

## The political question doctrine *vis-à-vis* drones' 'outsized power': Antithetical approaches in recent case-law

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### 1. Introduction

Literature on armed drones (or Unmanned Aerial Vehicles – UAVs) and on their impact not only on the international law on the use of force (the so-called *jus ad bellum*), but also on the law of armed conflict (the so-called *jus in bello*) and human rights law, has been flourishing in the last years.<sup>1</sup> While topics such as the use of force against non-state actors and the right to life and privacy stay at the forefront of the debate, just behind the scene is an issue that has been largely left unexplored so far, namely judiciary oversight on drone strikes and, consequently, drone victims' right to access to justice.<sup>2</sup>

As will be argued in the following, these victims and their next-to-kin – increasing often in number and seldom in public visibility<sup>3</sup> – have an extremely hard time seeking redress before courts. A major obstacle on their way to a declaration of responsibility is courts' resort to the so-

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<sup>1</sup> C. Heyns, D Akande, L Hill-Cawthorne, T Chengeta, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65 ICLQ 791.

<sup>2</sup> For a recent and comprehensive analysis of this topic, see extensively L Gervasoni, 'Overflying Justiciability? Drones and Avoidance Doctrines Before National Courts' in E Carpanelli, N Lazzarini (eds), *Use and Misuse of New Technologies. Contemporary Challenges in International and European Law* (Springer 2019).

<sup>3</sup> Several websites provide unofficial data on drone strikes. See for instance <[www.thebureauinvestigates.com/projects/drone-war](http://www.thebureauinvestigates.com/projects/drone-war)>.

called ‘political question doctrine’ (hereinafter: PQD).<sup>4</sup> Leaving the critical analysis of this concept to a later stage, suffice it to say that the PQD – a *species* belonging to the *genus* of the so-called ‘avoidance doctrines’<sup>5</sup> – posits the existence of a ‘political’ power (typically associated with the exercise of sovereign prerogatives, such as in foreign and defense matters) that can escape review by the Judiciary. As a matter of fact, narrowing our focus down to the US – veritably both PQD<sup>6</sup> and drones<sup>7</sup> motherland –, drone strikes are carried out by the Executive (typically, either the military or the CIA), extraterritorially (to name only some, in Yemen, Pakistan, Afghanistan) and mainly against non-citizens: a province in which Judiciary’s raids are traditionally dispirited.

The present contribution tackles the connection between drone strikes and the PQD by analyzing two judicial decisions that have been rendered recently on the same facts: the first by the US Court of Appeals for the District of Columbia Circuit (hereinafter: DC Circuit), the second by the German North Rhine-Westphalia Higher Administrative Court (hereinafter: Higher Administrative Court). Both complaints have been filed by the same plaintiff (Mr Faisal bin Ali Jaber), after whom the cases will be referred to as *bin Ali Jaber*: commenting on these decisions will thus allow for a pondered reflection on the PQD and its relevance for effective judiciary scrutiny on drone strikes.

This is all the more important today, as analogous cases could arise within other domestic legal orders in the near future. For instance, as will be explained below, the case before the Higher Administrative Court involves Germany’s assistance to the US for operating drone

<sup>4</sup> D Amoroso, *Insindacabilità del potere estero e diritto internazionale* (Editoriale Scientifica 2012). See also, amongst others, M Virally, ‘L’introuvable “acte de gouvernement” (1952) 58 *Revue de Droit Public* 317; H Thayer Kingsbury, ‘The “Act of State” Doctrine (1910) 4 *AJIL* 359; P Barile, ‘Atti di governo (e atto politico)’ in *Enciclopedia del diritto* (Giuffrè 1959); L Henkin, ‘Is There a “Political Question” Doctrine?’ (1976) 85 *Yale L J* 597. For an appraisal of the PQD in the international legal order, see the recent contribution of J Odermatt, ‘Patterns of Avoidance: Political Questions before International Courts’ (2018) 14 *Intl J L in Context* 221.

<sup>5</sup> E Benvenuti, ‘Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts (1993) 4 *Eur J Intl L* 159.

<sup>6</sup> TM Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton UP 1992).

<sup>7</sup> JG D’Errico, ‘Executive Power, Drone Executions, and the Due Process Rights of American Citizens’ (2018) 87 *Fordham L Rev* 1185, 1189 ff.



strikes through the military base of Ramstein. In the same vein, Italy regularly authorizes US drone strikes from the military base of Sigonella:<sup>8</sup> time will tell if, in the event of a dispute – akin to the one regarding Ramstein – before Italian judiciary authorities, the PQD will be resorted to for declining jurisdiction, similarly to the well-known *Marković* case.<sup>9</sup>

After a brief summary of the facts (Section 2), the cases will be analyzed in turn (Sections 3 and 4), with a view to showing that the PQD is dealt with in pretty antithetical terms. On this basis, the risks posed by the PQD to the effectiveness not only of international law at large, but also of human rights law in particular will be exposed in order to propose a different appraisal of the PQD when drone operations are at stake (Section 5). Finally, some conclusions will be provided (Section 6).

## 2. *The US drone strike against the bin Ali Jaber family*

On August 29, 2012 a Yemeni imam, Mr Salem bin Ali Jaber, and his nephew Waleed were meeting with three men in a village in Khashamir, a region located in Eastern Yemen, alongside a family wedding the bin Ali Jaber had attended the previous days. A discussion was taking place between the two bin Ali Jaber and the men when out of the blue a US armed drone fired four Hellfire missiles at the area, killing both Salem and Waleed and three men.

The operation carried out by the US was a textbook ‘signature strike’, that is a targeted killing in which the target is identified not on the basis of personal identity, but rather on behavioral patterns (such as cell phone usage or connections with members of a terrorist cell).<sup>10</sup>

<sup>8</sup> D Mauri, ‘On American Drone Strikes and (Possible) European Responsibilities: Facing the Issue of Jurisdiction for “Complicity” in Extraterritorial Targeted Killings’ (2019) *Italian YB Intl L* 249.

<sup>9</sup> Cass civ (SS UU) Order of 8 February 2002. For a first commentary see N Ronzitti, ‘Azioni belliche e risarcimento del danno’ (2002) 85 *Rivista di Diritto Internazionale* 682. For a critical appraisal of the Order through the lenses of the PQD, see M Frulli, ‘When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The *Marković* Case’ (2003) 1 *J Intl Criminal Justice* 406.

<sup>10</sup> To expound on this, see K Benson, “Kill ‘em and Sort it Out Later:” Signature Drone Strikes and International Humanitarian Law’ (2014) *Global Business & Development L J* 18; S Holewinski, ‘Just Trust Us’, in PL Bergen, D Rothenberg, *Drone Wars. Transforming Conflict, Law, and Policy* (CUP 2014); K Hall Kindervater, ‘The

Long story short, the target's personal identity may remain unknown not only before the strike, but also after it – which marks the difference from 'personality strike', in which the target is chosen on the basis of personal identity. By contrast, target nomination in 'signature strikes' depends hugely on the algorithmic re-elaboration of a bunch of personal data.<sup>11</sup>

The US has been constantly carrying out 'signature strikes' since the Obama administration: they are believed to avoid a huge number of civilian casualties and to work as an appropriate tool to fight the well-known 'Global War on Terror'. As a matter of fact, unofficial numbers reveal that the rate of error of 'signature strikes' is alarmingly high: the precision that new technology is believed to ensure resembles much a myth.<sup>12</sup> Incidentally, this is why many commentators have begun to question the consistency of the practice of 'signature strikes' with relevant international law, *in primis* human rights law.<sup>13</sup>

The present case confirms such assertion. It is argued that in fact the intended targets were the three men, allegedly flagged as suspects by the US authorities. The presence of both Salem and Waleed at the very place and time of the attack was nothing but an unfortunate coincidence. However, for the purposes of the present contribution, whether Salem and Waleed could make the object of a 'signature strike' and thus the issue of their right to life will not be investigated; what matters here is the existence (*rectius*: the availability) of judiciary paths to effectively contest the targeting decision.

Turning to the facts at hand, in the aftermath of the attack some relatives of Salem and Waleed – including Faisal – unsuccessfully attempted to receive official recognition for the attack from Yemeni officials. The complaints before the DC Circuit and the Administrative Court

Emergence of Lethal Surveillance: Watching and Killing in the History of Drone Technology' (2016) Security Dialogue 224.

<sup>11</sup> Benson (n 10).

<sup>12</sup> See <[www.thebureauinvestigates.com/projects/drone-war](http://www.thebureauinvestigates.com/projects/drone-war)>. The Bureau of Investigative Journalism is a UK-based NGO aiming 'to inform the public about the realities of power in today's world'. It runs a database on US drone strikes in Pakistan, Afghanistan, Yemen and Somalia from 2004 on. Statistics are regularly updated.

<sup>13</sup> KJ Heller, "'One Hell of a Killing Machine": Signature Strikes and International Law' (2012) 11 J Intl Criminal Justice 112.



have been filed subsequent to this failure: our analysis will depart from here.

### 3. *The suit before the DC Circuit: The PQD 'at the center'*

Faisal bin Ali Jaber, acting on behalf of Salem's and Waleed's estates and invoking next-friend standing, first filed a suit against the US in the DC District Court. Plaintiffs limited their action to seeking a declaration by the court that US officials had carried out an extrajudicial killing in contravention with the Torture Victims Protection Act (TVPA) and customary international law as enforced in the US legal order through the well-known Alien Tort Statute (ATS).<sup>14</sup>

Incidentally, it is worth noting that plaintiffs did not seek for compensation for damages suffered as a consequence of US officials' conduct. In the US practice this choice is fraught with numerous obstacles indeed. Tort liability for actions of federal officers and employers as per the Federal Tort Claims Act (FTCA) is restricted by several exceptions which may apply to the case of extraterritorial targeted killings, namely the discretionary function exception, the foreign country exception, and the military exceptions.<sup>15</sup> In sum, given the difficulty to obtain compensation before US courts, the plaintiffs' choice to seek for declaratory relief seemed strategically sound – albeit, as will be argued below, unsuccessful *a posteriori*.

Before tackling the proceedings, few words are due on how, at a general level, resort to the PQD impacts on the effective application of the ATS. As is known, after being left inactive for about two centuries the ATS has experienced an unexpected success since the 1980's within the framework of the so-called 'international human rights litigations'.<sup>16</sup> However, when substantial claims for compensation started to be filed against top US officials and corporations, the PQD started to be in-

<sup>14</sup> For a short analysis of the Statute and its relevance in the so-called 'international human rights litigation', see D Amoroso, 'A Fresh Look at the Issue of Non-justiciability of Defence and Foreign Affairs' (2010) 23 *Leiden J Intl L* 933, 938.

<sup>15</sup> To expand on this see US Congressional Research Service, 'The Federal Tort Claims Act (FTCA): A Legal Overview' (20 November 2019) 16 ff.

<sup>16</sup> *Filartiga v Pena-Irala*, 630 F 2d 876 (2d Cir. 1980).



voked in courtrooms and eventually to be applied on a regular basis so as to neutralize ATS claims *de facto*.<sup>17</sup>

As will be seen, the *bin Ali Jaber* is sadly situated along this trend. After a short overview of the proceedings and main findings therein (3.1), attention will be devoted on two arguments that contrast with the final decision adopted by the DC Circuit (3.2).

### 3.1. *A short overview of relevant findings*

Deciding on Faisal's claim, the District Court made recourse to the PQD on a twofold basis: first, the absence of 'judicially manageable standards' to assess the circumstances of the alleged misfire; second, the inevitability of a 'policy determination ... for nonjudicial discretion', that is the use of force in Yemen.<sup>18</sup> The District Court thus concluded by rejecting the claim.

As a result, plaintiffs appealed and had their case heard by the DC Circuit; the arguments put forward by both parties remained essentially the same. DC Circuit's Judge Brown, writing for the panel, held that the 'first and fundamental question' that needed to be answered was whether the Court had 'jurisdiction to decide' the case.<sup>19</sup> In its essential form, the question revolved around the application of the PQD: can a drone misfire resulting in the death of individuals that could not make the object of a targeting operation be scrutinized by a court?

In order to a correct appraisal of the DC Circuit's decision, it is important to address some judiciary precedents on the PQD the Court confronted with.

In the famous 1962 *Baker v Carr* case, the US Supreme Court held that 'the nonjusticiability of a political question is primarily a function of the separation of powers'.<sup>20</sup> This holds true in particular with respect to foreign relations, a province in which the Executive (and thus the President) acts as the 'sole organ' endowed with 'very delicate, plenary and exclusive' power.<sup>21</sup> Deference to the Executive in external affairs has since then spread in the US constitutional and non-constitutional

<sup>17</sup> Amoroso (n 14) and case-law quoted at 938.

<sup>18</sup> *Ali Jaber v United States*, 155 F. Supp. 3d 70, 73 (D.D.C. 2016).

<sup>19</sup> 861 F.3d 241 (D.C. Cir.), *cert. denied*, 138 S. Ct. 480 (2017).

<sup>20</sup> *Baker v Carr*, 369 US 186, 210 (1962).

<sup>21</sup> *United States v Curtis-Wright Export Corp.*, 299 US 304 (1936).



jurisprudence, its echoes being clearly hearable in *bin Ali Jaber*. In another telling precedent, *El-Shifa*, a Sudanese company filed an ATS claim against the US for failing to provide compensation for an allegedly misfire that had destroyed its company.<sup>22</sup> In that case, the Court distinguished claims questioning the 'wisdom' of a particular military action (covered by the PQD and thus nonjudiciable) from claims involving the resolution of purely legal issues, such as whether the Executive has the legal authority to act (not covered by the PQD).

Referring to *El-Shifa*, in *bin Ali Jaber* the DC Circuit held that '[i]t would be difficult to imagine precedent more directly adverse'.<sup>23</sup> According to the Court, the plaintiffs' claim would engage a clear determination by the judiciary on the 'wisdom of Executive's decision to commence military action – mistaken or not – against a foreign target'.<sup>24</sup> an assessment of the urgency of a military action, the occurrence of an imminent threat of death to the US and the excessiveness of the risk associated with taking innocent lives are all 'questions [that] are the province of the political branches'.<sup>25</sup>

The DC Circuit added then the following arguments in support of its finding. First, as the claim involves matters of political and military strategies, courts are ill-equipped to address such issues and thus it would be inappropriate for them to second-guess the Executive on so 'complex, subtle and professional decisions'.<sup>26</sup> Second, a judicial role in this area is not contemplated by the US Constitution, a circumstance which would bar scrutiny by any court.<sup>27</sup> On such premises and given the abovementioned precedents, the DC Circuit rejected the claim.

### 3.2. *Two counter-arguments for the misapplication of the PQD*

Commenting on the case at hand, arguments can be found whereby the DC Circuit's decision may be flawed as a result of an incorrect ap-

<sup>22</sup> 607 F.3d 836.

<sup>23</sup> (n 19) 250, 259.

<sup>24</sup> *ibid*

<sup>25</sup> *ibid* 260.

<sup>26</sup> *Gilligan v Morgan*, 413 US 1, 10 (1973).

<sup>27</sup> *El-Shifa Pharmaceutical Industries Co. v United States*, 607 F3d 836 (US DC Cir. 2010) 849, according to which there exist 'no comparable constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target'.



plication of the PQD. Essentially, these boil down to two: first, the DC Circuit seems to have ignored the existence of ‘judicially discoverable and manageable standards’, provided by international law and applicable to the facts; second, the byproduct of such stubborn application of the PQD is that their victims’ right to access to justice gets totally frustrated. Let us tackle these arguments in turn.

*Firstly*, at the end of the day it seems that the DC Circuit did nothing different from asserting that an executive action that contravenes the TVPA and the prohibition on extrajudicial killings as contained in customary international law falls within the Executive’s *discretionary* foreign policy prerogatives. But this is contradictory: there can be no discretion in deciding to abide by statutes or, in another words, ‘[i]f a conduct-regulating statute prohibits the Executive from carrying out strikes that constitute extrajudicial killings, then the action was not discretionary’.<sup>28</sup> It cannot be up to the Executive’s discretion to decide whether to abide by statutory law.

This point is of paramount importance, as it helps unveil the limits inherent to the DC Circuit’s legal reasoning. As is known, one reason that would justify the application of the PQD is traditionally found in the ‘lack of judicially discoverable and manageable standards for resolving it’.<sup>29</sup> When courts have no legal tools (ie ‘standards’) to solve an issue, this would prove the discretionary nature of the executive action. Applying this to the *bin Ali Jaber* case, it is easy to see that things differ considerably.

To begin with, one cannot ignore that it was the Obama Administration itself to shape its position on drone strike in unmistakably legal terms. As the plaintiffs note, a number of public statements and memoranda have been issued by the US authorities defining the limits and the scope of drone strikes: to name the most important ones, one may recall the so-called Obama’s *Presidential Policy Guidelines* (PPG),<sup>30</sup> which have been disclosed in 2016, and the more recent – and still undisclosed

<sup>28</sup> See ‘*bin Ali Jaber v United States*. D.C. Circuit Holds Statutory Challenge to Drone Strike is Nonjusticiable’ (2018) 131 *Harvard L Rev* 1473, 1479.

<sup>29</sup> *Baker v Carr* (n 20) 217.

<sup>30</sup> ‘Procedures for approving direct action against terrorist targets located outside the United States and areas of active hostilities’ (22 May 2013) available at <[www.justice.gov/oip/foia-library/procedures\\_for\\_approving\\_direct\\_action\\_against\\_terrorist\\_targets/download](http://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download)>.





– Trump’s Guidelines.<sup>31</sup> As a further proof that the issues at hand fall within the scope of judicially discoverable and manageable standards, one can consider the case-law regarding the ‘Global War on Terror’. For instance, some have noted that US courts have made numerous interventions in counterterrorism operations, crafting what has been labeled ‘domestic humanitarian law’.<sup>32</sup> In the famous *Hamdan v Rumsfeld* case, the US Supreme Court qualified the ongoing conflict against Al Qaeda as one of a non-international character in sharp contrast with the position held by the US Government (according to which that conflict was an international one).<sup>33</sup> Therefore a clear set of domestic legal standards can be – and in fact *are* – applied.

Along this line of reasoning, international law as well provides domestic courts with manageable and well-established legal standards regulating the use of force. According to the thorough *amici* filed in the present suit,<sup>34</sup> the facts can be qualified as an alleged use of force in self-defense by the US against non-state groups posing an imminent and direct threat to the former. It follows that *jus ad bellum* provisions – namely Articles 2(4) and 51 of the United Nations Charter and corresponding *jus cogens* – apply to the facts.<sup>35</sup> Alternative qualifications would be either a use of force carried out within an ‘armed conflict’ (regulated by *jus in bello*) or within a law-enforcement operation (regulated by human rights law).<sup>36</sup> Whether a particular drone attack has been carried out in accordance with (or in contravention of) such international standards – whichever they may be – is therefore an exquisitely *legal* question. In sum, one can safely conclude that, had the DC Circuit tackled the PQD through the lenses of the existence of ‘judicially discoverable and manageable standards’, provided not only by domestic law but also by international law, the decision could have been different.

<sup>31</sup> See <[www.bbc.com/news/world-us-canada-47480207](http://www.bbc.com/news/world-us-canada-47480207)>.

<sup>32</sup> See ‘bin Ali Jaber v. United States’ (n 28) 1479.

<sup>33</sup> *Hamdan v Rumsfeld*, 548 US 557, 629-631 (2006).

<sup>34</sup> ‘Brief of Amici Professors Mary Ellen O’Connell and Douglass Cassel in Support of Plaintiff-Appellants and Urging Reversal’ (29 August 2016).

<sup>35</sup> *ibid* 20.

<sup>36</sup> *ibid* 17 ff.

Surprisingly, the *second* counter-argument is provided by the very Judge writing for the DC Circuit.<sup>37</sup> Judge Brown appended an opinion which is obviously a concurring one; however, one could hardly claim to have read more critical and harsher words against a practice – that of drone strikes – which though the decision ends up availing. The departing point of her reasoning is crystal clear: new technologies bestow an unprecedented and unimaginable power on the Executive. Drones allow for seeing without being seen, attacking without being attacked: they are the most formidable ‘de-structuring’ weapon that any modern arsenal could dream of.<sup>38</sup> Judge Brown appropriately uses the words ‘outsized power’,<sup>39</sup> on which no oversight seems workable: an executive one would be auto-referential, while the congressional one ‘is a joke – and a bad one at that’, to the point that the very US democratic system seems ‘broken’.<sup>40</sup> Pretty strong words from a concurring Judge, which stem from the finding that drone strikes are operated in a vacuum of appropriate scrutiny.

However, one could hardly turn a blind eye on that the Judge herself seems to have made her bed: calling on the political branches to establish *ad hoc* accountability mechanisms (that is, the proposed solution to the abovementioned vacuum) would be unnecessary had she correctly taken into account the consequences of the decision in terms of the victims’ right to access to justice. At no point of the Opinion attention is paid to the circumstance that an adamant application of the PQD would result in the radical frustration of such right, in that victims could find no redress whatsoever for the drone misfire that caused the loss of their next-to-kin. This seems all the more troubling considering that the very Judge admits that the PQD is ‘a wholly inadequate response to an executive decision ... implementing a standard operating procedure that will be replicated hundreds if not thousands of times’.<sup>41</sup> In other words, one may legitimately wonder whether a more nuanced

<sup>37</sup> (n 19) Concurring Opinion of Judge Brown.

<sup>38</sup> M Vegetti, *L’invenzione del globo. Spazio, potere, comunicazione nell’epoca dell’aria* (Piccola Biblioteca Einaudi 2017); F Ruschi, ‘Il volo del drone? Verso una guerra postumana? Una riflessione di filosofia del diritto internazionale (2016) 13 *Jura Gentium* 1; G Chamayou, *Théorie du drone* (La fabrique editions 2013).

<sup>39</sup> (n 19) Concurring Opinion of Judge Brown 5.

<sup>40</sup> *ibid* 6.

<sup>41</sup> *ibid* 5.



understanding of what is at stake with drone strikes – the right to access to justice, coupled with the absence of any meaningful scrutiny on an ‘outsized power’ of a routine nature – could have led the Judge, and the DC Circuit, to a different conclusion. The failure to adopt a variable-intensity judicial review seems the veritable original sin of this decision.

Be it as it may, what emerges from the analysis of the DC Circuit’s decision on the *bin Ali Jaber* case remains that PQD is unfit to cope with technological progress entrusting an ‘outsized power’ to the Executive. Not only the essence of the separation of powers, but also the very effectiveness of international law – inasmuch as providing ‘judicially discoverable and manageable standards’ domestic courts can (and should) apply – end up being jeopardized by drone operations.

#### 4. *The suit before the Higher Administrative Court: The PQD ‘in a corner’*

Drone technology allows targeting decisions to be taken thousands of kilometers from the actual operational ground: an operator, safely located in Nevada, can open fire against a compound literally halfway around the world, thanks to military bases operating as relay stations that pass data on to drones via satellite. This is exactly what happened in the drone misfire that killed Salem and Waleed: an operation team in the Ramstein Air Base in Germany had evaluated the real-time pictures and assisted the operator in conducting the strike.<sup>42</sup>

This is why, in October 2014, Faisal and other members of the bin Ali Jaber family filed a suit to the Administrative Court in Cologne against Germany and requested it to prevent the use of Ramstein for drone attacks. The Court rejected the plaintiffs’ complaint arguing that no obligation existed for Germany to deny the US authorization to operate drones through Ramstein.<sup>43</sup> The plaintiffs then successfully appealed the decision to the Higher Administrative Court in August 2015: with a decision of March 19, 2019 the Higher Administrative Court held not only that Germany is constitutionally obliged to ascertain on a

<sup>42</sup> European Center for Constitutional and Human Rights, ‘Survivors of US drone strikes sue the German government’ Case Report 2019 available at <[www.ecchr.eu](http://www.ecchr.eu)>.

<sup>43</sup> Verwaltungsgericht Köln 3 K 5625/14 (27 May 2015).



case-by-case basis whether the US drone strikes are compatible with international law, but also that if the German government found this not to be the case, then efforts must be made to ensure compliance with international law – even by denying authorization to use Ramstein for a particular operation.<sup>44</sup> In fact, the plaintiffs had argued that the right to life as guaranteed under the German Basic Law (*Grundgesetz*) imposed a positive obligation (*Schutzpflicht*) upon the German government to inhibit the use of Ramstein altogether; however, as will be argued later, the Court did not push itself that far.

Abstractly, the invocation of the PQD in the present case would not seem groundless; after all, in the light of the above, what is at stake – authorizing a State to use a military base – is a typical decision of foreign policy (falling within the domain of State's military alliance). The Judiciary could hardly justify its dictating the way the Executive has to conduct foreign affairs. However, in Germany the PQD has never taken root in judiciary practice, not even when foreign affairs are at stake. For instance, in the *Status of the Saar* case treaty-making power has been held as never immune *per se* to judicial review;<sup>45</sup> in the *Inter-German Basic Treaty* case the claim regarded the very Brandt's *Ostpolitik*, more specifically an agreement reached between the two Germanies with a view to normalizing their international relations.<sup>46</sup> Many other cases witness the fact that German courts reject the application of the PQD *in toto* – including foreign and military affairs. In sum, as has been put it, in the German legal order virtually 'everything is adjudicable'.<sup>47</sup>

Turning to the *bin Ali Jaber* case, it therefore should not surprise that the Higher Administrative Court argues that 'the German federal government has in principle no political margin of discretion that is not

<sup>44</sup> Oberverwaltungsgericht für das Land Nordrhein-Westfalen 4 A 1361/15 (VG Köln 3 K 5625/14) (19 March 2019). For a commentary, see L Beinlich, 'Germany and its Involvement in the US Drone Programme before German Administrative Courts' EJIL:Talk! (8 April 2019) <[www.ejiltalk.org/germany-and-its-involvement-in-the-us-drone-programme-before-german-administrative-courts/](http://www.ejiltalk.org/germany-and-its-involvement-in-the-us-drone-programme-before-german-administrative-courts/)>.

<sup>45</sup> No 15 4 BVerfGE 157, 163-164 (1956).

<sup>46</sup> No 1 36 BVerfGE 1 (1973)

<sup>47</sup> Franck (n 6) 108. For more on the German approach towards the PQD *et similia*, see R Streinz, 'The Role of the German Federal Constitutional Court Law and Politics' (2014) 31 *Ritsumeikan L Rev* 95, 101 ff.



subject to judicial control'.<sup>48</sup> To draw a parallel with the DC Circuit's decision above, the Judiciary disposes of 'judicially discoverable and manageable standards' deriving from international law, as established by core constitutional provisions. First, international law enters the domestic legal order, directly creates rights and therefore binds all authorities (Articles 25 and 20(3) Basic Law); second, all individuals claiming to have suffered a violation of their rights by public authorities enjoy the right to access to justice (Article 19(4)). It follows that '[t]he question of whether and if so within what limits armed drone operations in Yemen are permitted by international law is therefore not a political but a legal question'.<sup>49</sup>

Upon such solid premises, the High Administrative Court builds up a thorough analysis of international law applicable to the facts. To begin with, *jus ad bellum* provisions – namely Articles 2(4) and 51 UNC – are tackled;<sup>50</sup> the Court then turns to *jus in bello* and human rights norms (namely Article 6 of the International Covenant on Civil and Political Rights, protecting the right to life).<sup>51</sup> The Court concludes that albeit not generally prohibited by norms regulating the use of force, armed drones must be employed consistent with those international standards – which apparently does not happen so often in US drone campaigns in Yemen.

This is a key passage: '[r]eliable information on drone strikes in Yemen [...] indicates that [the] process of distinguishing, required by international law, is insufficiently carried out, and not just in isolated cases'.<sup>52</sup> What is more, effective investigations in the US on the drone misfire resulting in the death of impermissible targets have not been conducted in a satisfying manner.<sup>53</sup> It follows that it is up for Germany

<sup>48</sup> (n 44) 134. All translations from German have been made possible thanks to the expertise and generosity of Dr Edoardo Caterina, fellow colleague of Constitutional Law at the Department of Legal Sciences of the University of Florence. Any mistakes or imprecisions remain mine. For an English summary, see European Center for Constitutional and Human Rights, 'Wording of the oral pronouncement of the judgment' available at <[www.ecchr.eu/en/case/important-judgment-germany-obliged-to-scrutinize-us-drone-strikes-via-ramstein/](http://www.ecchr.eu/en/case/important-judgment-germany-obliged-to-scrutinize-us-drone-strikes-via-ramstein/)>.

<sup>49</sup> *ibid*

<sup>50</sup> *ibid* 71-72.

<sup>51</sup> *ibid* 81 ff, 98 ff.

<sup>52</sup> 'Wording of the oral pronouncement of the judgment' (n 48) 8.

<sup>53</sup> *ibid* 9.

to comply with the positive obligation to protect individuals from violations of their rights by other States, and therefore to closely scrutinize US drone strikes conducted via Ramstein before authorizing them.

These findings are of paramount importance for a threefold reason. First, the current state of the art of international law applicable to armed drones operations is explained carefully and thoroughly. Second, the PQD is construed so that the Court can correctly distinguish justiciable from non-justiciable claims, respect for international provisions falling within the former. Third, this decision preserves – and even enhances – the effectiveness of international law, understood as its capability of directing state organs' conduct.

5. *The PQD and the peculiarity of drone operations: The need for a variable-intensity judicial review*

The US and German *bin Ali Jaber* cases stand as an antithetical dip-tych. On the one wing, the PQD is depicted in very large sizes, international law ('judicially discoverable and manageable standards') and thus judicial scrutiny being left in the corner; on the other one, dimensions are inverted, with little to no room left for a doctrine that *de facto* takes any acknowledgment and redress away from victims of drone misfire. The 'timidity' that traditionally characterizes US courts contrasts with the 'audaciousness' shown by German judges.<sup>54</sup>

Metaphors aside, on closer inspection it seems that each approach receives support by contemporary practice. The point is to ascertain which one is better suited for coping with the unprecedented challenges raised by drone operations.

A telling US precedent (yet not quoted by the DC Circuit) is *Al-Aulaqi v Obama*, where it was held that the PQD barred judicial review of the inclusion of the applicant on an executive 'kill list' (thus, *before* operating the targeted killing).<sup>55</sup> Maybe surprisingly, in a latter case involving the execution of Mr Al-Aulaqi the PQD was discarded as the subject-matter of the case was the (alleged) infringement of due process

<sup>54</sup> Benvenisti (n 5).

<sup>55</sup> 727 F. Supp. 2d 1 (D.D.C. 2010).



and constitutional rights.<sup>56</sup> One may legitimately wonder why international rules on fundamental rights would not enjoy a status akin to parallel constitutional liberties. This case is remarkable at least as it exposes some double standards associated with the application of the PQD.

Moving on to other jurisdictions, some UK decisions mirror US Judiciary's findings on the PQD. To date, the most important one is the *Noor Khan* case, decided by the English Court of Appeal (Civil Division) in December 2013.<sup>57</sup> Applicants attempted to challenge UK's cooperation with US drone campaign but had their complaint dismissed in the name of the foreign act of state doctrine. According to the Court, the exception to the doctrine whereby courts can adjudicate 'foreign acts of state which are in breach of clearly established rules of international law or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights' was not applicable.<sup>58</sup> Such finding is puzzling, if one considers that the case regarded the loss of life by forty people – thus, a (potential) major violation of the right to life.

On the opposite side of the corner one may cite the famous 2006 Israeli Supreme Court's decision in the targeted killing case.<sup>59</sup> Even though the case at hand did not concern drone strikes, core assumptions are fully applicable to our scenario. Reversing an opposite precedent,<sup>60</sup> not only did the Court find that resorting to the PQD would produce the undesirable effect of jeopardizing victims' 'most basic right [...] – the right to life',<sup>61</sup> it also implied that judicial scrutiny of the Executive's operations is essential to constrain its power, which must always be exercised in conformity with existing rules.<sup>62</sup>

<sup>56</sup> *Al-Aulaqi v Panetta* 35 F. Supp. 3d 56 (D.D.C. 2014). Unfortunately, the case was eventually dismissed after finding that US law provided victims with no remedy.

<sup>57</sup> *Noor Khan v Secretary of State* [2014] EWCA Civ 24 and, before, *Noor Khan v Secretary of State* [2012] EWHC 3728 (Admin).

<sup>58</sup> *ibid* para 28.

<sup>59</sup> *Public Committee against Torture in Israel v Government of Israel*, Case No HCJ 769/02, 13 December 2006.

<sup>60</sup> O Ben-Naftali, KR Michaeli, 'Justice-Ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings' (2003) 1 J Intl Criminal Justice 368.

<sup>61</sup> (n 59) para 54.

<sup>62</sup> *ibid* para 61 ('[e]very struggle of the state — whether against terrorism or against any other enemy — is carried out in accordance with rules and laws').



Comparing and contrasting these opposite approaches to the PQD allows us to reflect on the impact that such doctrine has on the very effectiveness of international law, in particular when it comes to its factual application by domestic courts.<sup>63</sup>

Preliminarily, it must be recalled that the relationship between the PQD and international law at large is an issue that has been studied in depth by scholarship to date. Judicial abstention is regarded as inevitable when matters of defense and foreign affairs are at stake,<sup>64</sup> in all cases, however, arguing that the PQD can be given *carte blanche* ends up nullifying the practical application of international law, including human rights norms.<sup>65</sup>

This is why it has been suggested that a working way out of the quagmire could be to abandon an all-or-nothing theoretical approach to the PQD (either it applies fully or it is discarded altogether) in favor of a nuanced approach favoring a variable-intensity judicial review.<sup>66</sup> In other words, every time courts are required to adjudicate a ‘politicized’ case (for instance, involving security and defense matters), they should assess whether individual rights may be impinged by the PQD and, in the positive, carefully balance the respect of such rights with the need to preserve the public authorities’ prerogatives.<sup>67</sup> At a more general level, this is confirmed by several soft-law instruments, in particular by a 1993 *Institut de Droit International’s* resolution on domestic courts’ role in international relations, whose Article 2 establishes that ‘[n]ational courts, when called upon to adjudicate a question related to the exercise of executive power, should not decline competence on the basis of

<sup>63</sup> Benvenisti (n 5). More generally, see A Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011).

<sup>64</sup> D Amoroso, ‘Judicial Abdication in Foreign Affairs and the Effectiveness of International Law’ (2015) 14 *Chinese J Intl L* 99.

<sup>65</sup> cf Benvenisti (n 5) 174 ([d]emocratic societies which ardently protect the rule of law within their communities seem ready and even willing to grant their executive branch *carte blanche* to mold their country’s external relations unfettered by international law). On the impact of the PQD on human rights, see also NS Williams, ‘Political Question or Judiciary Query: An Examination of the Modern Doctrine and Its Inapplicability to Human Rights Mass Tort Litigation’ (2001) 28 *Pepperdine L Rev* 849.

<sup>66</sup> J Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) 65 *Cambridge L J* 174. On the same line, see D McGoldrick, ‘The Boundaries of Justiciability’ (2010) 59 *ICLQ* 981 (with specific focus on UK practice).

<sup>67</sup> Amoroso (n 64) 121 ff (suggesting the replacement of non-justiciability by a variable-intensity judicial review).





the political nature of the question if such exercise of power is subject to a rule of international law'.<sup>68</sup>

*A fortiori*, this line of reasoning should apply to drone operations.

*First of all*, it is worth noting that a logic of balancing surfaces plainly in the Higher Administrative Court's decision: the constitutional principle of friendliness towards international law (*Völkerrechtsfreundlichkeit*) imposes not only a duty to comply with agreements with other States (in the present case, the agreement with the US on Ramstein), but also to enforce international law through both refraining from giving effect to other States' decisions that violate international law and cooperating to end such violations.<sup>69</sup> It follows that the PQD cannot be invoked to refrain from adjudicating human-rights cases *a priori*. Besides, the Higher Administrative Court's decision seems carefully balanced also from the viewpoint of the need of avoiding judiciary raids in politically sensitive matters: as has been already underscored, in face of the plaintiff's request of prohibiting the use of Ramstein for US drone operations altogether the Court limited itself to order the Government to conduct a legal assessment of particular operations before authorizing them. One could hardly argue that political and military reasons have been completely left aside in adjudicating the present case.

*Secondly*, striking a balance between the protection of the Executive's prerogatives and the respect for human rights requires a careful assessment of all the factors involved in given circumstances. This means, for instance, that the stricter human rights standards are (eg when absolute rights are at stake), the more courts must limit their recourse to the PQD.<sup>70</sup> Applying this contention to our case, we should avoid jumping to conclusions too soon. While the right to access to justice – that is, in principle, a derogable, non-absolute right – is at stake, practice has evolved remarkably and today leans on a more principled appraisal of this right.<sup>71</sup> In particular, it is now accepted that its *noyau*

<sup>68</sup> 'The Activities of National Judges and the International Relations of Their State' (1994-II) 65 *Annuaire de l'Institut de Droit International* 318.

<sup>69</sup> 'Wording of the oral pronouncement of the judgment' (n 48) 2.

<sup>70</sup> Amoroso (n 64).

<sup>71</sup> F Francioni, 'The Right of Access to Justice under Customary International Law' in F Francioni, *Access to Justice as an Human Right* (OUP 2007). For relevant practice, see also P De Sena, 'The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative

*dur* must be safeguarded also in states of emergency, as established by the Human Rights Committee's General Comment No 31.<sup>72</sup> Moreover, one should not forget that the right to access to justice and the right to remedy receive specific protection in cases of gross violations of human rights and serious violations of international humanitarian law.<sup>73</sup>

If this is true, then proper consideration is due to this right by courts when deciding whether or not to adjudicate on drone misfires. Contrariwise, victims would be completely denied not only redress, but also acknowledgment of their status: as a matter of fact, in the US the bin Ali Jaber were seeking for a mere declaratory judgment. The extent to which such outcome is at odds with the respect of the right to access to justice's hard core is plain, and it gets much more evident when one considers that drone strikes impact on a fundamental right – namely, the right to life – too frequently overlooked by the official narrative.<sup>74</sup>

*Thirdly*, our last finding is somehow confirmed by the very writing Judge Brown, who held that the PQD turns out to be completely inadequate to cope with drone strikes and therefore urged the Executive and the Congress to 'establish a clear policy for drone strikes and precise avenues for accountability'.<sup>75</sup> In other words, it seems that also the exercise of an 'outsized power' as the one ensured by armed drones adds weight to the scales, pushing for a reappraisal of the doctrine. In this direction, it is worth mentioning that some authors have begun to propose judicial mechanisms to ensure a proper overview on drone operations, for instance by establishing *ex ante* or *ex post* judicial review of proposed targets.<sup>76</sup> These legal mechanisms are intended to avert – or at least *reduce* – unjustified targeted killings by the US. Most of these pro-

Analysis under International Law' (2014) Zoom-out II QIL-Questions Intl L 17. See also Gervasoni (n 2) 333 ff.

<sup>72</sup> General Comment No 31 UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) para 16. See also General Comment No 29 UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001).

<sup>73</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law UN Doc A/RES/60/147 (16 December 2005) Preamble and Principles 2(b) 3(c) 18.

<sup>74</sup> ME O'Connell, 'The Law on Lethal Force Begins with the Right to Life' (2016) 3 J on the Use of Force and Intl L 205.

<sup>75</sup> (n 19) Concurring Opinion 6.

<sup>76</sup> D'Errico (n 7) 1200 ff.



posals are still partial (for instance, they are limited to US citizens, ignoring the universal scope of human rights instruments),<sup>77</sup> but at least have the merit of questioning the PQD in its very essence. The chance that drone strikes become a 'no-go' area for judicial control is perceived as unacceptable even to scholars belonging to the motherland of such doctrine.

In sum, it is safe to conclude from the above that both the current practice of drone operations and the relevance of the right to access to justice require a re-appraisal of the PQD so that, far from being discarded altogether, it can be applied via a variable-intensity model of judicial review. In this sense, our findings here do but *confirm* an intuition that legal scholarship has already put forward, albeit with respect to different scenarios.

## 6. *Concluding Remarks*

Moving from two recent cases, our analysis has demonstrated that the argument whereby the application of the PQD by domestic courts effectively impinges on the effectiveness of international law holds all the more true when armed drones are involved. The 'outsized power' of conducting surgical strikes all over the world they bestow upon their users (the Executive) is such that a stubborn resort to the PDQ for the purpose of judicial abdication may prove not only frustrating for the effectiveness of international law, but also deleterious for the effective protection of human rights.

Working solutions must be found in order to protect such rights while preserving the Executive's prerogatives in security and foreign affairs. As has been proposed, an approach based on a pondered balancing of all relevant interests, according to which the intensity of judicial review increases in areas covered by human rights standards, seems convincing. By denying the application of the PQD when international law clearly establishes standards, the Higher Administrative Court reaches a more acceptable conclusion than the DC Circuit – whose decision, however, has the merit of exposing the inherent contradiction of

<sup>77</sup> *ibid* 1214.

the PQD when applied to acts emanating from an Executive's 'outsized power'.

At the end of the day, the cases commented above prove that the application of the PQD to drone strikes is such that not only could States perform targeted killings across the globe in contravention of applicable international law, but they could also benefit from a self-made vacuum of accountability before courts.<sup>78</sup> Thus, in face of a power that tends to transcend any checks and limits, it is possibly more important than ever to restate that it is up to Law – according to its Greek etymon, *nomos*, thus 'measure' – to restore appropriate boundaries.

<sup>78</sup> The conclusions of Gervasoni (n 2) are totally shared here.

