

The Extraterritorial Effects of the Fundamental Rights of the German Constitution

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The German Basic Law is, due to its structure, designed to provide universal protection of fundamental rights, insofar, in principle fundamental rights also claim application on foreign territory, as the Federal Constitutional Court recently confirmed in its decision on the competences of the Federal Intelligence Service abroad. However, such extraterritorial effects remain bound to certain prerequisites, which vary with respect to the different dimensions of fundamental rights. In particular, in regard to the state's duty to protect them, the Federal Administrative Court recently set narrow limits for an assertion in its judgment on the use of Ramstein Air Base by American military forces, since otherwise conflicts with foreign legal systems and international law would arise.

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I. INTRODUCTION

Recently, the question of the degree to which the fundamental rights of the German Basic Law also have effect outside German territory has become virulent before national courts: the Federal Constitutional Court (FCC) had to clarify whether the Federal Intelligence Service remains bound to the German Constitution when carrying out surveillance measures abroad¹; the Federal Administrative Court (FAC) had to deal with a complaint by Yemeni nationals seeking protection from the German state from American drone operations in Yemen,² though this dispute may still engage the FCC.³ After briefly outlining the essential dogmatic structure of the German fundamental rights architecture (II.), this Article will then demonstrate that the character of the Basic Law is designed to provide universal protection of fundamental rights (III.), but that this universal protection is subject to certain prerequisites and limits (IV.).

II. THE BASIC PRINCIPLES OF THE GERMAN FUNDAMENTAL RIGHTS DOGMATICS

The fundamental rights of the German Basic Law are to be understood first as subjective rights, in terms of defensive rights, of the citizen against the state, which can be asserted by individuals by constitutional complaint (cf. Art. 93 para. 1 no. 4a GG). At the same time, however, the Basic Law also presents itself as an objective system of values that influences all areas of the German legal system.⁴ From this objective dimension, the FCC also derives the constitutional duty of the state to protect the individual from violations of fundamental rights (so-called duty to protect).⁵ The state's binding commitment to fundamental

1. FCC, judgment from 19.5.2020, 1 BvR 28535/17.

2. At the time of this writing this Article, the reasons for the decision had not yet been published. Therefore, this contribution is based on the press release of the FAC (No. 68/2020 from 25.11.2020), which is available at <https://www.bverwg.de/pm/2020/68>.

3. Pursuant to Art. 93 para. 1 no. 4a BL, those persons who are entitled to fundamental rights may file a constitutional complaint before the FCC against an act of public authority, which, according to Art. 1 para. 3 BL, also means the jurisdiction of the courts. The further requirement of exhausting legal process (§ 90 para. 2 BVerfGG) would now also be fulfilled with the decision of the FAC.

4. Concisely in: FCC vol. 7, 198, 205-206. For a detailed discussion of the character of fundamental rights, see e.g.: Starck, in v. Mangoldt/Klein/Starck, *Kommentar GG*, Art. 1 recitals 167 et seqq.; Herdegen, in Maunz/Dürig, *Kommentar GG*, Art. 1 Abs. 3 GG recitals 13 et seqq.

5. See for instance: FCC vol. 39, 1, 41-42; vol. 49, 89, 141-142; vol. 53, 30, 57; vol. 125, 39, 78.

rights as directly applicable law affects every form of public authority, i.e. legislation, executive power and jurisdiction (Art. 1 para. 3 BL).⁶

In principle, individual persons can invoke fundamental rights, although certain guarantees (for instance the freedom of assembly under Art. 8 para. 1 BL or freedom of occupation under Art. 12 para. 1 BL) only protect German nationals; but many other rights are available to everyone, thus including foreigners.⁷ Legal persons are entitled insofar as the fundamental rights are applicable to them by their nature (Art. 19 para. 3 BL).⁸

III. THE FOUNDATION OF THE APPLICATION OF THE FUNDAMENTAL RIGHTS OUTSIDE THE GERMAN TERRITORY

In years gone by, the scope of fundamental rights as defined in Art. 1 para. 3 BL was irrelevant beyond German territory, since the state's ability to exercise power regularly ended at the state's borders. With the further development of technology and the increasing international mobility of the citizens, however, it is no longer possible to avoid the question of the extent to which the fundamental rights of the German Basic Law must also apply to German citizens on foreign territory, meaning the degree to which there must be a shift away from this original, outdated principle of territoriality.⁹ The structure of the Basic Law supports the idea of universal protection of fundamental rights (A.), although various constellations arise in which the question of extraterritorial protection becomes virulent (B.).

A. *The Universalistic Structure of the Basic Law*

The FCC has for the first time explicitly recognized in a convincing manner that the structural character of the German Basic Law supports the applicability of fundamental rights in foreign countries: First of all, it can neither be inferred from Art. 1 para. 3 BL or from the history of the provision's origins that the application of German Basic Law is limited to

6. On the third-party effect of fundamental rights among private parties, see for example: FCC vol. 7, 198, 205 et seqq.; Jarass, in Jarass/Pieroth, Kommentar GG, Art. 1 recitals 48 et seqq.; Starck, in v. Mangoldt/Klein/Starck, Kommentar GG, Art. 1 recitals 303 et seqq.

7. See for more details e.g.: Rübner, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band V, § 116 recitals 2 et seqq.; Herdegen, in Maunz/Dürig, Kommentar GG, Art. 1 Abs. 3 GG recitals 49-50.

8. About this in depth for example: Huber, in v. Mangoldt/Klein/Starck, Kommentar GG, Art. 19 recitals 202 et seqq.; Dreier, in Dreier, Kommentar GG, Art. 19 Abs. 3; Remmert, in Maunz/Dürig, Kommentar GG, Art. 19 Abs. 3.

9. See FCC vol. 100, 313, 362 and closer Becker, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band XI, § 240 recitals 6 et seqq.

the national territory, even though at the time the Constitution was drafted such a notion was not yet the object of discussion.¹⁰ Rather, pursuant to Art. 1 para. 2 BL, the Constitution recognizes that the inviolable and inalienable human rights are the basis of every human community, of peace and justice in the world, which places the fundamental rights of the Basic Law in the context of international human rights guarantees; the protection of the individual is thus intended to cross national borders.¹¹ This underlines the fact that fundamental rights should be interpreted in the light of international human rights guarantees.¹²

Therefore, it would be incompatible with such a universalistic structure of the Basic Law, however, if fundamental rights were not valid outside Germany's national borders; especially in times of internationalization of political relations, the guarantee of fundamental rights would be reduced if the application of the constitution did not follow the extraterritorial actions of the state.¹³ In other words, because of the nature of the Basic Law, it must be assumed that there is extensive, anthropocentric protection of fundamental rights, according to which fundamental rights should always have validity when the German state acts.¹⁴

B. The Conceivable Constellations

If a case has a cross-border nature, it must first be made clear that any foreign state authorities involved are excluded a priori as a point of reference when it comes to the protection of fundamental rights under the German Basic Law; they are not obliged to respect them. Consequently,

10. FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 89.

11. FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 94. Significantly more restrained yet: FCC vol. 100, 313, 362-363. Second opinion: Isensee, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band V, § 115 recital 79.

12. FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 95. On such an interpretation see, for example: FCC vol. 111, 307, 317; vol. 128, 282, 306; order from 6.11.2019, 1 BvR 16/13, recital 58.

13. FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 96. Concurring interpretation: Oppermann, in *Festschrift Grewe*, p. 528. See, in contrast, as prominent examples rejecting such a universalistic structure: Merten, in *Festschrift Schiedermaier*, p. 338, who otherwise fears a dictatorship of values by the German Constitutional State or assumes a catechism of the German Basic Law, which would lead to an instruction of the other states (p. 339); Isensee, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band V, § 115 recital 79.

14. FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 89. Refusing such a principle of effect, on the other hand: Isensee, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band V, § 115 recital 83; Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band XI, § 240 recital 16.

only recourse to the German state can be considered.¹⁵ In this respect, on the one hand, the defensive dimension of fundamental rights can be impaired abroad (1); on the other hand, an appeal to the duty to protect can be considered (2).¹⁶

1. The Impairment of the Defensive Dimension

The Federal Republic's binding commitment to respect fundamental rights is already widely recognized¹⁷ in cases where the direct intervention takes place abroad, but the indirect involvement of German public authority occurs on the territory of the Federal Republic (a). The FCC has also recently explicitly applied the fundamental rights of the German Basic Law for the first time when the Federal Republic itself acted directly on foreign territory (b). A distinction must be made here between situations in which there is a cross-border conflict, but where only the undoubted protective effect of the fundamental rights within German territory is concerned. In this regard, reference should be made above all to the FCC's "Spaniard decision." According to the FCC's ruling, Art. 6 para. 1 BL would be violated if German authorities forbid the marriage between a divorced German and a foreigner because the foreign law does not recognize the divorce.¹⁸ Furthermore, the approval by the German government of the installation of medium-range missiles on German territory as a result of a NATO resolution can be cited as an example: The complainants asserted a threat to their right to life on German ground (Art. 2 para. 2 sentence 1 BL), because the Soviet Union may have felt obliged to launch a strike on Germany first in response to the danger posed by Germany authorizing the installation of the weapons.¹⁹

a. The Indirect Participation of the German Federal Republic

A prominent illustration of the Federal Republic's indirect involvement in violations of fundamental rights abroad is the so-called extradition cases. In this context, the FCC regularly checks whether both the minimum standards of international law, which are binding in

15. FCC vol. 1, 10, 11; vol. 66, 39, 56-57; Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band XI, § 240 recital 35.

16. For these dimensions see again part II.

17. See for instance: FCC vol. 6, 290, 295; Dreier, in Dreier, *Kommentar GG*, Art. 1 Abs. 3 recital 44; Herdegen, in Maunz/Dürig, *Kommentar GG*, Art. 1 recital 79; Starck, in v. Mangoldt/Klein/Starck, *Kommentar GG*, Art. 1 recital 212.

18. FCC vol. 31, 58 et seqq.

19. FCC vol. 66, 39, 40 et seqq. Another category of cases is also the right of asylum, see Isensee, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band V, § 115 recital 91.

Germany according to Art. 25 BL, and the non-negotiable constitutional principles of the German Basic Law are upheld if the Federal Republic is to hand over a person located in Germany to the state that requested the extradition.²⁰ For example, a cruel, degrading or inhumane execution of a judgment abroad would violate human dignity pursuant to Art. 1 para. 1 BL, and that handover would subsequently have to be avoided.²¹ As a further example, reference can generally be made, in this context, to the German government's approval of an international treaty which is executed outside Germany—in contrast to the aforementioned constellation concerning the stationing of weapons in Germany.²² In summary, it can therefore be stated: Fundamental rights have an extraterritorial effect in these case constellations to the extent that the actions of the Federal Republic on German territory—such as consent to extradition or to a treaty—must be measured against fundamental rights if the actual violation takes place abroad—as by executing the sentence or the treaty—by a foreign state.

b. The Direct Action of the Federal Republic Abroad: The FCC's Ruling on the Federal Intelligence Service

A distinguishing question is what happens when the Federal Republic is obliged to observe the Basic Law when it acts outside its own territory and this action results in an infringement of fundamental rights.²³ The FCC has now expressly affirmed this for the first time, by having clarified whether the surveillance of telecommunications abroad—be it the collection and processing of data or their transmission—by the Federal Intelligence Service must be compatible with the secrecy of telecommunications under Art. 10 para. 1 BL or the freedom of the press under Art. 5 para. 1 sentence 2 BL.²⁴ In doing so, the court specified that the fundamental rights obligation also covers cases in which the state, in the absence of a monopoly on the use of force, does not exercise sovereign

20. FCC vol. 63, 332, 338; vol. 108, 129, 136; vol. 113, 154, 162.

21. FCC vol. 75, 1, 16-17; vol. 113, 154, 162; vol. 108, 129, 136. Therefore, the extradition is already prohibited by simple law (§ 8 of the Act on International Mutual Assistance in Criminal Matters) if the person faces the death penalty in the requesting state.

22. FCC vol. 6, 290, 295.

23. Wide parts of the literature already assumed in principle such a binding commitment to the fundamental rights, see for instance: Soiné, DÖV 2006, 2004, 211; Gärditz, DV 2015, 463, 472; Oppermann, in Festschrift Grewe, p. 523.

24. FCC, judgment from 19.5.2020, 1 BvR 28535/17, recitals 56 et seqq. See also: Herdegen, in Maunz/Dürig, Kommentar GG, Art. 1 Abs. 3 recital 79. Restrictive yet: FCC vol. 100, 313, 362 et seqq.

power over the individual.²⁵ Insofar, the validity of fundamental rights does therefore not require a relationship of subordination between the state and the person concerned—in other words, no link to the status of the person.²⁶

2. The Claiming of the Duty to Protect

The FCC confirmed in early years that the Federal Republic of Germany has a duty to protect its citizens' fundamental rights against interference by a foreign state.²⁷ Recently, the Federal Administrative Court (FAC) explicitly recognized that this obligation generally also applies if an impairment of these fundamental rights—by another state, for example—takes place abroad. This is based on the following case: the United States used Ramstein Air Base, which is located on German territory, to carry out armed operations in Yemen by drones; the detour via the relay stations there is technically necessary because, due to the curvature of the earth, there would be a delay in the signal reaching the drones if it was sent directly from the United States. The Yemeni nationals living there want to impose a positive duty on the German government, to prevent such action claiming their right to life and physical integrity (Art. 2 para. 2 sentence 1 BL),²⁸ since the basic permission to use the air base cannot be qualified as an indirect participation by Germany to the interference of these persons—the defensive dimension of the fundamental rights is not relevant in this case.²⁹ This case must be separated from the constellation regarding how far a foreign citizen can,

25. FCC, judgment from 19.5.2020, 1 BvR 28535/17 recitals 90-91. For the opposing view, see among many others recently: Gärditz, DV 2015, 463, 474; Gärditz, DVBl 2017, 525, 526.

26. In this direction already: Kronke, in Coester-Waltjen/Kronke/Kokott, *Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsbezug*, p. 42-43; Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band XI, § 240 recital 22, for whom a simple relationship between the state and the person concerned is sufficient. But on the other hand: Isensee, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band V, § 115 recitals 78, 83 et seqq.

27. FCC vol. 6, 290, 299; vol. 40, 141, 178; vol. 55, 349, 364.

28. FAC, judgment from 25.11.2020, 6 C 7.19, last accessed as a press release on 8.2.2021 at <https://www.bverwg.de/pm/2020/68>. Likewise already the lower court: OVG Nordrhein-Westfalen, judgment from 19.3.2019, 4 A 1361/15, recitals 106 et seqq., recitals 184 et seqq. – retrieved on juris. In the literature, the picture is divided: Basically, open about, e.g.: Merten, in *Festschrift Schiedermaier*, p. 342; Badura, in *Merten/Papier, Handbuch der Grundrechte*, Band II, § 47 recitals 20, 22. Extremely restrictive, on the other hand, for instance Herdegen, in *Maunz/Dürig, Kommentar GG*, Art. 1 Abs. 3 recital 85. Completely excluding such protection of fundamental rights: Oppermann, in *Festschrift Grewe*, p. 534.

29. OVG Nordrhein-Westfalen, judgment from 19.3.2019, 4 A 1361/15, recitals 134 et seqq. – retrieved on juris. See to dimension of the fundamental rights again part II.

in principle, refer to the duties to protect when he or she is in Germany—this is solely a question relating to his or her entitlement to invoke fundamental rights.³⁰

IV. THE REQUIREMENTS AND LIMITS OF THE APPLICABILITY OF FUNDAMENTAL RIGHTS ABROAD

The applicability of fundamental rights abroad cannot be affirmed arbitrarily and without any restriction; rather, it is subject to certain requirements and limits for some of the aforementioned constellations. Basically, the extraterritorial protective effect depends on which dimension of the fundamental rights is asserted—their character as a right of defense or their character as a duty to protect.³¹ In concrete terms, then, the state must bear responsibility for the measure taken or sought (A.), whereby the claim of protection of fundamental rights abroad must not lead to a superimposition of the German legal system (B.) or to a breach of international law (C.).

A. *The Responsibility of the German Federal Republic*

In the case of an infringement of fundamental rights that is based on a direct intervention by the German state abroad, it is evident that no questions arise as to the state's responsibility. In this respect, the FCC correctly rejects the requirement that the affected person must be able to demonstrate a territorial connection to German ground if he or she wishes to invoke fundamental rights.³²

In the case of indirect participation, however, further differentiations are pertinently drawn.³³ The control of the Federal Republic over the course of events cannot in principle be denied simply due to the involvement of another state; instead, it can only be negated if factual and legal reasons prevent the ability to exert an influence.³⁴ Nevertheless, the actions of the German state must be causal for the danger and must be

30. See also regarding proofs for deepening, part II.

31. Justifiably already: FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 104.

32. FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 88. Yet left open: FCC vol. 100, 313, 362 et seqq. In the literature already: Badura, in Merten/Papier, *Handbuch der Grundrechte*, Band II, § 47 recital 4. See for the other view among many: Quaritsch, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band V, § 120 recitals 74 et seqq.

33. Cf. for instance: FCC vol. 66, 39, 60; vol. 92, 26, 47; vol. 100, 313, 362-363; Soiné, DÖV 2006, 204, 211; Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band XI, § 240 recitals 39 et seqq.; Gärditz, DV 2015, 463, 473.

34. FCC vol. 57, 9, 24; vol. 66, 39, 62.

attributable to it,³⁵ whereby the criterion of attribution enables particularly evaluative aspects to be taken into account.³⁶

With regard to the extradition cases listed as examples, the following picture emerges: If the Federal Republic accepts a request for handover, the German state evidently plays a causal and attributable role in the interference—the execution of the sentence—of fundamental rights,³⁷ whereas if the case were the other way around—and the Federal Republic requests a foreign state to extradite a German citizen—imputability must be rejected, since the examination of the legality of such a demand will be carried out by the foreign state, where the German state will not be able to exert any decisive influence.³⁸

In making its decision on the German government's approval regarding the stationing of missiles on German territory, the FCC also declined attributability, since the threat had essentially only arisen as a result of an autonomous decision by the foreign sovereign state—the Soviet Union; moreover, the German government must still be granted considerable scope for decision-making when evaluating the measures.³⁹ As a result, these convincing qualifications in regard to causality and attribution mean that, ultimately, the question of the German state's fundamental rights obligation in the case of indirect involvement must be decided on a case by case basis.⁴⁰

With regard to the German state's duty to protect fundamental rights even on foreign territory, the situation is more complicated: Obviously, it is not practical to provide protection to every person in the world;⁴¹ in concrete terms, it is not possible to grant every foreigner outside Germany the right to a minimum subsistence level according to Art. 1 para. 1 BL in conjunction with Art. 20 para. 1 BL.⁴² Consequently, it is reasonable to demand, considering the recent ruling of the FAC and the prevailing

35. Concisely highlighted in: FCC vol. 66, 39, 60.

36. See for example: Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band XI, § 240 recital 39; Gärditz, DV 2015, 463, 473.

37. Explicitly: Dreier, in Dreier, *Kommentar GG*, Art. 1 Abs. 3 recital 48. For an opposing opinion see for instance Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band XI, § 240 recital 43.

38. FCC vol. 57, 9, 23 et seqq.

39. FCC vol. 66, 39, 61-62.

40. Isensee, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band V, § 115 recital 101 assumes that the liability of the German state in the case of indirect participation is to be denied in principle.

41. Concisely expressed at Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, § 240 recital 23.

42. Merten, in *Festschrift Schiedermaier*, p. 343; Quaritsch, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band V, § 120 recital 76.

literature, as a further condition that a qualified link to the German national territory exists.⁴³ For Germans, this relationship arises solely on the basis of their citizenship within the meaning of Art. 116 of the Basic Law.⁴⁴

The justifiability of such a connection is more difficult for foreigners living abroad, since they are not German citizens and their place of residence is not on German territory.⁴⁵ For this reason, the presence of such a connection will always have to be clarified in each individual case. Contact with the territory of the Federal Republic of Germany can be assumed, for example—the validity of Art. 6 para. 1 BL is discussed here—if the foreigner concerned is married to or shares family with a person who can claim a connection with the German state, either through his or her nationality or through his or her place of residence.⁴⁶ Also, for instance, foreign people living abroad who have formerly worked in the Federal Republic have a right to the protection of their social security claims as property under Art. 14 para. 1 BL: There is a domestic connection present in this scenario due to the person's previous job in Germany, as such employment was subject to social security contributions.⁴⁷

Similarly, the assumption of a duty to protect against the emissions of, for example, a nuclear power plant located on German land, if asserted by a foreigner abroad, is equally convincing, because that person is just as at risk as a person in Germany—the territorial reference thus arises solely on the basis of territorial proximity.⁴⁸ It is essential, however, that such a territorial reference plays a decisive role in the infringement of fundamental rights; consequently, the mere transmission of data via

43. FAC, judgment from 25.11.2020, 6 C 7.19 accessed as a press release last on 8.2.2021 at <https://www.bverwg.de/pm/2020/68>. Concurring: OVG Nordrhein-Westfalen, judgment from 19.3.2019, 4 A 1361/15, recitals 113, 189 – retrieved on juris; Herdegen, in Maunz/Dürig, Kommentar GG, Art. 1 Abs. 3 recital 85; Quaritsch, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band V, § 120 recital 82; Becker, in Isensee/Kirchhof, Handbuch des Staatsrechts, § 240 recital 110; Merten, in Festschrift Schiedermaier, p. 344.

44. Isensee, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band V, § 115 recital 86; Quaritsch, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band V, § 120 recital 77; Becker, in Isensee/Kirchhof, Handbuch des Staatsrechts, § 240 recital 110.

45. Isensee, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band V, § 115 recital 87.

46. FCC vol. 76, 1, 46 et seqq., although the FCC does not grant foreign family members a right of entry.

47. See Quaritsch, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band V, § 120 recital 83 as well as FCC vol. 52, 1, 22. Fundamentally to the protection of social insurance law positions as property: FCC vol. 53, 257, 289 et seqq.

48. Quaritsch, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band V, § 120 recital 86-87. Second opinion e.g.: Oppermann, in Festschrift Grewe, p. 531.

Ramstein Air Base should not be sufficient for such a condition to be affirmed.⁴⁹

B. The Risk of Superimposing the German Legal System

With the acceptance of an extraterritorial protective effect in regard to fundamental rights, legal scholars regularly fear that this will lead to the superimposition of the German legal order over a foreign legal order.⁵⁰ The FCC, conversely, takes a more differentiated view of this issue: while it interprets the protective effect of fundamental rights in the case of purely indirect involvement of the German authorities in a restrictive manner—limited to the non-negotiable values of the Basic Law—so that the foreign legal order remains respected, it sees no danger of the superimposition Germany's own understanding of the law or restriction of the foreign legal order in the case of direct action abroad.⁵¹

The difference between the two constellations is primarily that in the case of indirect involvement by the Federal Republic, there may be direct interference with the foreign legal system. In concrete terms, when one takes into account that if the Federal Republic does not extradite a criminal because the German Criminal Code would lead to a different assessment of his guilt, it would have a direct effect on the foreign legal system. The obligation to respect the foreign law system therefore justifiably limits the protection of fundamental rights, so that the German state is not allowed to refuse extradition solely because it considers the penalty in the requesting state to be too high.⁵²

By contrast, if the German state were to take direct action, there would at least be an indirect influence on the foreign legal order, namely if the foreign state were to feel compelled to behave in a certain way following the German measures. Thus, in the case of surveillance of persons on the territory of a foreign state under the requirements of the German Basic Law, the latter's legal order would, at most, only be

49. FAC, judgment from 25.11.2020, 6 C 7.19, accessed as a press release last on 8.2.2021 at <https://www.bverwg.de/pm/2020/68>. Priority of this opinion: Herdegen, in Maunz/Dürig, Kommentar GG, Art. 1 Abs. 3 recital 85.

50. See for instance: Oppermann, in Festschrift Grewe, p. 531 claiming that a state with a different system of fundamental rights could feel its integrity disturbed and Isensee, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band V, § 115 recital 79 (Fundamental Rights Imperialism).

51. Cf. as an example in the case of indirect participation FCC vol. 75, 1, 17; vol. 113, 154, 162-163 and in the case of immediate intervention FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 101.

52. FCC vol. 75, 1, 17; vol. 113, 154, 162-163.

influenced by the fact that the foreign state would feel obliged to defend itself with countermeasures.⁵³ It must be concluded that the other state's authority to act remains unaffected, even in the case of a parallel extraterritorial fundamental rights commitment by the Federal Republic of Germany—here is a parallelism with the prohibition of intervention under international law.⁵⁴

In other words, with the application of the German Basic Law on foreign territory, only the legal sphere of the individual concerned is directly extended towards the German state authority; it remains open to the foreign state to grant other rights to this person. Thus, conflict should not arise between the two legal systems, since they can be applied side by side, they do not interfere with each other.⁵⁵ Rather, the affected person still has to complain about his or her impairment before the FCC (Art. 93 para. 1 no. 4a BL) after exhausting the legal process (§ 90 para. 2 Federal Constitutional Court Act). In this respect, it also seems more appropriate to speak only of a non-genuine extraterritorial application of the fundamental rights.⁵⁶ In summary, regarding the defensive nature of the fundamental rights, it can be stated that the above-mentioned differentiations are convincing, meaning that the risk of superimposing the German legal order consequently only exists in the case of indirect involvement. In this situation, extraterritorial application is insofar limited to the non-negotiable principles of the Basic Law within the meaning of Art. 79 para. 3 BL.⁵⁷ Indeed, from a substantive point of view, the effect of the fundamental rights in both constellations occurs abroad, but their execution concerns in the case of direct participation only the Federal Republic, while in the other scenario, indirect participation, the other state is also affected.⁵⁸

These differentiations must similarly be made with regard to the execution of the duty to protect fundamental rights, since international law, in the form of the principle of sovereignty, generally prohibits the German

53. The fact that the foreign state can defend itself against the German measures has already been noted by the FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 103.

54. FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 101.

55. Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band XI, § 240 recitals 26-27.

56. Cf. Merten, in *Festschrift Schiedermaier*, p. 333.

57. Also supporting such a restriction, e.g.: Graßhof/Backhaus, *EuGRZ* 1996, 445, 448; Dreier, in *Dreier, Kommentar GG*, Art. 1 Abs. 3 recital 49.

58. Cf. for this distinction Merten, in *Festschrift Schiedermaier*, p. 332.

Federal Republic from acting within the territory of a foreign state.⁵⁹ In other words, if protection of fundamental rights is sought abroad by demanding actions within German territory, no indoctrination of the German legal order can be said to have occurred—fundamental rights can, in principle, be applied without restriction. The same must be assumed, however, if the execution of the duty to protect is to take place on foreign territory: This does not, in fact, affect the foreign state's enforcement of its own legal order; the state could, in turn, only feel challenged once again, to take countermeasures.⁶⁰ Thus, once again, there is no conflict between the different legal orders at the level of their enforcement.⁶¹

However, the German state has a particularly wide margin of assessment in fulfilling its duty in this case, i.e., a violation only exists if the federal government has been completely inactive or its measures are completely inappropriate.⁶² This is because the extent to which an individual can be safeguarded does not depend solely on the will and power of the Federal Republic, especially when abroad.⁶³ According to the FAC, it should have been sufficient that the German Federal Republic contacted the U.S. on a diplomatic and political level to discuss the legal problems of the drone use in the above example; in particular, the U.S. should not be prohibited from using the Ramstein Air Base in the future, as this would have massive negative impacts on German relations with the U.S..⁶⁴ Thus, the fulfillment of the duty to protect is basically expressed through diplomatic cooperation.⁶⁵ In addition, the possibility of

59. See again: Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, § 240 recital 112; Isensee, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band V, § 115 recital 86; Oppermann, in *Festschrift Grewe*, p. 532.

60. Cf. again: FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 103.

61. Cf. once more Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band XI, § 240 recitals 26-27.

62. See specifically in this context: FAC, judgment from 25.11.2020, 6 C 7.19, accessed as press release last on 8.2.2021 at <https://www.bverwg.de/pm/2020/68> as well as earlier in the OVG Nordrhein-Westfalen, judgment from 19.3.2019, 4 A 1361/15, recital 533 – retrieved on juris. In general terms see for example: FCC vol. 56, 54, 81; vol. 77, 170, 215.

63. FCC vol. 40, 141, 178; vol. 55, 349, 364-365.

64. FAC, judgment from 25.11.2020, 6 C 7.19, accessed as press release last on 8.2.2021 at <https://www.bverwg.de/pm/2020/68>. The measures taken so far, on the other hand, were considered inadequate by: OVG Nordrhein-Westfalen, judgment from 19.3.2019, 4 A 1361/15, recitals 565 and seqq. – retrieved on juris.

65. Isensee, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band V, § 115 recital 86; Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, § 240 recital 111; Herdegen, in *Maunz/Dürig, Kommentar GG*, Art. 1 Abs. 3 recital 84. Other opinion: Dreier, in *Dreier, Kommentar GG*, Art. 1 Abs. 3 recital 47.

concluding treaties between states is a suitable option for the extraterritorial protection of certain interests.⁶⁶

C. The Compatibility with International Law

Regarding the question of whether or not the extraterritorial effects of fundamental rights are compatible with international law, it also seems appropriate to make a distinction between the different constellations.⁶⁷ If the German Federal Republic itself acts directly on foreign territory, the European Convention of Human Rights does not prevent the application of fundamental rights abroad, since it does not preclude protection of fundamental rights that go beyond its guarantees (cf. Art. 53 ECHR).⁶⁸ Furthermore, it would be contradictory to make the commitment to fundamental rights dependent on the legitimacy of state activity under international law, since this would lead to a situation whereby the German state could evade the validity of fundamental rights by deliberately acting in violation of international law.⁶⁹ Besides, as the sanctioning of the violation of fundamental rights takes place within German territory, there is basically no violation of the principle of territoriality.⁷⁰

In view of the above-mentioned conflict with the foreign legal system in the case of indirect participation by the German Federal Republic, however, the FCC's attempts to strike a balance by also taking into account whether common minimum standards of international law will be observed when assessing the legality of a measure of public authority make sense.⁷¹ For example, the German Federal Republic has signed treaties with many other states specifically for possible extradition requests, so that it would be acting in violation of international law if it disregarded its obligations, except if the agreements themselves violate the minimum standards of international law.⁷²

In this respect, the foundation of a duty to protect is also dependent on a synchronization with international law, whereby the FAC even

66. Already: Oppermann, in Festschrift Grewe, p. 535.

67. In contrast, making the binding commitment to fundamental rights without further distinction dependent upon the legitimacy according to international law, e.g.: Herdegen, in Maunz/Dürig, Kommentar GG, Art. 1 Abs. 3 recital 80.

68. FCC, judgment from 19.5.2020, 1 BvR 28535/17 recital 99.

69. Kronke, in Coester-Waltjen/Kronke/Kokott, Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsbezug, p. 42; Becker, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band XI, § 240 recital 9. Cf. also Isensee, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band V, § 115 recital 90.

70. Merten, in Festschrift Schiedermaier, p. 332.

71. See FCC vol. 75, 1, 19; vol. 113, 154, 162; vol. 100, 313, 363.

72. See Graßhof/Backhaus, EuGRZ 1996, 445, 448.

demands that violations of international law should not only appear possible, but must be clearly foreseeable or have already occurred.⁷³ As mentioned above, international law in terms of the principle of sovereignty fundamentally precludes the Federal Republic of Germany from acting within a foreign territory.⁷⁴ In order to be able to fulfill the duty to protect, the desired objective must be in the hands of German sovereignty, while its implementation on foreign ground is clearly limited.⁷⁵ For example, if the state were to carry out such a duty against activities that are contrary to international law⁷⁶ by taking measures on its own territory, that would be in accordance with the order of international law.⁷⁷

V. CONCLUSION

Due to new and ever further-reaching border-crossing possibilities for actions by the German state, it was high time the FCC also recognized the Federal Republic's binding commitment to fundamental rights in its activities abroad. This issue will become even more important with our increasingly interconnected world and advances in technology. For example, Germany is currently debating whether armed drones should be used to protect German soldiers in Afghanistan or Mali; any consequences—for the civilian population there, for instance—would have to be measured against German fundamental rights. A distinction must be made between this and the question of whether German soldiers have a right to the utilization of such a military defense—in recognition of the German Federal Republic's duty to protect them. In any case, when determining extraterritorial protection of fundamental rights, one must always bear in mind that although the German Basic Law has such a universally applicable character, certain qualifications concerning the protective effect

73. FAC, judgment from 25.11.2020, 6 C 7.19, accessed as press release last on 8.2.2021 at <https://www.bverwg.de/pm/2020/68>. Less strict yet: OVG Nordrhein-Westfalen, judgment from 19.3.2019, 4 A 1361/15, recitals 221 et seq. – retrieved on juris, according to which a danger need only be imminent.

74. See again: Becker, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, § 240 recital 112; Isensee, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band V, § 115 recital 86; Oppermann, in *Festschrift Grewe*, p. 532.

75. Concisely summarized by Becker, *NVwZ* 2015, 1335, 1340.

76. The FAC left open the question of how far U.S. drone operations in Yemen violate international law (cf. under <https://www.bverwg.de/pm/2020/68>), while the lower court assumed in part that the action was contrary to international law OVG Nordrhein-Westfalen, judgment from 19.3.2019, 4 A 1361/15, recitals 293 et seq. – retrieved on juris.

77. OVG Nordrhein-Westfalen, judgment from 19.3.2019, 4 A 1361/15, recital 215 – retrieved on juris.

may be necessary in particular cases since the Basic Law also respects other legal systems and international law.