

Challenging German Support for U.S. Lethal Drone Strikes

March 2019

A Somali Herdsman Sues Germany over Drone Killing

On Wednesday, March 13, the Higher Administrative Court of North Rhine-Westphalia in Münster will hear arguments from lawyers representing a Somali herdsman whose innocent father was killed in a U.S. drone strike in February 2012.

The original complaint, filed in 2015, argues that allowing U.S. bases on German territory to support such drone strikes violates both the German constitution as well as Germany's Status of Forces Agreements with NATO, under which U.S. forces are granted the right to operate on its territory while respecting German law. It seeks a judicial declaration that Germany has committed these violations.

What does the plaintiff want to get out of this case?

This case raises important questions about Germany's role in supporting unlawful US drone killings. But it is also a personal quest for justice by our client for the illegal killing of his father, an innocent Somali herdsman.

Our client's father went out with his camels one day and never returned. Our client went searching for him and found his body severed in two near a burnt vehicle that had been struck by a drone.

This would not have happened had the German government enforced German law on the US Air base in Ramstein, which provides indispensable support for drone strikes in Somalia. This is why we brought this case on our client's behalf in Germany.

Our client seeks a court judgement finding that the German government has failed to ensure that German law is respected on the US air base in Ramstein. By participating in this case, the client is putting himself and his family at considerable personal risk with no prospect of material gain.

What does the Open Society Justice Initiative want to get out of this case?

This case is part of a broader effort by the Justice Initiative to set the highest possible standards for accountability for the use of armed drones, particularly outside conventional war zones.

The Open Society Foundations, and the Justice Initiative, work to constrain the use of armed drones for targeted killings outside of traditional battlefields in a manner that promotes the rule of law, protects human rights, and fosters transparency and accountability with respect to the use of force.

Why does this case matter?

Aside from our client's search for justice, this case highlights how, with German support, the United States has carried out illegal killings as part of its "War on Terror" doctrine—which represents a threat to the rule of law everywhere.

At the time, the U.S. was not party to an armed conflict in Somalia, which means that the U.S. actions should be assessed under national and international human rights law, and not the looser standards for constraining killing under the laws applicable to armed conflict. The killing of the innocent herdsman was both a criminal act and a violation of his rights. Yet no government has acknowledged the killing and there has been no



Open Society Foundations
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224 West 57th Street,
New York, New York, 10019
P. +1 212-548-0600
opensocietyfoundations.org

investigation into the killing; no one has been held to account; and no compensation has been paid to the victim's family.

What's current US policy on drone strikes?

The U.S. has stepped up its use of drones in Somalia and other areas, while easing Obama-era reporting requirements aimed at checking civilian casualties.

Our client's father was killed in February 2012. In 2013, President Obama declared that beyond the Afghan war theater, "before any strike is taken, there must be near-certainty that no civilians will be killed or injured." He also said that the U.S. would only carry out strikes "against terrorists who pose a continuing and imminent threat to the American people." Yet the process of review for approving strikes remained secret, and the U.S. continued to report only selective information on strikes and the casualties resulting. These became known as the "Presidential Policy Guidance" on the use of airstrikes.

In 2016, Obama approved an Executive Order requiring the Director of National Security (DNS) to issue an annual public report on the number of U.S. airstrikes carried out outside "areas of active hostilities," together with the number of casualties, including both combatants and non-combatants.

In March 2017, President Trump declared several areas of Somalia to be "areas of active hostilities" as part of an intensified military effort against al-Shabaab. This month, he repealed the Obama-era requirement for the DNS to make public data on airstrikes.

Meanwhile, the scale of the United States has conducted at least 103 drone strikes in Somalia, according to monitoring by New America, a Washington DC based policy center, compared to 31 during President Obama's eight years in office. Forty-four strikes occurred during the past six months.

What is the role of the Open Society Justice Initiative?

The legal work in Germany of the Justice Initiative is part of a broader effort by the Open Society Foundations to push for more transparency in the administration of the U.S. lethal drone program.

The Open Society Justice Initiative is part of the Open Society Foundations, the largest private funder of human rights work around the world, founded by philanthropist George Soros.

The Justice Initiative's previous litigation on national security-related abuses has included winning judgments from the European Court against Poland, Romania and North Macedonia for collaborating with the United States' Central Intelligence Agency in secretly detaining, torturing and "rendering" individuals captured in the so-called "war against terror." The Justice Initiative has published *Death by Drone: Civilian Harm Caused by U.S. Targeted Killings in Yemen*, detailing civilian casualties caused by U.S. airstrikes carried out between 2012 and 2014.

The legal work in Germany of the Justice Initiative is part of a broader effort by the Open Society Foundations to push for more transparency in the administration of the U.S. lethal drone program.

Last year, the Open Society Foundations opened a regional headquarters in Berlin.

Summary of the Case

Since 2002, the US has been using targeted drone attacks to kill people suspected of being involved in terrorism. Others often die in the process – in Afghanistan, Pakistan, Somalia and in Yemen.

In the February 2012, an innocent Somali herdsman was killed in a drone attack in Somalia, that was directed against British-born Mohamed Sakr, a suspected member of the Al-Shabaab group who was also killed in the attack.

Following the killing, the herdsman's family received no acknowledgement of the killing, or apology, or compensation of any kind.

The United States has not officially acknowledged killing him. Germany has not officially acknowledged its role in supporting U.S. drone strikes. There has been no known investigation into his case.

Eberhard Kempf, Victor Pfaff, and Natalie von Wistinghausen, with support from the Open Society Justice Initiative, are now representing the herdsman's son in legal action against Germany, based on the fact that U.S. bases on Germany soil are used to support drone attacks in Africa.

The son has requested to remain anonymous because of security concerns

Legal Background

1) Administrative Law Challenge

Our complaint, filed in 2015, argues that allowing U.S. bases on German territory to support such drone strikes violates both the German constitution as well as Germany's Status of Forces Agreements with NATO, under which U.S. forces are granted the right to operate on its territory while respecting German law. It seeks a judicial declaration that Germany has aided and abetted these violations.

However, in April 2016, the lower administrative court in Cologne ruled the case was inadmissible, finding there was an insufficient link between the inaction of the German government and the constitutional rights of the complainant.

On Wednesday, March 13, the Higher Administrative Court of North Rhine-Westphalia will consider the complainant's appeal against that ruling.

2) Criminal Law Challenge

A separate criminal complaint was filed before the state prosecutor of Zweibrücken in September 2015, calling for a criminal investigation into the killing of the two men.

The complaint asserted that German officials are jointly responsible for the deaths of the two men because Germany hosts two U.S. military facilities indispensable for planning and operating drone strikes in Africa: the U.S. Air Force base at Ramstein, which plays a crucial role in conducting U.S. drone operations worldwide, and the U.S. military's African command headquarters (AFRICOM) in Stuttgart, which is responsible for all military operations in Africa.

On May 29, 2017, the Stuttgart prosecutor's office refused to investigate the role of AFRICOM in the drone strike. On June 13, 2017, the Zweibrücken prosecutor declined to investigate the role of the U.S. base at Ramstein.

The prosecutors claimed that there were insufficient indications that a criminal act had been committed. They asserted that the German government did not have a duty to

prevent illegal criminal acts by states who had authority to use facilities on German soil. With respect to the criminal liability of U.S. personnel, prosecutors argued that it was up to the United States to prosecute them under the applicable NATO Status of Forces Agreement.

The legal team subsequently filed an application to the Higher Regional Court of Zweibrücken arguing that the prosecutors had failed to conduct an effective investigation, that the United States' so-called "global war on terrorism" is not justifiable under German law, and that the German government has a duty to prevent any U.S. military action under that category that is supported from German territory. The application seeks an order directing the prosecution to conduct the necessary investigations which they have failed to undertake until now.

The **Open Society Justice Initiative**, part of the Open Society Foundations, uses strategic litigation and other kinds of legal advocacy to defend and promote the rule of law, and to advance human rights. We pursue accountability for international crimes, support criminal justice reforms, strengthen human rights institutions, combat discrimination and statelessness, challenge abuses related to national security and counterterrorism, defend civic space, foster freedom of information and expression, confront corruption and promote economic justice. In this work, we collaborate with a community of dedicated and skillful human rights advocates across the globe, and form part of a dynamic and progressive justice movement that reflects the diversity of the world.
