

In an order published today, the Second Chamber of the Second Senate of the Federal Constitutional Court did not admit for decision a constitutional complaint, submitted by a Palestinian complainant living in Gaza, concerning licenses granted for the export of military equipment to Israel.

The Basic Law (*Grundgesetz* – GG) requires the German State to protect international humanitarian law and international human rights. Under certain circumstances, this general mandate may amount to a concrete obligation to protect the life of individuals living abroad. State organs have a wide margin of appreciation in choosing how to fulfil this general mandate and any concrete duties to protect individuals that may arise. As a general rule, an individual cannot claim that specific steps or measures must be taken.

It is for the ordinary courts to decide whether an exception must be made from this general principle when deciding an individual case. The Federal Constitutional Court examines whether the ordinary courts have failed to recognise the significance and scope of fundamental rights, namely of a duty of protection arising under Art. 2(2) first sentence of the Basic Law, or have denied such a duty in an objectively arbitrary manner. Complainants must show that the decisions taken by the ordinary courts are based on a violation of constitutional rights that may be examined by the Federal Constitutional Court.

In the case at hand, the complainant did not sufficiently demonstrate that the ordinary courts failed to recognise a duty of protection under Art. 2(2) second sentence of the Basic Law or that they denied such a duty in an objectively arbitrary manner. It is not objectionable under constitutional law that the ordinary courts found that the provisions of the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz* – AWG) and the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung* – AWV) do not convey protection on third parties and that a constitutional duty of protection does not grant legal standing to challenge licences for the export of military equipment. Therefore, it was not necessary to decide whether the general mandate to protect human rights and international humanitarian law even gave rise to a specific duty of protection in the present case.

Facts of the case:

The Federal Office for Economic Affairs and Export Control granted the export licenses that form the subject of these proceedings. These export licenses are immediately enforceable. The complainant initiated third party objection proceedings against granting the licenses and petitioned the Administrative Court to order the suspensive effect of the objection by way of preliminary legal protection. The complainant argued that the export licenses violate a specific duty of protection with regard to his right to life. He argued that – for compatibility with the constitution – the relevant provisions of foreign trade law

had to be interpreted so as to convey protection on third parties. In the present case, the discretion afforded to administrative bodies was limited in such a way that revoking the export licenses previously granted was the only option.

The Administrative Court rejected the petition to order suspensive effect. It held that the complainant lacked legal standing, because the legal provisions in question did not convey actionable individual rights. A complaint lodged against this decision was rejected by the Higher Administrative Court (*Verwaltungsgerichtshof*). It held that the Administrative Court's finding that the complainant lacked legal standing was justified.

With his constitutional complaint, the complainant challenges the orders of the Administrative Court and the Higher Administrative Court as well as the export licenses granted by the Federal Office for Economic Affairs and Export Control. He asserts a violation of his fundamental rights under Art. 2(2) first sentence of the Basic Law and Art. 19(4) first sentence of the Basic Law.

Key considerations of the Chamber:

The complainant did not sufficiently demonstrate that the ordinary courts, in considering whether he had legal standing, unreasonably restricted his right of access to the courts by failing to recognise the significance and scope of the duty of protection that may have existed vis-à-vis the complainant under Art. 2(2) second sentence of the Basic Law or by denying such a duty in an objectively arbitrary manner.

1. According to the case-law of the Federal Constitutional Court, the fundamental right to life and physical integrity under Art. 2(2) first sentence in conjunction with Art. 1(2) of the Basic Law and the Basic Law's principle of openness to international law entails a general mandate of protection with regard to international humanitarian law and the applicable human rights. Under certain conditions, this general mandate of protection can give rise to a specific duty of protection.

However, state organs are generally free to decide within their own responsibility how they choose to fulfil this general mandate and any specific duties of protection that may arise. Art. 2(2) first sentence of the Basic Law, Art. 1(2) of the Basic Law and the Basic Law's principle of openness to international law do not prescribe specific steps or measures that must be taken. Rather, in fulfilling such duties of protection, the legislator and the executive are afforded a wide margin of assessment, appreciation and design, which must be respected by the Federal Constitutional Court. Furthermore, in foreign policy matters, the Basic Law grants the Federal Government wide latitude for autonomous decision-making in the exercise of its functions.

2. In considering the standards set forth above, no violation of specific constitutional law can be identified from the complainant's submissions.

In recognition of their general mandate of protection with regard to human

rights and international humanitarian law, the legislator and the executive have created a protective legal framework for the export of military equipment, which takes human rights and international humanitarian law into account.

The applicable provisions of foreign trade law, of the Arms Trade Treaty and the standards set by European Union law in the form of the Council Common Position 2008/944/CFSP each dictate that when assessing an application for licenses for the export of military equipment, it must be examined whether such export entails risks for compliance with international humanitarian law and international human rights. If the existing risk exceeds a certain threshold, such licenses must be denied.

The constitution does not require that this extensive scheme of protection is generally extended so as to grant legal standing to third parties. Due to the wide margin of assessment, appreciation and design afforded to public authority, the general mandate of protection for human rights and international humanitarian law generally does not require granting third parties legal standing to individually challenge specific measures taken in the area of armament and security policy. A legal regime that is structured in a purely objective way and thus does not grant legal standing to third parties can be sufficient to fulfil this mandate, if – as is the case here – potential risks to human rights and the adherence to international humanitarian law have been appropriately accounted for.

3. The complainant also did not sufficiently demonstrate that the considerations of the ordinary courts, based on which they denied the right of the complainant to challenge the measures in question as a third party on the basis of a duty of protection, could raise concerns under constitutional law. Whether the general mandate of protection that exists with regard to human rights and international humanitarian law even gave rise to a specific duty of protection in the present case does not need to be decided.

Generally, a duty of protection does not give rise to specific actionable rights that would be enforceable by individuals before the courts. It is only under very specific circumstances that the latitude afforded to public authority is limited in such a way that only one specific measure can fulfil the duty of protection.

In a way that is unobjectionable under constitutional law, the ordinary courts determined that the legislator and the executive did not fail to take action, but have created a general framework of protection in order to effectively address the risks of exports of military equipment for human rights and to ensure compliance with international humanitarian law. The same applies to the finding that the legislator and the executive took specific measures with regard to the Israeli military offensive and the catastrophic humanitarian situation in Gaza.

In light of this, the complainant did not sufficiently address the requirements for the very specific circumstances under which a potential duty of protection

may be narrowed down in such a way as to give rise to a claim that a specific measure must be taken.