsible for the attack, he fails to provide the necessary elaboration on this issue.⁸¹ The assumption is supported by reference to reports from international media suggesting that drone strikes in Pakistan are controlled and carried out by the US foreign intelligence service – the CIA.⁸² The view that CIA employees are engaged in drone strikes is supported by a decision by the US Appeal Court from 30 March 2012. In this decision, the Court found that statements from Leon Panetta, the director of the CIA at the time, and from the US President clearly demonstrate that the CIA uses drones in lethal strikes and these strikes have taken place at the very least in Pakistan and Yemen.⁸³ Since 2002, there have been reports of a secret, more comprehensive CIA drone program.⁸⁴ It is in part assumed that there is a clear delineation between the competencies of the military and the CIA in relation to, on the one hand, the official military drone strikes in Afghanistan and Iraq – i.e. zones in which a ‘recognized’ armed conflict is taking place – and, on the other hand, the CIA’s secret drone program in Afghanistan and beyond as a counter terrorism measure.⁸⁵ In Pakistan the CIA station chief is said to have complete control and the power to take all local decisions.⁸⁶ A

⁸⁰ Federal Prosecutor General’s decree from 20 June 2013, p. 14 and 15.

⁸¹ Federal Prosecutor General’s decree from 20 June 2013, p. 33.

⁸² See e.g. New York Times, A Secret Deal on Drones, Sealed in Blood, 6 April 2013, http://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html?pagewanted=all&_r=0.

⁸³ See United States Court of Appeals for the District of Columbia Circuit, in the cases *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010) and *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010): “the statements make clear that the CIA uses drones to conduct lethal strikes, that those strikes have occurred in (at least) Pakistan and Yemen, that the government believes the strikes have killed particular targeted individuals. When considered together, the statements of Mr. Panetta and the President plainly acknowledge the CIA drone program”.

⁸⁴ P. Alston, Study on Targeted Killings, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 28 May 2010, A/HRC/14/24/Add.6, par. 18; A. Burt/A. Wagner, Blurred Lines, Yale Journal of International Law Online, Vol. 38, autumn 2012, p. 3-4.

⁸⁵ See The New Yorker, The Predator War, 26 Oct. 2009, available at: http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer; New York Times, A Secret Deal on Drones, 6. Apr. 2013, available at: http://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html?pagewanted=all&_r=0.

⁸⁶ See for instance New York Times, A Secret Deal on Drones, 6 Apr. 2013, available at: http://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html?pagewanted=all&_r=0.

criminal complaint has previously been lodged against the CIA representative acting at the time of the strike, Jonathan Banks, which prompted him to return to the US.⁸⁷

Aside from the claim, disputed in this text, that a non-international armed conflict existed, the CIA are prevented from relying on the so-called combatant privilege since CIA employees are not members of the US armed forces.⁸⁸ In accordance with Article 43 (2) AP I, in an armed conflict only combatants are entitled to directly participate in hostilities and thus to benefit from immunity from prosecution, assuming they adhere to the rules of international humanitarian law.⁸⁹ To enjoy this status the individual in question must be clearly identifiable as a member of a party to the conflict by wearing a uniform or holding a weapon.⁹⁰ These rules also apply to non-international armed conflict since the rules of international armed conflict are as much as possible applicable, particularly in a case in which a state is engaged in conflict with non-state actors on another state's territory.⁹¹ The principle of reciprocity means that state and non-state actors who fail to identify themselves as parties to the conflict may be punished in an identical manner.⁹² One of the aims of this rule is to ensure that it is clear who is responsible for individual hostile acts so that illegal maneuvers may be appropriately punished. This would present problems in a scenario in which secret service agents take part in hostilities; for this reason such agents may not benefit from combatant privilege.⁹³ In such cases national criminal law applies. In the present case it is possible to apply US criminal law (on account of the nationality of the perpetrator) and Pakistani criminal law (scene of the crime) as well as the German Criminal Code (nationality of the victim).⁹⁴ It is not possible to refer to the rules of international humanitarian law in order to provide justification for the actions of the persons responsible for the strike. In this sense the Federal Prosecutor General is mistaken in his finding that civilians who, during their participation in hostilities, adhere to international humanitarian law commit no breaches of this law and thus may rely on this as a justification to avoid criminal liability.⁹⁵ Yet even if this assumption on

⁸⁷ The criminal complaint is available at:

http://www.reprieve.org.uk/static/downloads/2010_12_13_PUB_FIR_application_drones_Kareem_Khan.pdf;
Spiegel online, *CIA unter Druck: US-Spitzenagent muss aus Pakistan fliehen*, 17 Dec. 2010, available at:

<http://www.spiegel.de/politik/ausland/cia-unter-druck-us-spitzenagent-muss-aus-pakistan-fliehen-a-735370.html>.

⁸⁸ The CIA was established in 1947 with the main aim of obtaining intelligence information, see National Security Act of 1947, Sections 104 and 104A.

⁸⁹ K. Ambos, §§ 8, in: W. Joecks/K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 6/2 – Nebenstrafrecht III, Völkerstrafgesetzbuch*, 2009, marginal no. 37.

⁹⁰ K. Ambos, §§ 8, in: W. Joecks/K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 6/2 – Nebenstrafrecht III, Völkerstrafgesetzbuch*, 2009, marginal no. 37.

⁹¹ See, with further references, F. Boor, *Der Drohnenkrieg in Afghanistan und Pakistan*, HuV-I 2011, p. 103.

⁹² F. Boor, *Der Drohnenkrieg in Afghanistan und Pakistan*, HuV-I 2011, p. 103

⁹³ P. Alston, Study on Targeted Killings, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 28 May 2010, A/HRC/14/24/Add.6, par. 72.

⁹⁴ K. Ambos, §§ 8, in: W. Joecks/K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 6/2 – Nebenstrafrecht III, Völkerstrafgesetzbuch*, 2009, Rn. 37; P. Alston, Study on Targeted Killings, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 28 May 2010, A/HRC/14/24/Add.6, par. 71.

⁹⁵ Federal Prosecutor General's decree from 20 June 2013, p. 35; see also R. Frau, *Deutschlands Drohnenopfer, Junge Wissenschaft im öffentlichen Recht*, Blog, 8 Aug. 2013, available at: <http://www.juwiss.de/deutschlands-drohnenopfer/>.

the part of the Federal Prosecutor General were correct, the use of a civilian drone represents a breach of international humanitarian law and the perpetrator may therefore face prosecution in accordance with ordinary criminal law.⁹⁶ In the absence of pertinent investigations on the part of the Federal Prosecutor General, there is insufficient evidence to show that the drone used in the present case carried military markings and thus that it could be classified as a military aircraft.

In relation to the control of combat drones over Pakistani territory, the Federal Prosecutor General considers that the CIA is comparable to the regular military and that the two bodies cooperate intensely as one entity.⁹⁷ Furthermore, according to this view, the CIA is subject to the same command as the military. However, this would in practice render the requirement to display clear identification symbols useless, since the persons operating the drone would be located far from the field of battle.⁹⁸

By equating the CIA and the military in relation to the use of combat drones in Pakistan, the Federal Prosecutor General fails to recognize the fundamental differences between military operations and the activities of secret services. Referring to the fact that both entities share the same ultimate commanding authority does not support a conclusion that the CIA is part of the military. While the US President may have ultimate authority over both the military forces and the secret service, this does not automatically mean that the CIA and the military are embedded in the same command structure. The two entities are fundamentally different; the CIA has an independent hierarchy and organization that is not incorporated into any military command structure.⁹⁹ In addition, there are doubts as to the intensity of the cooperation between the military and the CIA in Pakistan, since the CIA has its own informants in Pakistan and the tribal areas to provide guidance on targeting of drone strikes.¹⁰⁰ Training in the application of international humanitarian law is a further important distinction between the two entities. Only members of the armed forces undergo this training; CIA agents do not.¹⁰¹

The requirement that military forces carry visible identification markings allows for clear attribution to the relevant forces and makes it instantly apparent who is a member of a party to the conflict.¹⁰² The decisive factor here is not that the person can be seen by the opponent party but that he or she may be distinguished from the civilian population and hence that, if

⁹⁶ According to Rule 17 (a) of the “Manual on International Law Applicable to Air and Missile Warfare”, Harvard Program on Humanitarian Policy and Conflict Research, 2009, only military aircraft and drones are permitted to be used in combat.

⁹⁷ Federal Prosecutor General’s decree from 20 June 2013, p. 34.

⁹⁸ Federal Prosecutor General’s decree from 20 June 2013, p. 34.

⁹⁹ See National Security Act of 1947, Sections 104 and 104A; M.E. O’Connell, *Spy vs. Soldier*, *New Republic*, 2 Apr. 2013, available at: <http://www.newrepublic.com/article/112810/cia-drone-program-move-pentagon>.

¹⁰⁰ See *The New Yorker*, *The Predator War*, 26 Oct. 2009, available at: www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

¹⁰¹ See e.g. M.E. O’Connell, *Spy vs. Soldier*, *New Republic*, 2 Apr. 2013, available at: <http://www.newrepublic.com/article/112810/cia-drone-program-move-pentagon>.

¹⁰² See Art. 44 (7) AP I; K. Ipsen, *Combatants and Non-combatants*, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), marginal no. 308.

seen, they are recognizable as a party to the conflict.¹⁰³ This has long been the practice in relation to persons who fire long-range missiles or lay land mines and others who are not seen by the opposing party at the moment the weapon is detonated. Thus, contrary to the view of the Federal Prosecutor General, the important issue is not whether or not wearing identifying symbols is of practical use.¹⁰⁴ Ultimately, CIA agents do not wear such symbols, which points to the fact that they are not part of the armed forces.¹⁰⁵

While civilians may be part of a party to a conflict in an armed conflict, under no circumstances may they themselves assume the right to carry out acts of combat – even if they adhere to the provisions of international humanitarian law.¹⁰⁶ As such, every act of a civilian in an armed conflict may be evaluated and prosecuted under both the ordinary criminal law and the Code of Crimes against International Law.¹⁰⁷ This also applies to CIA agents.

Conclusion

The decree from the Federal Prosecutor General terminating the investigatory proceedings raises a series of questions. The first problem arises in the Prosecutor's establishment of his own jurisdiction over the case; jurisdiction in this case requires the existence of an armed conflict. It is doubtful whether the attack on Bünyamin E. occurred within the context of an armed conflict. A more accurate assessment is likely that the CIA was carrying out a covert operation within the framework of their 'global war against terror' and while this may have occurred in a region in which the Pakistani government are engaged in a conflict with the Taliban, the operation was not itself connected with the latter conflict.

The rules of armed conflict do not, however, apply to covert secret service measures. The CIA is not fighting rebels in the region side by side with the Pakistani army, but is instead pursuing US interests as part of the global fight against terrorism. Similarly, it has not been established that the attack on Bünyamin E. took place in the context of the conflict in Afghanistan as

¹⁰³ R. Frau, *Deutschlands Drohnenopfer*, *Junge Wissenschaft im öffentlichen Recht*, Blog, 8 Aug. 2013, available at: <http://www.juwiss.de/deutschlands-drohnenopfer/>.

¹⁰⁴ View put forward in the Federal Prosecutor General's decree from 20 June 2013, p. 34.

¹⁰⁵ M.E. O'Connell, *Unlawful Killing with Combat Drones*, Notre Dame Law School, Legal Studies Research Paper No. 09-43 (2009), p. 8; A. Burt/A. Wagner, *Blurred Lines*, *Yale Journal of International Law Online*, Vol. 38, autumn 2012, p. 10.

¹⁰⁶ ICRC, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law* (2009), p. 84.

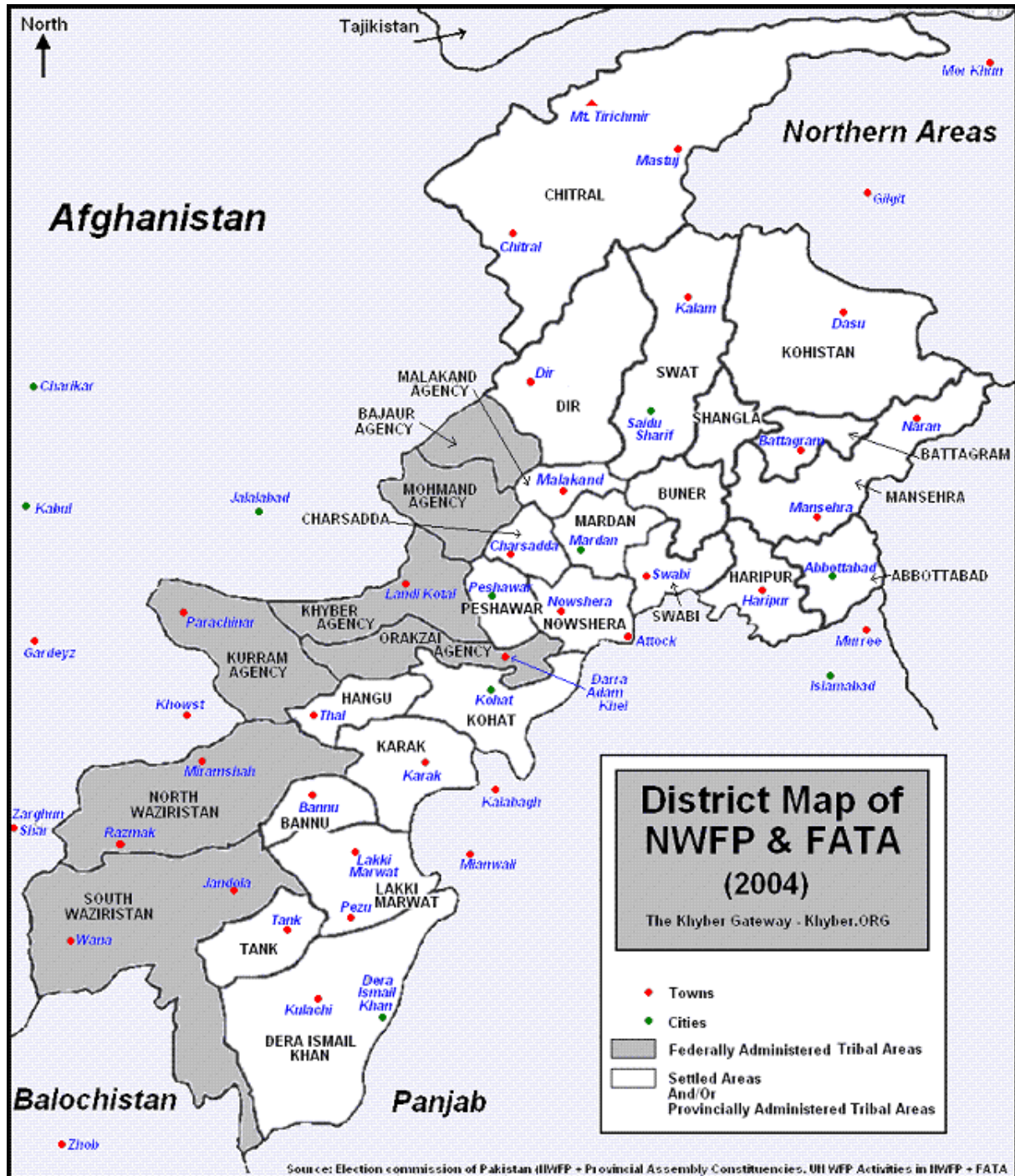
¹⁰⁷ ICRC, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law* (2009), p. 84; K. Ambos, §§ 8, in: W. Joecks/K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Band 6/2 – Nebenstrafrecht III, Völkerstrafgesetzbuch*, 2009, marginal no. 37; A. Burt/A. Wagner, *Blurred Lines*, *Yale Journal of International Law Online*, Vol. 38, autumn 2012, p. 11; Jurisdiction for prosecution under the Criminal Code would lie with a local prosecutor and not the Federal Prosecutor General – this jurisdictional question is currently pending before the Federal Constitutional Court in connection with the constitutional complaint lodged in the Kunduz air strike case. On this see the opinion by F. Jeßberger, available in German at:

http://www.ecchr.de/index.php/Kundus.html?file=tl_files/Dokumente/Universelle%20Justiz/Kundus%2C%20Jeßberger%2C%20Verfolgungszustandigkeit%20des%20Generalbundesanwalts%2C%202010-12.pdf.

there is insufficient indication as to which parties to the Afghani conflict use Pakistani territory as a safe zone and whether Bünyamin E. was a member of such a group. The Federal Prosecutor General fails to distinguish between the various types of conflict in the region and effectively categorizes every armed actor as a party to the conflict, thereby overlooking the varying kinds of conflicts in the region. It is essential to establish which groups meet the criteria for a party to the conflict and who they are fighting. A distinction must be made between US and Pakistani counter terrorism measures. By generalizing the different parties to the conflicts and the various natures of the conflicts, the Federal Prosecutor General is applying legal frameworks for which, in the given situation, the legal requisites have not been met. By doing so the Federal Prosecutor General is breaching the fundamental standards of protection afforded to the civilian population as well as basic human rights such as the right to life and to a fair trial.

The conclusion of the above analysis is that the investigation should have been passed on to the relevant local prosecutor since the killing did not occur in the course of an armed conflict. The Federal Prosecutor General has exceeded his jurisdiction. Furthermore, the subsequent investigation was insufficiently comprehensive and thus failed to meet the standard required in cases regarding the crime of murder.

Annex: Map of the tribal regions (FATA) and the province of Khyber Pukhtoonkhwa (KPK)



Source: http://www.pakistanpaedia.com/provinces/fata/map_fata-nwfp.gif