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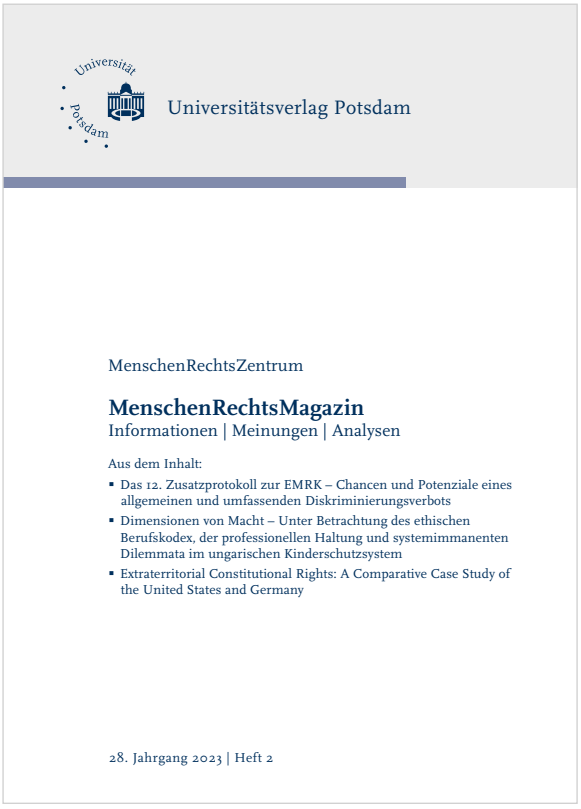

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Extraterritorial Constitutional Rights: A Comparative Case Study of the United States and Germany*

Fritz Kainz

Overview

I. Introduction

In the past decades, scholars and courts have paid considerable attention to the extraterritorial applicability of human rights treaties.[1] By contrast, the extraterritorial application of constitutional rights has received comparable attention only in the United States.[2] The paucity of comparative constitutional research has contributed to the prevailing view that human rights law provides the proper framework under which domestic courts should examine extraterritoriality questions under constitutional law.[3] In 2020, the German Federal Constitutional Court issued a decision on foreign surveillance of the German Federal Intelligence Service in which it espoused a broad conception of the extraterritorial applicability of the German constitution.[4] This conception goes beyond what the relevant treaty bodies recognize for the extraterritorial applicability of both the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). While German scholars have extensively discussed this case and its consequences,[5] its comparative constitutional analysis is still lagging behind.[6]

This article seeks to show why that should change. It argues that domestic constitutional regimes can provide an important counterweight to the deadlocked extraterritoriality debate at the international level. Specifically, interpreting constitutions free from a human rights framework can allow domestic courts to better guard the normative values of human dignity and universality in an extraterritorial context than international human rights bodies.[7]

I will first lay out the relevant theoretical frameworks for the relationship between

* The author would like to thank Professor Mila Versteeg, Professor David Law, and Mr. Etienne Fritz for their valuable input and critical feedback in writing this article.

1 See generally *Marko Milanović,* Extraterritorial Application of Human Rights Treaties: Law, Principle, and Policy, 2011; *Chimène Keitner,* Rights Beyond Borders, in: Yale J. Int'l L. 36 (2011), pp. 55–114.

2 See, e. g., *Jane Rooney,* Extraterritorial Application of Constitutional Rights, in: Rainer Grote et al. (eds.), Max Planck Encyclopedia of Comparative Constitutional Law, 2017.

3 See section III.

4 BVerfGE 154, 152; see Section IV.2.b).

5 See, e. g., *Stefanie Schmahl,* Grundrechtsbindung der deutschen Staatsgewalt im Ausland, in: NJW 2020, pp. 2221–24 (2223); *Başak Çali,* Has 'Control Over Rights Doctrine' for Extra-Territorial Jurisdiction Come of Age? Karlsruhe, Too, Has Spoken, Now It's Strasbourg's Turn, EJIL:Talk! Of 21 July 2020; *Louis Graf,* Die grundrechtlich gebundene Ausland-Ausland-Fernmeldeaufklärung des BND, in: Leipzig Law Journal 2022, pp. 36–66; *Thomas Giegerich,* Extraterritorial Schutzwirkung von Grund- und Menschenrechten, in: EuGRZ 50 (2023), pp. 17–39.

6 But see *Russel A. Miller,* The German Constitutional Court Nixes Foreign Surveillance, Lawfare of 27 May 2020.

7 See also *André Nollkaemper,* Rethinking the Supremacy of International Law, in: ZöR 65 (2010), pp. 65–85 (81–85).

human rights law and constitutional law *(Section II).* Then I will examine the existing normative justifications for different models of constitutional extraterritoriality and show how the existing scholarship relates an import of international human rights law standards to widened extraterritoriality on the constitutional level *(Section III).* Subsequently, I will briefly sketch both the human rights and constitutional extraterritoriality regimes applicable to the United States and Germany *(Section IV).* Then, using the theoretical models introduced in *Section II,* I will analyze how the respective human rights and constitutional extraterritoriality frameworks, namely the ICCPR in the American context and the ECHR in the German context, relate to each other. Based on these findings, I will argue that constitutional analysis independent from human rights treaty doctrine has greater potential to serve the normative values underlying the human rights project *(Section V).*

While I admit that this analysis is rather limited, I still believe that it has epistemological value. First, the ICCPR–U.S. and the ECHR–Germany groupings represent what Ran Hirschl has termed "prototypical cases."[8] Thus, the ICCPR–U.S. relationship is representative of other states with comparatively isolated approaches to international human rights law which are embedded into weak international human rights regimes. Conversely, the ECHR-German dyad represents states which are generally open to international law interacting with a relatively strong human rights treaty system.[9] In the absence of a more comprehensive study on this topic, these samples are thus among the most likely to be conducive to analogies.[10] However, in the final analysis, this article can only provide an impetus for increased comparative research into constitutional extraterritoriality regimes and their value for the wider human rights project.

II. Theoretical Foundations

This article is based on a pluralist theory of the relationship between international and domestic legal orders. Starting from the proposition that international and domestic law do not constitute one integrated, essentially monistic legal system, pluralism offers a framework to how these norms interact and how institutions manage conflicts between them.[11] To explain the relationship between domestic constitutions and human rights conventions specifically, Gerald Neuman offers a persuasive framework by distinguishing between three aspects of fundamental rights: a consensual aspect that is based on consent of the governed or their political representatives to apply certain rights; a suprapositive aspect that reflects certain underlying, non-legal values; and an institutional aspect that may influence how the relevant actors draft and interpret rights.[12] Neuman argues that the "dual positivization"[13] of fundamental rights shapes differently the contours of human rights and constitutional rights and that they therefore collide within and across these three aspects.[14] Both international and constitutional law have developed certain methods to solve these conflicts.[15] The incor-

8 *Ran Hirschl,* The Question of Case Selection in Comparative Constitutional Law, in: Am. J. Compar. L. 1 (2005), pp. 125–156 (142–144).

9 For this reason, the present study will not focus on the relationship between the German constitution and the ICCPR, even though the latter is also binding on Germany.

10 See *Hirschl* (fn. 8), p. 142.

11 See generally *André Nollkaemper,* Inside or Out: Two Types of International Legal Pluralism, in: Jan Klabbers et al. (eds.), Normative Pluralism and International Law: Exploring Global Governance, 2013, pp. 94–139; *Anne Peters,* Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse, in: ZöR 65 (2010), 3–64 (50–63); *Armin von Bogdandy,* Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law, in: ICON 6 (2008), pp. 397–413.

12 *Gerald Neuman,* Human Rights and Constitutional Rights: Harmony and Dissonance, Stan. L. Rev. 55 (2003), pp. 1863–1900 (1866–72).

13 Ibid., p. 1864.

14 Ibid., pp. 1873–80.

15 Ibid., pp. 1882–99; see also *Peters* (fn. 11), pp. 55–59.

poration of human rights extraterritoriality principles into domestic constitutional jurisprudence in the United States and Germany depends largely on what Neumann terms "voluntary considerations", because neither international nor the relevant domestic law contains an explicit legal command in this regard.[16] However, consistent with a pluralist outlook, Neuman and others argue that convergence may not be the logical or even desirable focal point, even where national and international bodies do engage in judicial dialogue.[17]

This relationship is familiar in the context of the German legal system's reaction to both European Union law and the European Convention on Human Rights. Starting in 1974, when the Constitutional Court decided the first *Solange* decision,[18] Germany has had a rich caselaw on judicial resistance to the supranational legal regime of the European Communities/Union, which are largely based on normative concerns about fundamental rights protection on the European level.[19] Similarly, in the 2004 *Görgülü* case, the German Constitutional Court decided that German domestic courts must merely "take into account" („berücksichtigen") decisions of the European Court of Human Rights (ECtHR) and may, under certain circumstances, such as conflicting fundamental rights under the German Basic Law, deviate from the Court's findings.[20]

The present analysis does not go so far. It does not demand that constitutional courts violate human rights conventions. To the contrary, focusing on the constitutions themselves frees domestic courts from the constraints of human rights conventions to give better expression to the values underlying the global human rights project.

III. Existing Constitutional Extraterritoriality Approaches

In justifying the extraterritorial application of constitutional rights, scholars have developed different normative frameworks.[21] The broadest of these theories is universalism, which applies no geographical restriction to the applicability of rights at all. However, the location of the rights-bearing individual abroad may influence the substantive test, i. e., make it easier to justify restrictions, usually within the context of a proportionality test.[22] Proponents of this theory often connect and justify this approach with the notion of natural rights that apply everywhere because they precede organized government.[23] Closely connected to universalism is the functional approach, which employs practical considerations implicated by extraterritorial fact patterns. However, in contrast to universalism, functionalism conducts the extraterritoriality analysis at the level of the right's applicability and asks which specific rights may practicably be applied in which extraterritorial context.[24]

In contrast, models based on social contract theory limit the number of beneficiaries of rights to those that have consented to be

16 *Neuman* (fn. 12), pp. 1897–1900.

17 *Neuman* (fn. 12), p. 1900; *Eyal Benvenisti/Alon Harel,* Embracing the Tension Between National and International Human Rights Law: The Case for Discordant Parity, in: ICON 15 (2017), pp. 36–59 (58); *Nollkaemper* (fn. 7), pp. 81–85.

18 BVerfGE 37, 271 – Solange I.

19 See generally *Robert van Ooyen,* Die Staatstheorie des Bundesverfassungsgerichts und Europa: Von Solange über Maastricht und Lissabon zu Euro-Rettung, Europawahl und EU-Haftbefehl II, 7th ed., 2018.

20 BVerfGE 111, 307, para. 50; see also *Peters* (fn. 11), p. 59; see also *Gertrude Lübbe-Wolff,* ECtHR and national jurisdiction – The Görgülü Case, in: Humboldt Forum Recht 2006, pp. 137–46.

21 See generally *Galia Rivlin,* Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question, in: Bos. J. Int'l L. 30 (2012), pp. 135–227 (152 f., fn. 46); see also *Rooney* (fn. 2), paras. 5–10. Cf. Keitner (fn. 1), pp. 57–68.

22 See *Gerald Neuman,* Whose Constitution?, in: Yale L. J. 100 (1991), pp. 909–991 (916); *Rooney* (fn. 2), para. 5.

23 See, e. g., *Louis Henkin,* The Constitution as Compact and as Conscience, in: Wm. & Mary L. Rev. 27 (1985), pp. 11–34 (32).

24 *Gerald Neuman,* Understanding Global Due Process, in: Geo. Immigr. L. J. 23 (2009), pp. 365–401 (398); *Rooney* (fn. 2), para. 5; *Rivlin* (fn. 21), pp. 152 f., fn. 46.

governed by the constitution, which implicates most extraterritorial fact patterns. Accordingly, different iterations of this theory either completely deny the application of rights to non-citizens, whether *in situ* or abroad, or support a presumption against extraterritoriality.[25] Strict territoriality models are similarly narrow and operate on the premise that states may apply their law only on their own territory.[26]

The theories explained above all focus on the applicability of the rights themselves. In contrast, alternative models frame the question as structural issues. Thus, the limited government or organic theory views all rights contained in the constitution as objective constraints on the government's power. Therefore, regardless of whether the government oversteps these constraints at home or abroad, the acts are unconstitutional exercises of power either way.[27] A similar approach frames extraterritoriality as a separation of powers issue.[28]

The proponents of the different constitutional extraterritoriality models laid out above often link their understanding of the constitutional issues to international human rights law. In doing so, they almost always identify the latter with the normative values of natural rights, universality, and limited government. Consequently, proponents of wider extraterritorial application of constitutional rights tend to generally argue in favor of using the applicable human rights instruments in interpreting the extraterritorial scope of domestic constitutions.[29] Conversely, scholars who argue in favor of more restricted extraterritoriality models generally reject international human rights law frameworks.[30] Thus, both sides of the constitutional extraterritoriality debate share a common conception of the supposedly extraterritoriality-expanding effect of human rights law.[31]

IV. Case Studies

1. The Extraterritoriality Regimes of the ICCPR and the U.S. Constitution

a. ICCPR

Art. 2 para. 1 of the ICCPR provides that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[32] This provision is subject to different interpretations, which range from a narrow to an expansive understanding of the geographical applicability of the ICCPR.

25 See *Neuman* (fn. 22), p. 917; *Sarah H. Cleveland,* Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, in: Tex. L. Rev. 81 (2002), pp. 1–284 (20–22); *Rivlin* (fn. 21), pp. 152 f., fn. 46.

26 Neuman (fn. 22), pp. 918 f.

27 See, e. g., *Stephen A. Saltzburg,* The Reach of the Bill of Rights Beyond the Terra Firma of the United States, in: Va. J. Int'l L. 20 (1980), 741–776 (745). See generally *Rivlin* (fn. 21), pp. 152 f., fn. 46.; *Neuman* (fn. 22), pp. 916 f.

28 *Rooney* (fn. 2), para. 8; see, e. g., *Steve Vladeck,* Boumediene's Quiet Theory: Access to Courts and the Separation of Powers, in: Notre Dame L. Rev. 84 (2009), pp. 2107–50 (2146 f.).

29 See *Henkin* (fn. 23), p. 32; *Diane Marie Amann,* Guantánamo, in: Colum. J. Transnat'l L. 42 (2004), pp. 263–348 (310–319); *Jean-Marc Piret,* Boumediene v. Bush and the Extraterritorial Reach of the U.S. Constitution: A Step Towards Judicial Cosmopolitanism?, in: Utrecht L. Rev. 4 (2008), pp. 81–103 (93); *Fiona de Londras,* What Human Rights Law Could Do: Lamenting the Absence of an International Human Rights Law Approach in Boumediene & Al Odah, in: Isr. L. Rev. 41 (2008), pp. 562–95 (580 f.); see also *Stephen Gardbaum,* Human Rights and International Constitutionalism, in: Jeffrey Dunoff/Joel P. Trachtman (eds.), Ruling the World? Cambridge University Press, 2009, pp. 252 f.; *Neuman* (fn. 24), 395.

30 See, e. g., *Eric A. Posner,* Boumediene and the Uncertain March of Judicial Cosmopolitanism, in: Cato Sup. Ct. Rev. 2007, pp. 23–46 (36 f.); *Andrew Kent,* Boumediene, Munaf, and the Supreme Court's Misreading of the Insular Cases, in: Iowa L. Rev. 97 (2011), 101–180 (103–05).

31 But see *Keitner* (fn. 1), p. 113.

32 Art. 2 para. 1 International Covenant on Civil and Political Rights of 16 December 1966, 660 UNTS 195, Federal Law Gazette 1973 II, p. 1534 [ICCPR].

The most limited theory reads the ordinary meaning of "within its territory and subject to its jurisdiction" as cumulative requirements. Consequently, this view, which the U.S. government has espoused since the 1990s, limits the Convention's application to individuals who are in a state party's sovereign territory.[33] A more expansive interpretation argues that the text is ambiguous and therefore turns to the Covenant's *travaux préparatoires*.[34] The International Court of Justice adopted this approach in its 2004 *Wall Advisory Opinion,* where it found the ICCPR to be applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[35] While one view sees this exercise of jurisdiction only as territorial control, such as occupation,[36] or personal control over individuals, as in cases of kidnapping or detention,[37] some proponents of the expansive theory subsume all acts done in the exercise of state power under jurisdiction.[38] Moreover, some scholars and the UN Human Rights Committee has extended the ICCPR's extraterritorial application obligation to include at least some positive obligations.[39]

Bridging the gap between the narrow and expansive approaches, some scholars and practitioners apply only the negative obligation to respect extraterritorially while limiting the positive obligation.[40] This view holds that a different treatment of the two forms of the obligation is one possible, if not the better, way of construing the ordinary meaning of Art. 2 para. 1 and is most consistent with the ICCPR's object and purpose.[41]

Thus, in part owing to the relatively weak institutional framework of the universal human rights system, the ICCPR's extraterritorial applicability, at least as it relates to the United States, remains contentious and at least in part unsettled.

b. U.S. Constitution

The U.S. Constitution contains no explicit territorial limitation in its text. The Supreme Court first considered extraterritorial application of constitutional rights in 1901 in the so-called *Insular Cases,* which dealt with territories which the United States had acquired after the Spanish-American War of 1898.[42] The Court held that since Congress had abstained from incorporating these territories, only the most fundamental rights

33 *Harold Hongju Koh,* Memorandum Opinion from the Legal Advisor, U.S. Department of State, Harold Hongju Koh, on the Geographic Scope of the International Covenant on Civil and Political Rights (19 October 2010), pp. 1 f.; see also *Michael J. Dennis,* Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation, in: Am. J. Int'l L. 99 (2005), pp. 119–41 (122–25).

34 See Arts. 31–32 Vienna Convention on the Law of Treaties of 22 May 1969, UNTS vol. 1155, p. 331, Federal Law Gazette 1985 II, p. 926.

35 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004 ICJ 136), Advisory Opinion of 9 July 2004, para. 111; see also ICJ, *Democratic Republic of the Congo v. Uganda (Armed Activities on the Territory of the Congo)* (2005 ICJ 168), Judgment of 19 December 2005, para. 216.

36 See *Milanović* (fn. 1), pp. 127–73.

37 See *Milanović* (fn. 1), pp. 173–209; see also HRC, *Lopez Burgos v. Uruguay* (R12/52), views adopted on 29 July 1981.

38 *Martin Scheinin,* Extraterritorial Effect of the International Covenant on Civil and Political Rights, in: Fons Coomans/Menno Kamminga (eds.), Extraterritorial Application of Human Rights Treaties, 2004, pp. 73–82 (77 f.).

39 See, e. g., *Yuval Shany,* Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law, in: Law and Ethics of Human Rights 7 (2013), pp. 47–71 (69); UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 10; UN Doc. CCPR/C/GC/36, para. 63 (regarding the right to life); *Philipp Janig,* Extraterritorial Application of Human Rights, in: Christina Binder et al. (eds), Elgar Encyclopedia of Human Rights, vol II, 2022, pp. 180–191 (paras. 43 f.) (explicating the Human Rights committee's case law).

40 *Milanović* (fn. 1), pp. 212–15; *Koh* (fn. 33), p. 4.

41 Ibid., pp. 8–22.

42 See, e. g., *Downes v. Bidwell* (182 U.S. 244), decision of 27 May 1901; see also *Neuman* (fn. 22), pp. 957–60.

applied there.[43] However, in subsequent decisions, the Court turned toward a social contract approach. In the 1950 decision *Johnson v. Eisentrager*, the Court decided that the rights of habeas corpus and other constitutional protections for criminal defendants did not apply to German prisoners of war convicted of war crimes by a military commission in China and held in detention in occupied Germany.[44]

Subsequently, the Court encountered increasing tensions between more formalist and functional approaches,[45] including in 1990 in *United States v. Verdugo-Urquidez*, which implicated the applicability of the 4th Amendment's protection against unreasonable searches and seizures to a Mexican citizen whose residence in Mexico had been searched by U.S. law enforcement officers without a search warrant.[46] The majority denied the extraterritorial applicability based on a textual differentiation of "persons" and the "the people,"[47] which reflects a social contract approach.[48] However, Justice Anthony Kennedy, while concurring in the judgment, developed a functional approach that relied heavily on Justice Harlan's Concurrence in *Reid*.[49]

However, the majority switched to Kennedy's view in 2008's *Boumediene v. Bush*, which dealt with the applicability of the Suspension Clause, i.e. the constitutional right to habeas corpus, to detainees at the U.S. Naval Base in Guantánamo Bay in Cuba.[50] The Court's resolution of this case embodies both a structural separation of powers and a functional approach.[51] The former led to Court to look beyond formalist conceptions of sovereignty and territory because of its concern that this would allow the executive to "switch the Constitution on or off" through constructions like the Guantánamo lease.[52] Consequently, the United States, exercised "de facto sovereignty over this territory"[53] because an indefinite treaty-based lease gave it "complete jurisdiction and control"[54] over Guantánamo. It synthesized a framework based partly on its prior cases and held that

> at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[55]

Applying these factors, the Court found first that the enemy combatant status of the aliens was a matter of dispute.[56] Second, Guantánamo was not a "transient possession" like occupied Germany had been in the *Eisentrager* case.[57] Thus, there were also no practical obstacles to apply the Suspension Clause in Guantánamo.[58]

In effect, *Boumediene* represented a shift in American extraterritoriality jurisprudence and embodies the current functional ap-

43 *Neuman* (fn. 22), pp. 961–64; *Smadar Ben-Natan*, Constitutional Mindset: The Interrelations Between Constitutional Law and International Law in the Extraterritorial Application of Human Rights, in: Isr. L. Rev. 50 (2017), pp. 139–176 (153–55).

44 *Johnson v. Eisentrager* (339 US 763), decision of 5 June 1950, pp. 766 & 785.

45 See, e.g., *Reid v. Covert* (354 U.S. 1), decision of 10 June 1957, pp. 5 f., and ibid., Justice Harlan concurring, pp. 74 f.

46 *United States v. Verdugo-Urquidez* (494 US 259), decision of 28 February 1990, pp. 262 f.

47 Ibid., pp. 264–68, 274 f.

48 *Verdugo-Urquidez* (fn. 46).

49 Ibid., p. 276, Justice Kennedy concurring.

50 *Boumediene v. Bush* (553 US 723), decision of 12 June 2008; see also *Keitner* (fn. 1), p. 76.

51 See, e.g., *Vladeck* (fn. 28), pp. 266–68.

52 *Boumediene* (fn. 50), p. 765.

53 Ibid., p. 755.

54 Art. III Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations of 23 February 1903, T.S. No. 418.

55 *Boumediene* (fn. 50), p. 766.

56 Ibid., p. 766 f.

57 Ibid., pp. 768 f.

58 Ibid., pp. 769 f.

proach[59] to habeas corpus petitions, based on practicability but also incorporating aspects of the social contract and strict territoriality theories.[60]

2. *The ECHR and the German Basic Law*

a. ECHR

Art. 1 of the European Convention on Human Rights does not contain an explicit reference to territory.[61] Nevertheless, the prevailing view sees the Convention's applicability as primarily territorial[62] and allows for exceptional extraterritorial application only where a state has either effective control over an area or over persons.[63]

A state may exercise effective control over an area either directly through sufficient military force[64] or through a subordinate local administration.[65] Where a state fulfils this criterion, it engages the "entire range of substantive rights set out in the Convention",[66] including positive obligations.[67] A state fulfils the requirements for the second exception of personal control where it directly exercises "physical power and control over the person in question".[68] In this regard, short-term and isolated exercises of power such as the arrest and abduction of an individual suffice to establish personal control.[69] However, personal control does not implicate all the rights and obligations of the Convention but merely those most relevant to the situation.[70]

The power and control concepts have their limits. In the 2001 *Banković* case, when confronted with a NATO bombing operation in Serbia which killed several civilians, the Court held that the mere use of kinetic force through long-range weapons does not, without more, bring the affected individuals within the state's jurisdiction.[71] While the Court has somewhat extended the jurisdictional framework regarding the use of military force,[72] it has never formally overruled *Banković's* core holding that a state does not have jurisdiction over individuals who are neither in its controlled territory nor under its direct custody or authority.[73]

Overall, the European Convention's extraterritorial coverage, which reflects both an extended territorial and personal approach, is relatively comprehensive. However, its interpretation remains closely tied to the textual anchor of "jurisdiction" and there may remain significant fact patters which it does not cover, specifically when they concern positive obligations of the state.

59 Court of Appeals for the District of Columbia Circuit, Al Maqaleh v. Gates (605 F.3d 84).

60 See *Neuman* (fn. 24), p. 399; *Keitner* (fn. 1), p. 78.

61 Art. 1 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, UNTS vol. 213, p. 221, Federal Law Gazette 1952 II, p. 685 [ECHR].

62 *William A. Schabas,* The European Convention on Human Rights: A Commentary, 2015, p. 95; *Christoph Grabenwarter,* European Convention on Human Rights: Commentary, 2014, p. 6.

63 *Grabenwarter* (fn. 62), pp. 8 f.

64 See, e. g., ECtHR, *Loizidou v. Turkey* (15318/89), judgment of 18 December 1996, paras. 16, 56.

65 ECtHR, *Ilaşcu v. Moldova & Russia* (48787/99), judgment of 8 July 2004, para. 392; *Schabas* (fn. 62), p. 103.

66 ECtHR, *Al-Skeini v. United Kingdom* (55721/07), judgment of 7 July 2011, para. 138.

67 *Schabas* (fn. 62), p. 103; see, e. g., ECtHR, *Loizidou* (fn. 64), para. 62.

68 ECtHR, *Al-Skeini* (fn. 66), para. 136; *Schabas* (fn. 62), p. 101.

69 See ECtHR, *Öcalan v. Turkey* (46221/99), judgment of 12 May 2005, para. 91.

70 Ibid., pp. 95–100.

71 ECtHR, *Banković v. Belgium* (52207/99), Admissibility Decision of 12 December 2001, para. 75.

72 See, e. g., ECtHR, *Andreou v. Turkey* (45653/99) Admissibility Decision of 3 June 2008.

73 See *Bernadette Rainey* et al., Jacobs, White, and Ovey: The European Convention on Human Rights, 8th ed., 2021, pp. 91–97; see, e. g., H. F. and Others v. France (24384/19 & 44234/20), Judgment of 14 September 2022.

b. The German Basic Law

In Germany, the main textual guide for the extraterritorial applicability of constitutional rights is Art. 1 para. 3 of the Basic Law, which provides that "[t]he following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law."[74] The prevailing scholarly view has long interpreted this as enshrining the universal applicability of fundamental rights.[75] Until recently, the courts did not follow the scholarship but developed a more complex framework, leaving some crucial questions unanswered.[76]

However, in its 19 May 2020 decision on the interception of foreign communications intelligence conducted by the Federal Intelligence Service, the Federal Constitutional Court significantly broadened its approach to extraterritoriality.[77] The case had been brought by foreign individuals and non-governmental organizations located outside of Germany who expressed significant concern that the BND would intercept and analyze their communications,[78] for which it had explicit statutory authorization.[79] The applicants claimed that this violated the freedom of the press as well as their right to privacy.[80]

In its decision, the Court made it clear that "[t]he constitutional rights of the Basic Law bind the Federal Intelligence Service and the legislature regulating its powers, regardless of whether the service is active in Germany or abroad."[81] The Court adopted this structural approach, which at least on its face promises universal application of the Basic Law's rights, using its established methodology of interpretation.[82] Thus, it first found that there was no textual basis to limit the broad statement of Art. 1 para. 3.[83] Historically, its historical background as a reaction to the crimes of the Nazi dictatorship made clear that its comprehensive protections should be tied to the acts of the German government and not end at the border. Moreover, the Basic Law's purpose was to guarantee human dignity within the universal human rights framework and to ensure responsible German governance in the world.[84]

The Court next explicitly discussed the Basic Law's relationship to the ECHR. It noted the importance of the territorial control model but argued that the Convention's extraterritorial application was not yet clear in all respects, and that the ECtHR had applied Convention rights to extraterritorial intelligence activities before.[85] However, even if the ECHR enshrined a narrower extraterritorial application, this would not hinder a more comprehensive interpretation of the rights under the Basic Law.[86]

74 Art. 1 para. 3 Grundgesetz.

75 See, e. g., *Hans Jarass/Martin Kment,* Grundgesetz für die Republik Deutschland: Kommentar, Art. 1, para. 44; *Ingo von Münch,* in: Ingo von Münch (ed.), Grundgesetz-Kommentar, Vol. I, 3rd ed., 1985, Art. 1, para 49; Deutscher Bundestag: Wissenschaftliche Dienste, Grundrechtsbindung Deutscher Stellen bei Nachrichtendienstlicher Tätigkeit im Ausland, 2007, pp. 10–12.

76 See, e. g., BVerfGE 100, 313, para. 176; *Giegerich* (fn. 5), p. 33; *Stefan Krempl,* Geheimakte BND & NSA: Bad Aibling und die „Weltraumtheorie", heise online of 26 March 2017.

77 BVerfGE 154, 152; see *Timo Schwander,* Eine Antwort, viele neue Fragen: Das BND-Urteil des Bundesverfassungsgerichts, Verfassungsblog of 23 May 2020; *Miller* (fn. 6).

78 BVerfGE 154, 152, paras. 34 f.

79 §§ 6–18 Gesetz über den Bundesnachrichtendienst [BNDG] (Ger.); *see also* BVerfGE 154, 152, paras. 1–14; *Schwander* (fn. 77).

80 Arts. 5 & 10. GG.

81 BVerfGE 154, 152, para. 87 (translation by the author).

82 See *Björn Schiffbauer,* Die Würde des Rechtsstaats ist Unantastbar, Junge Wissenschaft im Öffentlichen Recht of 19 May 2020.

83 BVerfGE 154, 152, para. 89 f.

84 Ibid., para. 89.

85 Ibid., paras. 97–98. However, in that case the respondent state did not raise objections based on extraterritoriality and the ECtHR did not rule on the issue. ECtHR, *Big Brother Watch et al. v. United Kingdom* (58170/13, 62322/14, & 24960/15), judgment of 25 May 2021, para. 274.

86 BVerfGE 154, 152, para. 99; see also Art. 53 ECHR.

Explicating its framework further, the Court noted that special conditions in extraterritorial fact-patterns might affect the proportionality of government acts that restrict constitutional rights.[87] However, since these caveats reflect the scope of the rights themselves and not their applicability, the judgment still fits squarely within the universalism model.[88] Applying this framework to the case at issue, the Court held that the freedom of the press and the right to privacy applied extraterritorially and that the BND's intelligence activities and their statutory bases constituted unjustified restrictions of these rights.[89]

Some scholars have argued that this framework should also apply to positive obligations.[90] In fact, after the BND decision, the German courts have continued to evolve the Basics Law's extraterritoriality doctrine to include at least some form of positive extraterritorial obligations. First, in November 2020, the Federal Administrative Court dealt with this question in a case brought by citizens and residents of Yemen against the American Air Force's use of its German base at Ramstein.[91] While the Court eventually dismissed the case based on the specific facts, it noted that "in principle, the German state may (…) also have duties to protect fundamental rights vis-à-vis foreigners living abroad".[92] In March 2021, the Constitutional Court itself was confronted with this issue in a high profile decision on Germany's obligations regarding climate change, in which some of the applicants were residents of Bangladesh and Nepal.[93] The Court declined to answer the question directly because it considered that the German state had disposed of its obligations under the Basic Law in any event.[94] However, in a lengthy obiter exposition, it stated that, in principle, the Basic Law could create extraterritorial positive obligations to fight climate change.[95] At the same time, owing to the nature of the extraterritorial situation, these obligations would only include measures to slow or halt climate change but not accommodation measures such as physical barriers and resettlement.[96]

Thus, while the German model of extraterritorial applicability seems to be still at least somewhat in flux, it represents the broadest approach of the four regimes analyzed because it recognizes the applicability of extraterritorial fundamental rights obligations across the board and only later, on the substantive level, takes the extraterritorial fact pattern into account as a factor.[97]

V. Analysis

The foregoing case studies show that the extraterritoriality regimes of all four legal frameworks analyzed above diverge both in the scope of coverage and in their justifications. This section will explain these differences with Neuman's theory by analyzing the consensual, suprapositive, and institutional aspects of the ICCPR-U.S.

87 BVerfGE 154, 152, para. 104.

88 See *Miller* (fn. 6). But see *Giegerich* (fn. 6), p. 34.

89 BVerfGE 154, 152, paras. 111–331.

90 See, e. g., *Thilo Marauhn* et al., Verletzung von Schutzpflichten durch die Bundesrepublik in Afghanistan? Verfassungsrechtliche und völkerrechtliche Implikationen im Fall der Beendigung einer militärischen Intervention, Verfassungsblog of 7 October 2021. But see *Benedikt Reinke,* Rights Reaching Beyond Borders: A discussion of the BND-Judgment, dated 19 May 2020, 1 BvR 2835/17, Verfassungsblog of 30 May 2020.

91 BVerwG, Judgment of 25 November 2020, 6 C 7.19, paras. 68–80.

92 Ibid., para. 42; see also *Giegerich* (fn. 5), pp. 36 f.

93 BVerfG, Order of 24 March 2021 – 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, para 78.

94 Ibid., paras. 154–172, 180.

95 Ibid., paras. 174 f.

96 Ibid., paras. 176–78; see also *Lea Dannich,* Die Geltung deutscher Grundrechte im Ausland – eine Chance für den Menschenrechtsschutz?, available at: https://www.menschenrechte.org/de/2021/10/13/die-geltung-deutscher-grundrechte-im-ausland-eine-chance-fuer-den-menschenrechtsschutz/ (last visited 29 May 2023).

97 Cf. *Çali* (fn. 5), who equates the Constitutional Court's approach with that of the Human Rights Committee and *Giegerich* (fn. 5), p. 34, who argues that it is now essentially the same as the ECHR's.

and ECHR-German dyads and then draw some conclusions about the preferability of an independent constitutional approach towards extraterritoriality.

Turning first to the consensual aspect, it is most prevalent in limiting the extraterritorial applicability of the human rights instruments. Both the narrow and extensive interpretations of the ICCPR never stray far from the textual hook of the "individuals within its territory and subject to its jurisdiction."[98] Moreover, the proponents of the broad and moderate views seem to rely more on the intent of the state parties than on purpose or value-based arguments such as universality or effectiveness. Likewise, the ECtHR consistently uses the connection to "jurisdiction"[99] in the ECHR to limit the Convention's extraterritorial application. While this was most apparent in *Banković,* the current caselaw still remains behind a truly functional or universal approach.

In contrast, the two constitutional regimes analyzed pay less regard to consensual limitations. The absence of an explicit jurisdictional or territorial limitation in the constitutional text only partly explains this result. Thus, in *Boumediene,* the U.S. Supreme Court rejected originalist or historical arguments for finding a consensual basis and explicitly adopted a functional approach.[100] The German Federal Constitutional Court, in its foreign surveillance decision, used the suprapositive values of universal human rights and dignity to instill a concrete extraterritoriality rule into the broad provision of Art. 1 para. 3 of the Basic Law.[101] Here emerges an important distinction between a broad, value-based human rights frame as adopted by this court and a narrow, consensual, and essentially positivistic human rights frame based on the applicable treaties. This also explains the Constitutional Court's stark deviation from the ECHR's extraterritoriality regime.

The role of institutional factors is most apparent in the ICCPR-U.S. relationship. Because of the diffuse nature of the bodies interpreting the ICCPR, the narrow interpretation of the U.S. Executive, and the comparatively defiant attitude of U.S. courts to international judicial decisions,[102] it is unlikely that a converging view on the ICCPR's extraterritoriality will emerge soon. As the Supreme Court itself hinted at, in interpreting Art. 2 para. 1 ICCPR, it would very likely have followed the U.S. Executive's narrow, strictly territorial interpretation.[103] Conversely, sticking to constitutional interpretation provided the court with room to express its institutional concerns and adopt a structural separation of powers approach to broaden extraterritorial applicability where attempts to circumvent the judiciary are all too apparent.[104]

The ECHR-German dyad presents a somewhat inverted picture. Albeit significantly more effective than the ICCPR's enforcement bodies, the ECtHR refused to intervene in sensitive national security and armed-conflict issues in *Banković*.[105] In comparison, the German Constitutional Court had the institutional power to address the similarly sensitive foreign surveillance issue head-on.[106]

Thus, overall, divergence between different aspects of rights on the international and constitutional levels can provide an understanding for the different approaches

98 Art. 2 para. 1 ICCPR.

99 Art. 1 ECHR.

100 See supra Section IV.1.b).

101 See supra Section IV.2.b).

102 See, e. g., U.S. Supreme Court, *Medellín v. Texas,* (552 US 491), decision of 25 March 2008.

103 *Boumediene* (fn. 50), p. 753.

104 See *Keitner* (fn. 1), pp. 111 f.; *Vladeck* (fn. 28), pp. 246 f.

105 See, e. g., *Erik Roxstrom* et al., The NATO Bombing Case (Bankovic et al. v. Belgium) And The Limits Of Western Human Rights Protection, in: Bos. U. Int'l L. J. 25 (2005) 59–136 (133).

106 High-ranking members of the German Intelligence criticized the decision. See, e. g., *Wolfgang Büscher,* Uns droht eine nationale Sicherheit zweiter Klasse, in: Die Welt (online version), 19 May 2020, available at https://www.welt.de/debatte/kommentare/article208083849/BND-Urteil-Uns-droht-eine-nationale-Sicherheit-zweiter-Klasse.html (last visited 28 May 2023).

of the four international and domestic regimes to extraterritoriality issues. This allows some tentative conclusions about the fit of human rights treaty-based extraterritoriality frameworks for domestic constitutions. First, proponents of the human rights frame have argued that the greater development of human rights law can provide a methodological advantage.[107] However, the treaty-based human rights frameworks are tied to the peculiarities of the respective treaties, which have explicit jurisdictional limitations. In line with the relevant public international law methodology, international institutions take this language relatively seriously as a consensual constraint. By contrast, suprapositive and institutional aspects feature more strongly in the extraterritoriality jurisprudence of the analyzed domestic systems. Moreover, as the unsettled nature of the ICCPR's extraterritoriality in the U.S. context shows, the supposedly greater development of the human rights framework is not readily apparent.

The most conspicuous result of the comparative analysis conducted in this essay is that domestic constitutional courts are sometimes better guardians of the normative values underlying human rights than international human rights bodies. While the German Foreign Surveillance case illustrates this best, *Boumediene* also shows that, in a much more limited manner, domestic courts can incorporate and apply values of the international human rights system in the extraterritoriality context. In comparison, the jurisprudence of the treaty bodies is evolving but seems to have difficulty to escape from a consensual understanding based on the treaties' text and history and in some way runs counter to the underlying values of the human rights system. However, even where treaty bodies do adopt universality, states may still regard such interpretations as illegitimate because they share the essentially consent-based view of international human rights law. Thus, domestic courts willing to truly embrace the principle of universality in extraterritorial circumstances may find more legitimacy and less resistance in their own constitutions. Conversely, in the case of a domestic court that is not open to incorporating this principle, the interpretive regime would make little difference. If such a court's domestic legal order were embedded in a relatively weak institutional human rights regime, there seems to be little chance that international interpretive input would do much to change that. If the relevant international human rights regime were relatively strong, there would be independent and parallel protection allowing affected individuals to bypass the courts' restrictive constitutional jurisprudence.[108]

Most importantly, as developments like the aftermath of *Solange* have shown, value-driven resistance at the constitutional level can change legal policy at the international level.[109] Thus, a constitutional approach independent from the consensual constraints of human rights treaties may provide the institutional clout necessary for human rights bodies to overcome these constraints at the international level. In other words, they may just "nudge"[110] their international peers towards a truly universal human rights framework.

107 See, e. g., *De Londras* (fn. 29), pp. 563 f., 593.

108 See *Keitner* (fn. 1), pp. 113 f.

109 See *Peters* (fn. 11), p. 62.

110 *Çali* (fn. 5).