

Extraterritorial Application of Human Rights Law – New Developments with regard to Germany

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A. Introduction: The ECHR's Position in Germany

I. Constitutional Framework

Since its inception in 1949, the Federal Republic of Germany emphasises the value of human rights law and it takes pride in putting human rights at the centre of the entire legal order. Consequently, the very first provision of the German Constitution, the Basic Law or *Grundgesetz* (GG), states in the first paragraph: '(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' The German people acknowledge in the second paragraph that inviolable and inalienable human rights are not only the basis of every community, but of peace and of justice throughout the world. The legislature, the executive and the judiciary branch are bound to the following basic rights in art. 2–19 GG as directly applicable law by the third paragraph.

II. The ECHR's position in the German Legal Order

Germany is one of ten original members of the Convention for the Protection of Human Rights and Fundamental Freedoms, or as it is colloquially known, the European Convention on Human Rights (ECHR). Thus, this international instrument binds the state of Germany since September 1953. There already had been some debate about the position and effects of the ECHR within the German legal order when, in 1987, the German Federal Constitutional Court entered the debate. The case concerned the legal status of the presumption of innocence as included in the ECHR. In its judgment,¹ the Federal Constitutional Court noted that the *Grundgesetz* did not contain an explicit presumption of innocence, while the ECHR

1 BVerfG, Decision, 26 March 1987, *BVerfGE* 74, 358.

does in art. 6 (2). The Court was then left with the task of combining the two, meaning the Basic Law and the ECHR. And while the accurate reasoning can be left aside here, the result needs to be mentioned. The Court held that in interpreting the German constitution one must take into account the guarantees of the Convention and the decisions of the ECtHR.² Later the Court added that this was only possible ‘as part of a methodologically justifiable interpretation of the law’.³ In addition, the Court warned that any ‘failure to consider a decision of the ECHR and the “enforcement” of such a decision in a schematic way, in violation of prior-ranking law, may therefore violate fundamental rights in conjunction with the principle of the rule of law.’⁴

In other words: The German legal system strongly upholds the position of the ECHR in particular, and human rights law in general. This holds true – at least in practice, if not by law – for military operations abroad as well.⁵ However, this is where the challenges arise: Is human rights law applicable to military operations abroad? What are the new developments since the infamous *Banković* judgment of late 2001? What are the consequences of the German Federal Constitutional Court’s new approach with regard to art. 1 (3) GG?

This article will examine the legal challenges behind these questions. It will attempt to answer them in light of the recent jurisprudence. First, the applicability of human rights law needs to be evaluated. Second, the general framework and jurisprudence for extraterritorial application of the ECHR will be presented, which is then, third, accompanied by an analysis of newer case law. The fourth part focuses on the recent judgment of the Federal Constitutional Court regarding the Federal Intelligence Service followed by, fifth, the conclusion attempting to combine both lines of reasoning.

2 *Id.*, (370).

3 BVerfG, Decision, 14 October 2004, *BVerfGE* 111, 307 (323).

4 *Ibid.*

5 *Cf.* German Federal Ministry of Defence, *Law of Armed Conflict Manual* (2013), para. 105.

B. Human Rights Law in Times of Armed Conflict

I. General Relationship between the two Regimes

In times of both international and non-international armed conflict, the law of armed conflict applies. International humanitarian law, also known as the law of war, also applies in other situations that are not *prima facie* seen as an ‘armed conflict’ but are, nevertheless, considered an ‘armed conflict’ by law. Such situations include belligerent occupations and joint military operations.⁶

Not until two decades ago, the overwhelming majority of courts and legal scholars were of the opinion that human rights law and the law of armed conflict were mutually exclusive.⁷ This view is no longer widely held, but it explains why the extent that human rights law applies in times of armed conflict remains uncertain.⁸

Jurisprudence is divided on the legal framework regulating the relationship. Some authors argue for a merging of the regimes,⁹ while others describe the relationship with the traditional conception of IHL as *lex specialis* and human rights law as *lex generalis*¹⁰ or with the related concept

6 De Schutter, *International Human Rights Law* (2010), 125; Dinstein, *The International Law of Belligerent Occupation* (2009), 161 ff.

7 For the historical evolution of the relationship, see Kolb, ‘Human Rights and Humanitarian Law’ in Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2013), paras. 3 ff., <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e811?rskey=RO20SF&result=1&prd=MPI>; Droege, ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 40 *Israel Law Review*, 310.

8 Sivakumaran, ‘International Humanitarian Law’ in Moeckli et al. (eds), *International Human Rights Law* (2010), 521 (530 ff.); Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2010), paras. 44 ff.; Kleffner, ‘Human Rights and International Humanitarian Law: General Issues’ in Gill and Fleck (eds), *The Handbook of the International Law of Military Operations* (2010), 51 (para. 4.02).

9 Further reference provided by Kolb, ‘Human Rights and Humanitarian Law’ in Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2013), para. 30, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e811?rskey=RO20SF&result=1&prd=MPIL>, and by Sivakumaran, ‘International Humanitarian Law’ in Moeckli et al. (eds), *International Human Rights Law* (2010), 521 (530 ff.).

10 Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2010), paras. 44 ff.

of *renvoi*, meaning IHL making references to human rights law, and vice versa, both benefiting from one another and drawing from each others principles.¹¹ However, for the present purpose this dispute is beside the point, as the practical effects remain the same regardless of the line of arguments. Therefore, the lawyer is responsible for working out:

with precision areas and questions where the coordinated application of provisions of both branches of the law leads to satisfactory — if not innovative — solutions, securing progress of the law or filling its gaps. [...] The point is not one of derogation by priority [...] but rather one of complex case-by-case mutual reinforcement and complement always on concrete issues. Thus, rather than stressing mutual exclusiveness, be it specialty or priority, it would be better to focus on two aspects: a) gap filling and development of the law by coordinated application of norms of HRL in order to strengthen IHL and vice versa; b) interpretation allowing an understanding of one branch in the light of the other normative corpus in all situations where this is necessary, i.e. in armed conflict or occupation.¹²

This is also the view of the International Court of Justice (ICJ).¹³ It subscribed itself to such a reasoning when it was faced with problems regarding the right to life (art. 4 (1) International Covenant on Civil and Political Rights (ICCPR)) in armed conflict. The Court held that even if the other criteria required by Art. 4 (1) ICCPR are met, art. 4 (2) ICCPR expressly prohibits a derogation of the right to life.

In war, lives are violently ended. This is more than a matter of fact; it is a matter of law: IHL runs counter to the human right concerning extra-judicial deprivation of life.¹⁴ How can both regulations be brought in conformity? This is the point where the nature of IHL as *lex specialis* comes into play. Consequently, the ICJ stated in the Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons:

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- 11 Kolb, 'Human Rights and Humanitarian Law' in Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2013), paras. 35 ff., <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e811?rskey=RO20SF&result=1&prd=MPII>.
- 12 *Id.*, para. 60, seems to subscribe to this view
- 13 ICJ, Advisory Opinion, 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996)
- 14 Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2010), para. 56.

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹⁵

II. Derogations from Human Rights Law in Armed Conflict and other Public Emergencies

In addition to the overall relationship, there may be situations in which states depart from their human rights obligations. Derogating from human rights law is lawful only in exceptional circumstances, such as if a state of public emergency exists. Most prominently, art. 4 ICCPR provides that in:

time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.¹⁶

Case law has identified five prerequisites that need to be fulfilled before a State may lawfully derogate from its human rights obligations:¹⁷ a state of public emergency that threatens the life of the nation;¹⁸ the measures

15 ICJ, Advisory Opinion, 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), para. 25.

16 Cf. also UN Human Rights Committee ('UN HRC'), *General Comment 29, States of Emergency (Article 4)*, 24 July 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, paras. 2 ff.; De Schutter, *International Human Rights Law* (2010), 513 ff. Similar provisions are art. 15 (1) ECHR and art. 27 ACHR.

17 UN HRC, *General Comment 29, States of Emergency (Article 4)*, 24 July 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, paras. 2 ff. Cf. also De Schutter, *International Human Rights Law* (2010), 514.

18 This will only be the case in exceptional circumstances. UN HRC, *General Comment 29, States of Emergency (Article 4)*, 24 July 2001, UN Doc. CCPR/C/21/Rev.1/

derogating from the human rights in question are limited to the extent strictly required by the exigencies of the situation;¹⁹ these measures are non-discriminatory and are applied in a non-discriminatory fashion; the State observes its other obligations under international public law;²⁰ and relevant procedural safeguards are observed.²¹ Additionally, some human rights are non-derogable, even in a state of emergency.²² Hence, an armed conflict does not automatically allow derogation. Regardless of whether they are performed in an international or a non-international armed conflict, measures derogating from the Covenant are allowed only if and to the extent that the armed conflict constitutes a threat to the life of the nation.²³

Add.11, para 3. Under the ECtHR, not every ‘war’ amounts to such an exception. ECtHR, Judgment, 1 July 1961, *Lawless v Ireland* (no. 3), Application No. 332/57, para. 38; ECtHR, Decision, 12 December 2001, *Banković and Others v Belgium and 16 Other Contracting States*, Application No. 52207/99, para. 62. What kind of a factual situation amounts to a public emergency in the meaning of art. 15 ECHR is, first and foremost, an assessment to be made by each government ‘as the guardian of their own people’s safety’, but subject to judicial review by the UN HRC or the ECtHR. Cf. ECtHR, Judgment (GC), 19 February 2009, *A. and Others v United Kingdom*, Application No. 3455/05, paras. 180 ff.

- 19 The limitation to the exigencies of the situation is basically a limitation according to the principle of proportionality and concerns the overall application of human rights, not the instance of a single infringement as this infringement may be justified for reasons of proportionality.
- 20 Meaning the respective other instruments of human rights law.
- 21 In essence, this means that the emergency has to be officially proclaimed and notified to the other parties to the respective instrument.
- 22 The ICCPR allows no arbitrary derogation from the right to life (art. 6 ICCPR), the prohibition of torture (art. 7 ICCPR), the prohibition of slavery and servitude (art. 8 (1), (2) ICCPR), imprisonment for failure to fulfil a contractual obligation (art. 11 ICCPR), liberty (art. 12 ICCPR), *nulla poena sine lege* (art. 15 ICCPR), recognition as a person before the law (art. 16 ICCPR) and freedom of thought, conscience and religion (art. 18 ICCPR). The ECHR does not allow derogation from the prohibition of torture (art. 3 ECHR), the prohibition of slavery and servitude (art. 4 (1) ECHR) and no punishment without law (art. 7 ECHR). The right to life (art. 2 ECHR) may only be infringed by lawful acts of war.
- 23 UN HRC, *General Comment 29, States of Emergency (Article 4)*, 24 July 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 3.

C. Extraterritorial Applicability of Human Rights Law

Having established that human rights law generally applies in times of armed conflict despite the possibility to derogate from specific obligations, it is crucial to assess if human rights law applies extraterritorially. If this is not the case, this would mean that military operations outside of a state's own territory would regularly not be measured against human rights law. In other words, claims that a specific attack violated human rights would be unfounded: a bold statement, the merits of which need to be assessed.

State parties to the human rights instruments must provide protection to anyone 'within' (art. 1 ECHR) or 'subject to' (art. 2 (1) ICCPR; art. 1 (1) American Convention on Human Rights; art. 3 (1) Arab Charter on Human Rights) their jurisdiction.²⁴ This concept, based on the sovereign equality of States,²⁵ is primarily territorial.²⁶ Everyone on the territory of a State party is entitled to protection according to the respective treaties. However, this territorial approach does not mean that human rights law is only applicable to the national territory of a State party. In the words of the ECtHR:

The concept of 'jurisdiction' under article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts

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- 24 ECtHR, Judgment (GC), 23 March 1995, *Loizidou v Turkey (preliminary objections)*, Application No. 15318/89, para. 62; UN HRC, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 10; De Schutter, *International Human Rights Law* (2010), 125; Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (2005), art. 2, para. 29; Wenzel, 'Human Rights, Treaties, Extraterritorial Application and Effects' in Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2008), para. 4, [https://opil.o uplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e819?rsk ey=wEyE5m&result=1&prd=MPIL](https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e819?rsk ey=wEyE5m&result=1&prd=MPIL); Kleffner, 'Human Rights and International Humanitarian Law: General Issues' in Gill and Fleck (eds), *The Handbook of the International Law of Military Operations* (2010), 51 (para. 4.01.); Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 32 *European Journal of International Law* 32, 121 (122).
- 25 ECtHR, Decision, 12 December 2001, *Banković and Others v Belgium and 16 Other Contracting States*, Application No. 52207/99, para. 59.
- 26 De Schutter, *International Human Rights Law* (2010), 124; art. 2 (1) ICCPR; art. 1 ECHR; art. 1 (1) ACHR; art. 26, 34 (5) Arab Charter on Human Rights; ICJ, Advisory Opinion, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), 136 (para. 112).

and omissions of their authorities which produce effects outside their own territory.²⁷

Thus, the term ‘jurisdiction’ is neither equivalent to, nor interchangeable with, ‘attributability’²⁸ or ‘territory’. However, because human rights obligations are primarily territorial, other bases of jurisdiction are exceptional and require a special justification in the particular circumstances of each case.²⁹ Case law has identified two exceptions; one definition is guided by a spatial approach and the other by a personal approach to ‘jurisdiction’, each demanding ‘effective control’ over territory or, respectively, a person. The personal approach will be left out of this analysis.³⁰

The spatial approach requires effective control over territory.³¹ It does not require detailed control over the policies and actions of the authorities in question.³² ‘Rather, ‘effective overall control’ is sufficient.’³³ The ECtHR has held a State responsible:

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- 27 ECtHR, Judgment (GC), 18 December 1996, *Loizidou v Turkey (merits)*, Application No. 15318/89, para. 52. Cf. also ECtHR, Judgment, 26 June 1992, *Drozdz and Janousek v France and Spain*, Application No. 12747/87, para. 91; ECtHR, Judgment (GC), 23 March 1995, *Loizidou v Turkey (preliminary objections)*, Application No. 15318/89, para. 62.
- 28 De Schutter, *International Human Rights Law* (2010), 123; Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8 *Human Rights Law Review*, 411 (436 ff.).
- 29 ECtHR, Decision, 12 December 2001, *Banković and Others v Belgium and 16 Other Contracting States*, Application No. 52207/99, para. 61.
- 30 Cf. Frau, ‘Unmanned Military Systems and Extraterritorial Application of Human Rights Law’ (2013) 1 *Groningen Journal of International Law*, 1 (1 ff.), for a detailed analysis.
- 31 It used to be important whether or not the territory over which effective control is exercised belongs to the ‘legal space’ of the convention, cf. ECtHR, Decision, 12 December 2001, *Banković and Others v Belgium and 16 Other Contracting States*, Application No. 52207/99, para. 80. The ECtHR denounced this concept in later cases (see ECtHR, Judgment (GC), 7 July 2011, *al-Skeini and Others v The United Kingdom*, Application No. 55721/07, para. 142).
- 32 ECtHR, Judgment (GC), 18 December 1996, *Loizidou v Turkey (merits)*, Application No. 15318/89, para. 56.
- 33 Kleffner, ‘Human Rights and International Humanitarian Law: General Issues’ in Gill and Fleck (eds), *The Handbook of the International Law of Military Operations* (2010), para. 4.01.40, with reference to ECtHR, Judgment (GC), 18 December 1996, *Loizidou v Turkey (merits)*, Application No. 15318/89, para. 56; Lawson, ‘Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights’ in Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004), 51 (83 ff. and 98).

when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.³⁴

The question of whether or not a State exercises effective overall control is a matter of fact, not a matter of law.³⁵ Effective control can be a consequence of military action, whether lawful or unlawful, or as part of a peace operation outside of a State's national territory. Under the universal human rights instruments, (belligerent) occupation entails effective control,³⁶ while the ECtHR decided this question on very formal criteria.³⁷ However, bearing in mind the definition,³⁸ it becomes evident that a belligerent occupation will in most cases amount to an exercise of effective control.³⁹

The ECtHR has developed this approach in the *Banković* case of 2001. This most prominent case involved casualties caused by air attacks outside of the state parties territories. During one night in its Kosovo Air Campaign in 1999, NATO forces attacked 24 targets in Serbia, three of which in Belgrade. One target in Belgrade included a building housing *Radio Televizije Srbije (RTS)*, which was destroyed. The attack caused 16 casualties. In essence, the Court declined to find that an aerial bombardment could constitute effective control.

34 ECtHR, Decision, 12 December 2001, *Banković and Others v Belgium and 16 Other Contracting States*, Application No. 52207/99, para. 71.

35 Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review*, 411 (423).

36 UN HRC, *Concluding Observations on Israel*, 21 August 2003, UN Doc. CCPR/CO/78/ISR (2003), para. 11; UN HRC, *Concluding Observations on Israel*, 18 August 1998, UN Doc. CCPR/C/79/Add.93, para. 10; Kleffner, 'Human Rights and International Humanitarian Law: General Issues' in Gill and Fleck (eds), *The Handbook of the International Law of Military Operations* (2010), 51 (para. 4.01.39).

37 Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 32 *European Journal of International Law* 32, 121 (130).

38 *Benvenisti*, 'Occupation, Belligerent' in Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2009), para. 1, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e359?rskey=iGPpVg&result=1&prd=MPIL>.

39 Also ECtHR, Judgment (GC), 23 March 1995, *Loizidou v Turkey (preliminary objections)*, Application No. 15318/89, paras. 62 ff.; ECtHR, Judgment (GC), 8 July 2004, *Ilaşcu and Others v Moldova and Russia*, Application No. 48787/99, paras. 382 ff.

D. New Developments in Jurisprudence

I. European Court of Human Rights: *Al-Skeini*

In 2011, the Court adapted the findings in *Banković* in the *al-Skeini* decision. The *al-Skeini* decision dealt with an operation gone awry during the occupation of Iraq in 2003. A British patrol had encountered several armed Iraqi men and opened fire. While the soldiers believed themselves to be in a situation of self-defence, the men were participating in a funeral, where it is customary for guns to be discharged. After reviewing the incident, the commanding officer was satisfied that the soldier's actions were in line with the rules of engagement, and he did not proceed with further investigations. The Court held that the United Kingdom had jurisdiction and thus the ECHR applied to this incident. In this decision, the Court stated that

it is clear [...], whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'.⁴⁰

This judgment is seen as a cautious departure from the *Banković* ruling. Still, the situation in Iraq in 2003 was vastly different than the situation in Serbia in 1999. Most importantly, the UK had troops on the ground in Iraq while no such troops were present in 1999. However, two recent cases raise doubts about the applicability of human rights law in future cases.

II. European Court of Human Rights: *Hanan*

States and legal scholars eagerly awaited the *Hanan* decision of the ECtHR. The *Hanan* case deals with the infamous Kunduz air attack of 4 September 2009, in which a German colonel asked for American air support in attacking a target. This case has been dealt with extensively by German Courts, including the Federal Constitutional Court.⁴¹ Mr Hanan claims that the

40 ECtHR, Judgment (GC), 7 July 2011, *al-Skeini and Others v The United Kingdom*, Application No. 55721/07, para. 137.

41 BVerfG, Decision, 19 June 2015, 2 BvR 987/11.

German investigation into the air strike, which killed his sons, was not effective. What made the case so anxiously awaited was the fact that the chamber referred the case to the Grand Chamber, which in turn held oral arguments in early 2020. Such a referral is usually seen as making room for a landmark ruling.⁴²

In February 2021 the Court finally rendered its ruling.⁴³ Given the fact that the applicant exclusively complained under the procedural limb of art. 2 ECHR, in other words the duty to investigate civilian deaths,⁴⁴ the decision had only a very narrow aspect at its center. It concentrated on the issue of a possible jurisdictional link between the state and the victim's relatives in order to assess the admissibility.⁴⁵ With regard to the merits the Court assessed whether or not the standards of art. 2 ECHR were adhered to.⁴⁶ Here, a detailed analysis was made.⁴⁷ With regards to "effective control" outside of Germany's territory nothing substantial for the present purposes was added. The Court, in other words, failed to use the opportunity to re-design its approach to extraterritorial applicability overall, chose to keep close to the case, and avoided possible far-reaching *obiter dicta*. The Court took the most restrictive approach to come to its decision. The *Hanan* decision is a landmark decision with regard to the extraterritorial obligation to investigate civilian deaths – not more, especially not a decision on the extraterritorial applicability of other rights enshrined in the ECHR. This way, the Court could delve into the merits instead of focusing on the contentious issue of jurisdiction.⁴⁸ The Court did not overturn or adapt the *Banković* standard; the Grand Chamber did not re-interpret art. 1 ECHR and found a more encompassing understanding of 'jurisdiction', thus making human rights law applicable to more situations of extraterritorial actions.

42 Cf. also Steiger, '(Not) Investigating Kunduz and (Not) Judging in Strasbourg? Extraterritoriality, Attribution and the Duty to Investigate', EJIL:Talk!, 25 February 2020, <https://www.ejiltalk.org/not-investigating-kunduz-and-not-judging-in-strasbourg-extraterritoriality-attribution-and-the-duty-to-investigate/#more-17951>.

43 ECtHR, Judgment (GC), 16 February 2021, *Hanan v Germany*, Application No. 4871/16.

44 *Id.*, para. 132.

45 *Id.*, para. 135.

46 *Id.*, paras. 200 ff.

47 *Id.*, paras. 211 ff.

48 Cf. ECtHR, Judgment (GC), 29 January 2019, *Güzelyurtlu and Others v Cyprus and Turkey*, Application No. 36925/07, paras. 188 f.

The ECtHR did not take into account the new approach by the German Federal Constitutional Court, which clearly opts for a wider applicability of human and fundamental rights.

III. *The new German Approach*

In May 2020, the German Federal Constitutional Court decided a case concerning the powers of the Federal Intelligence Service to conduct strategic telecommunications surveillance.⁴⁹ In essence, the case dealt with the applicability of German law to extraterritorial actions with no relation to German nationals or territory. Centred around art. 1 (3) of the Basic Law, the Court examined the territorial scope of national basic rights (*Grundrechte*). As mentioned before, art. 1 (3) of the Basic Law reads: ‘The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.’

Very clearly the first headnote to the judgment reads: ‘Under Art. 1 (3) of the Basic Law, German state authority is bound by fundamental rights; this is not restricted to German territory.’ However, according to the Court, the ‘protection afforded by individual fundamental rights within Germany can differ from that afforded abroad.’ For the specific basic protection against telecommunications surveillance the Court found that it protected foreigners in other countries.

How did the Court arrive at its conclusion? It was, in essence, neither a difficult nor a long task. The Court referenced art. 1 (3) GG and quickly stated that the provision did not contain any ‘restrictive requirements that make the binding effect of fundamental rights dependent on a territorial connection with Germany or on the exercise of specific sovereign powers’.⁵⁰ Especially, there is no explicit restriction to German territory included.⁵¹ The Court put emphasis on the fact that the German Constitution is an answer to the atrocities of the Third Reich and consequently a rather human rights-friendly text. The Court recalled German history and stated that in light of human rights abuses committed by German state organs abroad, the lack of such a restrictive element is exactly what it seems to be: a far-reaching obligation to respect human rights. Even more,

49 BVerfG, Judgment, 19 May 2020, 1 BvR 2835/17. An English version is available on the Court’s website: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200519_1bvr283517en.html.

50 *Id.*, para. 88.

51 *Id.*, para. 89.

the *Grundgesetz* aims at placing the individual at its centre and at providing comprehensive fundamental rights protection ‘whenever the German state acts and might thereby create a need for protection – irrespective of where and towards whom it does so.’⁵² This is also due to art. 1 (2) GG putting human rights as the basis of every community, of peace and of justice in the world.

The Court opts for a very broad application of national basic rights. For one, it is not necessary that Germany holds the monopoly of the use of force in order to apply German basic rights.⁵³ Moreover, ‘any action of state organs or organisations constitutes an exercise of state authority that is bound by fundamental rights within the meaning of Art. 1 (3) GG because such actions are performed in the exercise of their mandate to serve the common good.’⁵⁴ There is a corresponding subjective right providing the individual with the possibility to seek remedies for basic rights violations.⁵⁵

In an excursus, the Federal Constitutional Court referenced the jurisprudence of the ECtHR on telecommunications surveillance in order to strengthen its reasoning. The Court explicitly referred to the ECHR’s jurisprudence in the *al-Skeini* case and the criterion of ‘effective control’. While stating that basic rights generally apply extraterritorially, the Court left open the possibility that the scope of personal and material protection may differ between Germany and abroad.

With this judgement it seems to be clear: the German Constitution demands adherence to basic rights by all components of the German state, whether they act domestically or abroad. While this holds true in principle, the circumstances of a specific case may result in different scopes of protection. In essence, the Federal Constitutional Court seems to demand adherence to basic rights even from German armed forces abroad. To summarize: While the ECtHR still maintains that any extraterritorial application of the ECHR is an exception to be justified in each specific circumstance, the Federal Constitutional Court starts by applying human rights everywhere and restricting the applicability depending on the circumstances. By default, the ECHR is not applicable outside of a member state’s territory, the *Grundgesetz* is by default applicable for the exercise of all German public powers, regardless of location.

52 *Id.*, para. 88.

53 *Id.*, para. 90.

54 *Id.*, para. 91.

55 *Id.*, para. 92.

IV. The Federal Constitutional Court's Approach and the Hanan-Case

The ECHR is an international treaty. As such, it is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (art. 31 (1) Vienna Convention on the Law of Treaties (VCLT)). The ECtHR is tasked with interpreting the ECHR.⁵⁶ The Court may take into account not only the text including its preamble and annexes as well as any subsequent practice by state parties (art. 31 (3) (b) VCLT). However, 'subsequent practice' refers to practice in the application of the treaty. It goes without saying that the German *Grundgesetz* is not an international treaty but domestic law. The Federal Constitutional Court is tasked with interpreting the German constitution and its basic rights, which is what the Court did. It neither based its reasoning on the ECHR nor did it explore the depths of 'jurisdiction' as the ECtHR usually does. It would not make sense to adopt the Federal Constitutional Court's interpretation for the ECHR. Thus, the Federal Constitutional Court's judgment cannot be included in the interpretation under Art. 31 (3) (b) VCLT.

However, the ECtHR could at least have referred to the Federal Constitutional Court's approach and acknowledge German constitutional law. After all, it would have made sense to refer to a recent judgement covering a comparable situation of whether fundamental rights apply to the actions by state organs done abroad. The foreign surveillance decision puts the ECtHR nevertheless in a somewhat strange position: if the highest German Court binds the state party's actions to basic rights regardless of where in the world these actions take effect, it may be difficult to argue otherwise in an international setting. A whole lot of jurisprudential work is awaiting the ECtHR, even in light of the *Hanan* case. Not binding specifically Germany's actions abroad feels a little off, because the Federal Constitutional Court placed such an emphasis on German history and the regime of human rights law as a response to Nazi atrocities. This may be the most awkward challenge that the ECtHR must master in future cases.

Still, the Federal Constitutional Court's approach is a signal to the European Court that states are willing to be measured against a human rights standard for actions abroad – maybe to a greater extent than jurisprudence and scholarship were aware of.

56 Art. 19 ECHR.

E. Summary

The extraterritorial application of human rights law is a complicated issue. European human rights law points in the direction of applying this regional standard to measures taken by state parties even outside of Europe. The *Hanan* decision did not clarify the interpretation of the ECHR. From a German perspective, the new jurisprudence of the Constitutional Court needs to be taken into account. National law protecting human rights is at least in general applicable outside German territory as well. However, the challenge of fleshing out the details still exists for jurisprudence and scholarship.

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