

Interlegality - Symposium

Inter-Legality and Surveillance Technologies

Sümeyye Elif Biber*

Abstract

On 19 May 2020, the German Federal Constitutional Court ruled that telecommunication surveillance of non-German individuals outside German territory violates the German Constitution. The reasoning of the Court entails a number of crucial questions both from the international and European human rights law perspective. The most important one being whether the German Federal Government is bound by the provisions of the German Constitution when it interferes with the rights of non-German individuals in a non-German territory. Relying on international human rights law, the Court answered affirmatively. The reasoning of the judgment has demonstrated a successful example of Inter-legality. Therefore, this paper aims at analyzing the judgment from such a perspective through a three-step analysis: Taking the vantage point of the affair – the case at hand – under scrutiny, understanding the relevant normativities controlling the case, looking at the demands of justice stemming from the case. It concludes that such an inter-legal reasoning provided the Court to close ‘virtual legal black holes’, and avoid injustice.

I. Introduction

On 19 May 2020, the German Federal Constitutional Court (hereafter: BVerfG) ruled that telecommunication surveillance of non-German individuals outside German territory violates the German Constitution.¹ In the judgment, the Court conducted a constitutional review on certain provisions (*Rechtssatzverfassungsbeschwerde*) of the German Act on Federal Intelligence Service (BNDG),² allowing German authorities to collect and process communication data between non-German nationals outside German borders.³ The complainants, a group of journalists and NGOs, claimed that the provisions

* Phd Candidate in Law and Technology, Sant’Anna School of Advanced Studies.

¹ BVerfG 19 May 2020 1 BvR 2835/17. Direct citations in the article to the Judgment refer to the official English translation of the Judgment, published on the website of the BVerfG, available at <https://tinyurl.com/2s3cfjvb> (last visited 31 December 2021). For another important judgments of the BVerfG assessing the constitutionality of surveillance regulations see BVerfG 20 April 2016 1 BvR 966/09 - 1 BvR 1140/09; BVerfG 14 July 1999 1 BvR 2226/94 - 1 BvR 2420/95 - 1 BvR 2437/95.

² Gesetz über den Bundesnachrichtendienst – BNDG of 20 December 1990.

³ The constitutional complaint mainly challenged §§ 6,7 and §§ 13 to 15 BNDG. See BVerfG n 1 above, para 57.

of the BNDG violate their right to privacy, and the freedom of press.⁴

The Government objected that it is not bound by the German Basic Law when conducting surveillance activities on foreign individuals on foreign soils.⁵ However, the Court found violations of Arts 5 and 10 of the German Constitution, and stated that the Legislature would need to revise the existing provisions in accordance with the German Basic Law until the 3 December 2021.⁶

The reasoning of the Court entails a number of crucial questions both from the international and European human rights law perspective. The most important among such questions is whether the German Federal Government is bound by the provisions of the German Constitution when it interferes with the rights of non-German individuals in a non-German territory. Relying on international human rights law, the Court answered affirmatively, raising three main arguments in favour of the accountability of the German Federal Government on foreign soils, mainly interpreting paras 2 and 3 of Art 1 of the German Constitution.⁷

Indeed, pursuant to Art 1, para 3, of the Basic Law, the Court stated that German authorities are comprehensively bound by the fundamental rights of the German Constitution without restrictions on the German territory (*Staatsgebiet*) or the German people (*Staatsvolk*).⁸ In this context, by making references to the history of the Basic Law and applying to the teleological interpretation, the Court clearly emphasized that the Constitution aims at a comprehensive reading of the fundamental rights rooted in human dignity.⁹

Secondly, in the light of the second paragraph of Art 1 and the Preamble, the Court found that the Basic Law recognizes inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.¹⁰ Thus, the fundamental rights of the Basic Law are placed in the context of international human rights guarantees. This requires that fundamental rights of the Basic Law must be interpreted in the light of Germany's international-law obligations.¹¹

Finally, according to the Court, new technological developments and their usages require a comprehensive reading of para 3 of Art 1 to take into account

⁴ Para 33. Arts 5, para 1, second sentence and 10, para 1. Art 5, para 1, 'Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt'. Art 10, para 1, 'Das Briefgeheimnis sowie das Post- und Fernmeldegeheimnis sind unverletzlich'.

⁵ BVerfG n 1 above.

⁶ *ibid.*

⁷ Art 1, para 2, 'Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt'. Art 1, para 3, 'Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht'.

⁸ BVerfG n 1 above, paras 87-89.

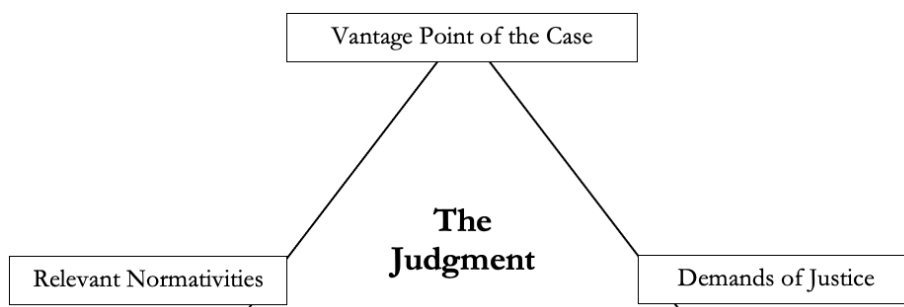
⁹ *ibid* para 89.

¹⁰ *ibid* § 94.

¹¹ *ibid* §§ 94-95.

the threats to fundamental rights and the resulting shifts in the powers.¹² This leads to the fact that German authorities are subject to international human rights obligations regardless of the territory in the context of new technologies which offer cross-border services.¹³ In other words, such a comprehensive reading of the German Constitution is particularly highlighted for new technological developments allowing states powers to reach out into third countries.

I believe that this judgment can be considered as a successful example of inter-legal reasoning. Therefore, this study aims at analyzing the judgment from such a perspective,¹⁴ through a three-step analysis: (i) taking the vantage point of the affair – the case at hand – under scrutiny, (ii) understanding the relevant normativities actually controlling the case, (iii) looking at the demands of justice stemming from the case.¹⁵ The purpose of constructing such a three-step analysis is to provide judges an analytical way to apply to the perspective of inter-legality. The triangle below clearly sketches the three pillars of the concept:



It should be noted that there is no hierarchical relation between the three steps of the concept. They relate to each other and dynamically guide each other. However, the vantage point of the case is the most essential step of inter-legality.¹⁶ Therefore, we will start our analysis with this pillar. Since the pillar of ‘demands of justice’ requires to reconnoitre the ‘relevant normativities’, it will be the final phase of our analysis. Subsequently, the analysis will provide concluding remarks.

¹² BVerfG n 1 above, § 105.

¹³ *ibid* § 105.

¹⁴ J. Klabbers and G. Palombella, *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press, 2019).

¹⁵ J. Klabbers and G. Palombella, ‘Introduction Stating Inter-Legality’, in Id and J. Klabbers eds, n 14 above, 1-20; G. Palombella, ‘Theory, Realities, and Promises of Inter-Legality A Manifesto’ *ibid* 363-390.

¹⁶ J. Klabbers and G. Palombella, n 14 above, 2 (‘the shift toward the construction of law from the angle of the case is essential to an inter-legality approach’).

II. Taking the Vantage Point of the Affair – the Case at Hand – Under Scrutiny

The concept of inter-legality essentially focuses on the vantage point of the case.¹⁷ In this context, Palombella addresses the essentiality of the angle of case at stake as follows:

‘One that seeks to reach the layer controlling the case in its deepest fundus, ie the place where, one would say with Wittgenstein, ‘I have reached bedrock, and my spade is turned’. To be required to think of law in terms of inter-connectedness, among many normativities’.¹⁸

To understand the vantage point of the case, the practice of strategic surveillance of the Federal Intelligence Service could be briefly summarized in five steps, namely (i) access to telecommunication data by intercepting signals from telecommunications networks, (ii) application to the diversion of data or other interception methods ‘initiating a multi-step and fully automated process of sorting and analysis,’ and following this, filtering data (DAFIS filtering mechanism), (iii) collecting and storing all traffic data that is left after the application of filtering mechanism without using any selectors,¹⁹ (iv) screening data manually as to its relevance for the Federal Intelligence Service, (v) cooperating with other intelligence services.²⁰ Particularly, the filtering system is in dispute between the parties. Although Federal Intelligence Service has some parameters to identify data connected persons within Germany or German citizens, ‘it is unknown how many telecommunications process are falsely categorized as purely foreign telecommunications’ due to the use of intermediary services located abroad or due to the use of hotspots.²¹ Therefore, this problematic filtering mechanism partially stems from the features of the technology being used.

In this context, the judgment clearly analyzed the features of the advanced surveillance technologies and fundamental differences from the traditional technologies in the past:

‘In the past, the only purpose of gathering foreign intelligence was the early detection of dangers to avert armed attacks on German territory; measures directly targeting individuals were limited to a small group of persons, as a result of both the technical possibilities and the intelligence interest at the time (cf. BVerfGE 67, 157,178). Given today’s possibilities of

¹⁷ *ibid* 2.

¹⁸ G. Palombella, *Theory* n 15 above, 380.

¹⁹ It is a computer-based analysis through cross-checking and other methods. BVerfG n 1 above, para 21.

²⁰ BVerfG n 1 above, paras 16-26.

²¹ BVerfG n 1 above, para 19.

communication and the accompanying internationalisation, potential impending dangers (*drohende Gefahren*) originating from abroad have multiplied. Information technology makes it possible to communicate directly across borders, regardless of physical distance, and to coordinate without any delay'.²²

Furthermore, the Court highlighted that in line with new technological developments, limiting the application of fundamental rights to the national borders would leave individuals vulnerable and cause the scope of the protection of fundamental rights to lag behind internationalization:

'In light of such developments, an understanding of fundamental rights according to which their protection ended at national borders would deprive holders of fundamental rights of all protection and would result in fundamental rights protection lagging behind the realities of internationalisation ([...]). It could undermine fundamental rights protection in an increasingly important area that is characterised by intrusive state action and where – in the field of security law – fundamental rights are especially significant in general. By contrast, in binding the state as the relevant actor, Art 1(3) GG accounts for such novel risks and helps bring them into the general framework of the rule of law that is created by the Basic Law'.²³

According to the BVerfG, such kind of international dimension allowing communication within states and beyond states borders ambiguates the distinction between domestic and foreign.²⁴ This interpretation demonstrates that the BVerfG detects the vantage point of the case as virtual in the context of new technologies providing cross-border services. In other words, these technologies, which make time and space meaningless, actually virtualize the vantage point of the case. Therefore, these technologies confront courts with a case which is independent from the physical places or borders. In this context, an inter-legal approach becomes much more relevant because such a cross-border space provides a ground that potentially increases the interactions between legal systems. Such a dynamic and unpredictable ground also requires to consider that a legal system is better to be seen as interactional, not a system that is closed and structured.²⁵ This interactional way of understanding of legal

²² BVerfG n 1 above, para 107.

²³ *ibid* para 110.

²⁴ *ibid* para 109.

²⁵ See the discussion on product versus practice models of law in W. Van der Burg, *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* (Surrey: Ashgate Publishing, 2014), 10. According to Sanne Taekame, the product model of law generates a systemic conception of legal order, while a practice model of law addresses an interactional legal order. See the discussion in the context of inter-legality in S. Taekema, 'Between or

system requires to find out the relevant normativities controlling the case, the second pillar of our analysis.

III. Understanding the Relevant Normativities Controlling the Case

Inter-legality does not only capture the plural co-existence of legalities running on their own, it also presents a reality of the ‘unavoidable interconnectedness of legalities’.²⁶ An inter-legal approach indicates that none of the legalities or regimes work effectively on their own. As Palombella argues, ‘their functional isolation is a myth’.²⁷ Therefore, the only way to strengthen the effectiveness of a particular legality or a regime is to introduce it to their ‘interlocutors’. For instance,

‘the European Convention of Human Rights may well be conceived as a kind of constitutional legality, but its ordering strength depends on the ways ‘other’ legal systems accept and implement its normative clauses’.²⁸

In this framework, as a consequence of the inter-connectedness of legalities, an inter-legality perspective provides a perspective to the observer to see that these legalities are not only connected but also interwoven.²⁹ For this reason, disregarding this interwovenness, or the reliance on only one legality might lead justice to remain always as a ‘lame verdict’.³⁰ This suggests that it is not up to us the option to exclude or consider the normative characters of legalities, in a context where they are interwoven, interconnected, and de facto competing or concurring.³¹ In other words, every relevant legality in a ‘legal porosity’³² context where multiple networks of legal orders force us to ‘constant transition and trespassing’³³ has legally an objective say for justice due to their potential justice-related function.³⁴ In this way, the perspective excludes the monopoly or

Beyond Legal Orders Questioning the Concept of Legal Order’, in J. Klabbbers and G. Palombella, n 14 above, 69-88.

²⁶ G. Palombella, *Theory* n 15 above, 366.

²⁷ *ibid* 367.

²⁸ *ibid* 367; W. Sadurski, ‘Partnering with Strasbourg: Constitutionalism of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments’ 9 *Human Rights Law Review*, 397 (2009).

²⁹ G. Palombella, *Theory* n 15 above, 365-368.

³⁰ *ibid* 386.

³¹ *ibid* 363-390.

³² S. Santos, ‘Law: A Map of Misreading’, in B. De Sausa Santos ed, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London: Routledge, 1995), 473.

³³ *ibid* 473.

³⁴ Palombella emphasizes this point marking a difference from Santos’s idea of inter-legality, as follows: ‘it is true what Santos wrote that we live “in between”. But inter-legality is not just a state of things we can exploit, and profit from contradictions and divergences among separate and mutually irrelevant normative orders. Not as a *subjective sociological* but as an *objective legal* notion, inter-legality allows us to consider the law as something different; we

hegemony of a particular legal order,³⁵ and invites all relevant legalities to reach an equilibrium, and dissolve the tension between them.³⁶ Indeed, such a perspective also stands by the rule of law that requires to consider diverse needs and ends, and ‘prevents the law from turning into a sheer tool of domination’.³⁷ In this way, it gains a great potential to close ‘legal black holes’,³⁸ and answer the questions arisen from the inter-connectedness of legalities, and hence strengthen the culture of justification.³⁹

The judgment of the BVerfG clearly engaged with this ‘empirical reconnaissance’⁴⁰ takes place in the ecosystem of inter-legality by considering the interrelatedness of legalities within the framework of the case. In other words, the Court reconnoitered the relevant legalities creating an ecosystem of inter-legality on the basis of the case at stake.

According to the Court, the relevant normativities controlling the case are both the international norms and the German Constitution. Such a result

should pretend to avail of inter-legality also in a different sense’, in G. Palombella, *Theory* n 15 above, 378.

³⁵ The term ‘legal hegemony’ has been widely discussed by legal experts after the well-known ‘PSPP judgment’ of the BVerfG, Judgment of the Second Senate 5 May 2020, 2 BvR 859/15, paras 1-237. According to the BVerfG, the review done by the Court of Justice of the European Union on the European Central Bank’s decisions regarding the Public Sector Purchase Program does not satisfy the principle of proportionality. See some recent discussions about legal hegemony in A. von Bogdandy ‘German Legal Hegemony’ *Verfassungsblog*, available at <https://tinyurl.com/2p87kp6d> (last visited 31 December 2021). See some legal experts’ ideas on whether German legal hegemony is a matter of concern in EU law in Id et al, ‘German Legal Hegemony?’, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper no 2020-43, November 2020, 9, available at <https://tinyurl.com/4jve6dmw> (last visited 31 December 2021).

³⁶ G. Palombella, *Theory* n 15 above, 381-382.

³⁷ G. Palombella, ‘The Rule of Law at Home and Abroad’ 8(1) *Hague Journal on Rule of Law*, (2016).

³⁸ A. Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2008), 298 (arguing that judicial review eliminates legal black holes.) The term ‘legal black hole’ was coined by Johan Steyn in 2004. See J. Steyn, ‘Guantanamo Bay: The Legal Black Hole’ 53(1) *International and Comparative Law Quarterly*, (2004) (‘The most powerful democracy is detaining hundreds of suspected foot soldiers of the Taliban in a legal black hole at the United States naval base at Guantanamo Bay, where they await trial on capital charges by military tribunals’). In 2006, Dyzenhaus coined the term ‘legal grey holes’ to describe ‘disguised black holes’ that addresses situations in which ‘there are some legal constraints on executive action - it is not a lawless void - but the constraints are so insubstantial that they pretty well permit government to do as it pleases’. He emphasized that they are worse than legal black holes (‘since such grey holes permit government to have its cake and eat it too, to seem to be governing not only by law but in accordance with the rule of law, they and their endorsement by judges and academics might be even more dangerous from the perspective of the substantive conception of the rule of law than true black holes’). See D. Dyzenhaus *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 42.

³⁹ See an excellent discussion on the term ‘culture of justification’ and its relation with the principle of proportionality in M. Cohen-Eliya and I. Porat, ‘Proportionality and the Culture of Justification’ 59 *American Journal of Comparative Law*, 463 (2011).

⁴⁰ G. Palombella, *Theory* n 15 above, 382. Palombella uses the term ‘reconnaissance’ in both exploration and recognition sense.

stemmed from the interpretation of paras 2 and 3 of Art 1, that focuses on their ‘multifaced nature’. In other words, the Court read the ‘norm-text’ of these provisions and recognized that the relevant norms are composed of more than one system-sourced positive law:

‘In Art 1(2) GG, the Basic Law acknowledges inviolable and inalienable human rights as the basis of every community, of peace, and of justice in the world. The Basic Law thus places fundamental rights in the context of international human rights guarantees that seek to provide protection beyond national borders and are afforded to individuals as human beings. Accordingly, Art 1(2) and Art 1(3) GG build upon the guarantee of human dignity enshrined in Art 1(1) GG’.⁴¹

This tension-free and equilibrating reading of the Constitution implicitly follows the perspective of inter-legality that changes the ‘usual, traditional perspective, a perspective that is limited by the political, legal and cognitive borders of a single self-contained system’.⁴² In this sense, the perspective of inter-legality bears a resemblance to the structuring legal theory (SLT), founded by Friedrich Müller.⁴³ It identifies itself as a ‘post-positivist’ theory according to which legal norms are not identical with their text (‘Rechtsnorm ist *ungleich* Normtext’).⁴⁴ It sees interpretation or the application of law as a dynamic process in which the actual norms have to be constructed.⁴⁵ In this context, both the theses of SLT and inter-legality agree on the inadequacy of the norm-text and put the norm in a comprehensive and broad framework. In other words, by considering other relevant actors, they exclude the old-fashioned view that the only correct solution for every case can be found in legislation.⁴⁶

Furthermore, such a perspective also demonstrates that the BVerfG changes its perspective to international law, at least in the context of surveillance technologies. It has been recognized by some scholars that according to the German Federal Constitutional Court,

‘international law does feature only in their jurisprudence if and to the extent permitted by their domestic law. Therefore, when the Court applies international law or implements international decisions, they do so because

⁴¹ BVerfG n 1 above, para 94.

⁴² J. Klabbers and G. Palombella, *Introduction* n 15 above, 1.

⁴³ F. Müller and R. Christensen, *Juristische Methodik* (Berlin: Dunker & Humblot, 11th ed, 2013), 263. For the basic premises of his theory see M. Klatt, *Making the Law Explicit: The Normativity of Legal Argumentation*, (Oxford: Hart Publishing, 2008), 54-56 (‘the text is only a ‘guideline, as such it has no claim to normativity (...) the rule is not the beginning, but the product of the process of the application of the law’).

⁴⁴ See further discussion about the SLT in M. Klatt, ‘Contemporary Legal Philosophy in Germany’ *Archiv für Rechts und Sozialphilosophie*, 519-539 (2007).

⁴⁵ *ibid.*

⁴⁶ *ibid.*

domestic law requires it, not because they are organs of the international community.⁴⁷

However, in this judgment, there is no priority regarding the legalities at stake, the Court reads the Basic Law in the light of internationalization, relying on the principle of human dignity as a universal ideal.⁴⁸ Furthermore, the Court emphasized the responsibilities of the German state in a united Europe and the world.⁴⁹ The emphasis on the responsibility for the protection of fundamental rights of the German State also implies that sovereignty should not only be seen as something limited by fundamental rights, but also a responsibility for the protection of fundamental rights, placing the individual in its center.⁵⁰ In this way, sovereignty becomes a ‘humanized state sovereignty’ that is accountable for safeguarding humanity.⁵¹

Such a reading inevitably leads the BVerfG to focus on the relevant case-law of the European Court of Human Rights (ECtHR). It clearly cited the leading decisions as regards the territorial scope of the European Convention of Human Rights.⁵² In the light of these cases, the BVerfG induced that the case-law of the ECtHR is largely based on the doctrine of ‘effective control over territory’, and it is still not clear on the protection against surveillance measures taken abroad by the Convention States:

‘The European Court of Human Rights is mainly guided by the criterion of whether a state exercises effective control over an area outside its own territory; on this basis, it has in many cases affirmed the applicability of Convention rights abroad (cf in summary ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, Judgment of 7 July 2011, no 55721/07, §§ 132 *et seq.* with further references; cf also Aust, *Archiv des Völkerrechts* 52, 2014, p. 375, 394 *et seq.* with further references). However, there has been

⁴⁷ A. Paulus, ‘National Courts and the International Rule of Law (Remarks on the book by André Nollkaemper)’ 4 *Jerusalem Review of Legal Studies*, 5, 8-9 (2012).

⁴⁸ See a recent discussion about the judgment’s universalist and international language in M. Milanovic, ‘Surveillance and Cyber Operations’, in M. Gibney et al eds, *Research Handbook on Extraterritorial Human Rights Obligations* (London: Routledge, forthcoming), 10-11, available at <https://tinyurl.com/mraer6r2> (last visited 31 December 2021.) See also a wide discussion on the concept of human dignity in German constitutional law in A. Barak, ‘Human Dignity in German Constitutional Law’, in Id, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 225-242.

⁴⁹ BVerfG n 1 above, paras 94-95.

⁵⁰ A. Peters, ‘Humanity as the A and Ω of Sovereignty’ *European Journal of International Law*, 513-544 (2009).

⁵¹ *ibid.*

⁵² Eur. Court H.R., *Al-Skeini and others v United Kingdom*, Judgment of 7 July 2011, available at www.hudoc.echr.coe.it, para 132; Eur. Court H.R., *Big Brother Watch and others v United Kingdom*, Judgment of 13 September 2018, available at www.hudoc.echr.coe.it, para 271; Eur. Court H.R., *Center for Raštvisā v Sweden*, Judgment of 19 June 2018, available at www.hudoc.echr.coe.it.

no final determination as to whether protection is afforded against surveillance measures carried out by Contracting Parties in other states. In a decision that has not become final yet, the First Section of the European Court of Human Rights measured the implementation of surveillance measures targeting persons abroad against the standards of the Convention without any restrictions and found such measures to be in violation of the Convention. The complainants in this case included foreign nationals who were not present or resident in the state against which the applications were directed (cf. ECtHR, *Big Brother Watch and Others v. the United Kingdom*, Judgment of 13 September 2018, no 58170/13 and others, § 271). Similarly, a Swedish foundation challenged strategic foreign surveillance powers under Swedish law that exclude domestic communications. The European Court of Human Rights reviewed these powers without calling into question the Convention's applicability abroad (cf ECtHR, *Centrum för Rättvisa v Sweden*, Judgment of 19 June 2018, no. 35252/08). Both proceedings are now pending before the Grand Chamber'.⁵³

It is worth noting that in the case of *Bankovic and Others v Belgium* the ECtHR made it clear that

'the Convention is a multi-lateral treaty operating (...) in an essentially regional context and notably in the legal space of the Contracting States. (...) The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.'⁵⁴

However, in the context of foreign surveillance, the incoherency of the ECtHR's extraterritorial jurisprudence⁵⁵ has been highlighted by many human rights scholars. They argued that although the ECtHR has decided a number of major cases on the subject, the meaning of Art 1, which provides that 'the high Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this convention,' has still remained unclear.⁵⁶

⁵³ BVerfG n 1 above, §§ 97-98.

⁵⁴ Eur. Court H. R., *Bankovic and Others v Belgium and Others*, Judgment of 10 May 2001, available at www.hudoc.echr.coe.it, para 80. See also ECtHR, 'Guide on Article 1 of the European Convention on Human Rights', updated on 31 December 2020, available at <https://tinyurl.com/54fb29ae> (last visited 31 December 2021).

⁵⁵ See a summary of ECtHR case-law regarding mass surveillance in ECtHR, 'Mass Surveillance – Factsheet', May 2021, available at <https://tinyurl.com/bdfca7tu> (last visited 31 December 2021).

⁵⁶ M. Milanovic, *Extraterritorial Application of Human Rights Treaties Law, Principles and Policy* (Oxford: Oxford University Press, 2011); S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction Under the European Convention' *The European Journal of International Law*, 1223-1246 (2009); M. Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' 56(1) *Harvard*

Finally, the BVerfG noted that the application of the Basic Law abroad was only meant to limit the actions of German state authority, and thus not violated the principle of non-intervention under international law:⁵⁷

‘the binding effect of fundamental rights does not amount to a violation of the principle of non-intervention or to a restriction of other states’ executive or legislative powers. It neither imposes German law on other states, nor does it supplant the fundamental rights of other states. In particular, the binding effect of fundamental rights does not extend German state powers abroad, but limits potential courses of action of German state authority.’⁵⁸

Following this reasoning, the Court highlighted that Art 53 of the European Convention on Human Rights allows it to provide further protection for fundamental rights by stating that ‘the Convention does not rule out further-reaching fundamental rights protection by the Contracting Parties’.⁵⁹ This investigation leads the Court to focus on other relevant legalities to address the demands of justice stemming from the case, the third step of our analysis.

IV. Looking at the Demands of Justice Stemming from the Case

With regards to the third step guided by the first and the second, the Court implicitly applied to the doctrine of ‘effective control over rights.’ Different from the effective control over territory and over persons doctrines of the ECtHR, ‘effective control over rights’ is based on whether states have the effective control over the enjoyment of the rights.⁶⁰ Such a reading stemmed from the

International Law Journal, 81 (2015). See also ECtHR, ‘Extra-territorial Jurisdiction of States Parties to the European Convention on Human Rights’, July 2018, available at <https://tinyurl.com/y5bv4u42> (last visited 31 December 2021).

⁵⁷ BVerfG n 1 above, paras 101-103.

⁵⁸ *ibid* para 101.

⁵⁹ *ibid* para 99. It should be noted that this article has a particular importance from the perspective of inter-legality. It substantially seconds inter-legal reasoning for two reasons. First, it considers that there might be relevant legalities related to the issue at stake. Second, it orients domestic courts to look for just solutions. Art 53 of the ECHR states that ‘nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party’.

⁶⁰ See a recent discussion on the doctrine of effective control over rights in B. Çalı, ‘Has ‘Control Over Rights Doctrine’ for Extraterritorial Jurisdiction Come of Age? Karlsruhe too, has spoken, not it’s Strasbourg Court?’ *Blog of European Journal of International Law*, available at <https://tinyurl.com/28xkv596> (last visited 31 December 2021.) Compare with the debate on the concept of ‘preserving legal space’ of the ECtHR in M. Rojszczak, ‘Extraterritorial Bulk Surveillance after the German BND Act Judgment’ *European Constitutional Law Review*, 11-12 (2021) (arguing that the concept would prevent individuals from finding themselves in a ‘legal vacuum’ in the context of electronic surveillance).

reconnaissance of the link between human rights and fundamental rights. The Court found that the German state is accountable both on the ground of Basic Law and on the international conventions particularly citing the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights:

‘This link between fundamental rights and human rights guarantees is incompatible with the notion that the applicability of the fundamental rights of the Basic Law ends at the national border, which would exempt German public bodies from having to adhere to fundamental rights and human rights when they act abroad *vis-a-vis* foreigners. Such a notion would run counter to the Basic Law’s aim of ensuring that every person is afforded inalienable rights on the basis of international conventions and beyond national borders – including protection from surveillance (cf Art 12 of the Universal Declaration of Human Rights, Art 17(1) of the International Covenant on Civil and Political Rights). Given the realities of internationalised political action and the ever increasing involvement of states beyond their own borders, this would result in a situation where the fundamental rights protection of the Basic Law could not keep up with the expanding scope of action of German state authority and where it might – on the contrary – even be undermined through the interaction of different states. Yet the fact that the state as the politically legitimated and accountable actor is bound by fundamental rights ensures that fundamental rights protection keeps up with an international extension of state activities’.⁶¹

It is important to note that although the Court did not establish a clear link between fundamental rights and human rights, it highlighted that fundamental rights cannot be seen as closed legal regimes because of their relation with human rights. In fact, the Court emphasized the existence of terminological distinction between human rights and fundamental rights, but it noted that this distinction ‘cannot be used as an argument against the integration of fundamental rights into the context of universal human rights.’⁶² Otherwise fundamental rights remain inadequate when the German public bodies act abroad *vis-à-vis* foreigners. In this sense, the link between fundamental rights and human rights is crucial, not allowing fundamental rights to be undermined through the interaction of different states.⁶³ In other words, human rights are ‘fundamentally’ relevant

⁶¹ BVerfG n 1 above, para 96.

⁶² *ibid* para 94.

⁶³ See an excellent discussion on the relation between human rights and fundamental rights in G. Palombella, ‘From Human Rights to Fundamental Rights: Consequences of a conceptual distinction’ *Archiv Für Rechts Und Sozialphilosophie*, 396-426 (2007) (arguing that human rights are deontological imperatives concerning that which we owe to human beings; fundamental rights, by contrast, are related to things that are capable of contributing to the existence of a society.)

when a ‘domestic’ issue concerning fundamental rights arises, have a great potential to provide further protection for fundamental rights.

Furthermore, according to the Court, given the realities of internationalized political action, such a universal reading of fundamental rights is inescapable; and thus, it results in legal responsibility of the German public authorities at the global level. Thus, the reconnaissance of the link between human rights and fundamental rights and the reliance on international human rights law provided the Court to apply implicitly the doctrine of effective control over rights.

The doctrine of effective control over rights has been adopted by several international institutions. The UN Human Rights Committee in its General Comment no 36 clearly noted that:

‘In light of Art 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under Art 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner (see para 22 above).’⁶⁴

Similar approach can be found in the report on the ‘Right to Privacy in the Digital Age’ of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in the context of digital surveillance:

‘Digital surveillance therefore may engage a State’s human rights obligations if that surveillance involves the State’s exercise of power or effective control in relation to digital communications infrastructure, wherever found, for example, through direct tapping or penetration of that infrastructure. Equally, where the State exercises regulatory jurisdiction over a third party that physically controls the data, that State also would

⁶⁴ UN Human Rights Committee, General Comment no 36, para 63. Art 6 of the ICCPR: ‘1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this art shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.’

have obligations under the Covenant. If a country seeks to assert jurisdiction over the data of private companies as a result of the incorporation of those companies in that country, then human rights protections must be extended to those whose privacy is being interfered with, whether in the country of incorporation or beyond'.⁶⁵

In 2017, the Inter-American Court of Human Rights, in its advisory opinion on

'the Environment and Human Rights' also stated that extraterritorially affected victims are contingent upon the jurisdiction of the state of origin 'when the State of origin exercises effective control over activities carried out that caused the harm and consequent violation of human rights'.⁶⁶

The doctrine has been also suggested by several human rights experts due to the facts surrounding surveillance technologies. They argued that in the context of communication surveillance, human rights obligations of a state are triggered if the state affects the rights of a person, regardless of whether that person has a connection to that state.⁶⁷ Furthermore, they argued that both the effective control over individual and control over territory doctrines are ill-suited to the nature of communication surveillance, where the control of a state over infrastructure and individual is virtual.⁶⁸ As Aronson makes the point,

'communications surveillance programs most often involve a state's collection and review of data from its own territory, even though the communications may originate and terminate in other states and the rights holders may be beyond the collecting state's jurisdiction. Some types of collection more clearly involve extraterritorial action – eg, a state's interception of communications traffic via equipment located in its embassies abroad – but the impact on rights occurs in a different manner from the exercise of "effective control" over persons or territory'.⁶⁹

Although the BVerfG did not clearly refer to the doctrine of effective control over rights, reliance on international human rights law – by making general

⁶⁵ OHCHR, 'Report on the Right to Privacy in the Digital Age', UN doc A/HRC/27/37 (30 June 2014), para 34.

⁶⁶ Inter-American Court of Human Rights, 'Environment and Human Rights Advisory Opinion' OC-23/17, 15 November 2017, Series A No. 23/17, para 104(h).

⁶⁷ P. Margulies, 'The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism' 82 *Fordham Law Review*, 2137, 2148-2152 (2014) (arguing that a state exercises 'virtual control' over communications infrastructure when it practices surveillance activities); M. Land and J. Aronson, *New Technologies for Human Rights and Practice* (Cambridge: Cambridge University Press, 2018), 236-239.

⁶⁸ M. Land and J. Aronson, n 67 above, 236-239.

⁶⁹ *ibid.*

references to Art 12 of the Universal Declaration of Human Rights⁷⁰ and Art 17 of the International Covenant on Civil and Political Rights⁷¹ regulating the right to privacy – and the universalist reading of the Constitution have enabled the fundamental rights protected under the Basic Law to reach beyond borders. Such an approach has enabled the Court to fulfil the demands of justice stemming from the case, namely the third step of our analysis.

V. Conclusion

The concept of inter-legality is developed in the light of the recent developments occurring in the world. Globalization and the regulation of the world have challenged the state-based setting of a Westphalian and Hobbesian order.⁷² In this transformative, incomplete, or ‘suspended’ period, states have protected their hold on many issues regardless of whether regulated at the regional and global levels, and maintained their national roles effective as far as possible.⁷³ However, emerging cross border issues ranging from climate to security have started to decrease the power of states.⁷⁴ The increasing presence of extra-state regimes and international organizations have also been a clear sign that states have loosened the ‘chain of control’ in many issues.⁷⁵

In this context, the World Trade Organization, the European Union, the United Nations Convention on the Law of the Sea, the European Convention on Human Rights, the Codex Alimentarius Commission, the World Intellectual Property Organization, the International Organization for Standardization draw our attention away from the restricted ‘public’ of states.⁷⁶ The most recent striking example could be the ongoing COVID-19 crisis that has first identified in December 2019 in China but hasn’t stayed as a national issue within Chinese borders.⁷⁷ Indeed, the World Health Organization has played a significant role in the Crisis by publishing several documents and issuing statements.⁷⁸ This

⁷⁰ Art 12: ‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks’.

⁷¹ Art 17(1): ‘1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.’

⁷² G. Palombella, *Theory* n 15 above, 363; J. L. Dunoff and J. P. Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009); M. Tushnet ‘The Inevitable Globalisation of Constitutional Law’ 49 *Virginia Journal of International Law*, 985 (2009).

⁷³ G. Palombella, *Theory* n 15 above, 363.

⁷⁴ *ibid.*

⁷⁵ *ibid.*, 364.

⁷⁶ *ibid.*, 364-365.

⁷⁷ ‘WHO announced COVID-19 outbreak as a pandemic on 11 March 2020’, available at <https://tinyurl.com/5eaa954a> (last visited 31 December 2021).

⁷⁸ See the recent updates about the crisis at <https://tinyurl.com/5eaa954a> (last visited 31 December 2021).

has been a clear-cut and traumatic example that *ordre public* in this century is not something reducible to the national interest alone.⁷⁹

The emphasis on the ‘internationalisation’ and the features of new advanced technologies highlighted in the judgment demonstrated that the BVerfG takes this transition into account. Reading the legal concept of human dignity as a universal ideal, emphasizing the link between fundamental rights and human rights, and the increasing internationalized political actions have become clear reasons for the Courts to introduce the German Constitution to its interlocutors. On the basis of this reading, the Court conducted an ‘empirical reconnaissance’⁸⁰ among the relevant normativities controlling the case. It is worth noting that the Court pushed further its reasoning by accounting for international regimes of human rights, by considering the relevant case-law of the ECtHR and the relevant international conventions: engaging with ‘other legalities’ could not be considered a logical necessity, since the Court could have possibly reached to the same result by simply interpreting the inner rationale of the German Constitution as based on the defence of rights of persons *vis à vis* the action of the German State. But by gathering the composite law of the case, as sourced in more than one single venue, the Court demonstrated to be aware of ‘what is passing by the real substance of the case in-between multiple legalities settings’.⁸¹ Eventually, such an inter-legal reasoning provided the Court to close ‘virtual legal black holes’,⁸² and avoid injustice.

⁷⁹ ‘WHO chief warns against COVID-19 “vaccine nationalism” ’, available at <https://tinyurl.com/2htmaxwu> (last visited 31 December 2021). See a recent paper discussing that the COVID-19 crisis has a risk reinforcing preexisting national dynamics in F. Bieber, ‘Global Nationalism in Times of the COVID-19 Pandemic’ *Cambridge University Press, Nationalities Papers*, 1–13 (2020).

⁸⁰ G. Palombella, *Theory* n 15 above, 382. Palombella uses the term ‘reconnaissance’ in both exploration and recognition sense.

⁸¹ *ibid* 382.

⁸² I am inspired by Steyn for the term ‘virtual legal black holes’, n 38 above.