Determining the Domestic Effect of International Law through the Prism of Legitimacy

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Abstract

This contribution seeks to shed new light onto the classification of legal orders with respect to the domestic effect of international law. Traditional theory distinguishes between monist and dualist systems: those that accept the primacy of international law over domestic law, and those that do not attribute direct effect to international law in the domestic legal order. It is argued that this distinction has little explanatory value when it comes to the

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implementation of decisions of international courts or institutions. All courts dealing with the domestic effect of international secondary law ultimately face questions of legitimacy of the external decision-making procedure. The contribution analyzes the jurisprudence of three different constitutional courts on the effect of decisions of international authorities in the domestic order. These courts are the US Supreme Court, the European Court of Justice (ECJ), and the German Constitutional Court. It will be argued that each of these courts applies a different strategy to cope with the challenge of legitimacy of international decision-making. Therefore, it seems to be more appropriate to consider the relationship of a national legal order to international law through the prism of how its constitutional court approaches the governance issue, rather than referring to the traditional monism-dualism-dichotomy.

I. Introduction

One of the big debates of international law scholarship of the last century centered on the relationship between international law and domestic law.[1] Today, there seems to be agreement that it is not possible to give one abstract, universal answer to the question. The effect of international law rather depends on how the conflict is solved by each domestic legal order.[2] However, the question has regained attention. Traditionally, the question of domestic effect of international law referred to the application of customary international law or treaties to which the concerned state was a party. The political institutions of the respective state thus had a direct influence on the creation of the norm that was later to be applied in its domestic courts. Recently, however, there have been developments that blur this traditional picture. Increasingly, new institutions are evolving on the international plane, which take decisions without many of the affected states being involved in the decision-making process.[3] They exercise public authority unilaterally.[4]

[1] See the groundbreaking contributions of *H. Triepel*, Völkerrecht und Landesrecht, 1899 (taking a dualistic position, according to which international law and domestic law are separate legal orders), and *H. Kelsen*, Das Problem der Souveränität und die Theorie des Völkerrechts, 1920 (according to whom international law and domestic law are part of a single monistic legal order).

[2] *T. Buergenthal*, Self-Executing and Non-Self-Executing Treaties in National and International Law, RdC 235 (1992), 303, 317.

[3] See *B. Kingsbury/N. Krisch/R. Stewart*, The Emergence of Global Administrative Law, L. & Contemp. Probs 68 (2005), 15 et seq.

This not only concerns administrative and legislative bodies, but also international courts and tribunals, which often play a pivotal role in deepening international integration. These forms of governance pose questions of legitimacy and thus represent new challenges to domestic courts that have to implement such international secondary law in the domestic legal order.[5]

The traditional monism/pluralism divide assumes a hierarchy between competing legal orders.[6] Under monism, the international order always trumps domestic norms, while, under dualism, the domestic order determines the rank of international law in the domestic setting. This description may be accurate if we have static legal orders, but it is inappropriate for dynamic régimes, which are shaped by decisions of courts and international institutions. Therefore, while conceptualizing the relationship of courts with competing jurisdiction, many scholars have departed from the hierarchical description of legal systems. They perceive the relation of different courts rather as one of cooperation[7] or observe the emergence of a pluralistic order of jurisdictions.[8]

This contribution seeks to identify factors that explain the attitude of constitutional courts *vis-à-vis* international institutions. In two prominent

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[4] *A. von Bogdandy/P. Dann/M. Goldmann*, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, GLJ 9 (2008), 1375, 1381.

[5] The described developments are, of course, of a gradual, not a dichotomous, nature. It may thus be more appropriate to talk of thinner or thicker stratospheric layers than of distinct eras. See *J. H. H. Weiler*, The Geology of International Law – Governance, Democracy and Legitimacy, ZaöRV 64 (2004), 547, 551.

[6] Cf. *A. von Bogdandy*, Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law, I.CON 6 (2008), 397 et seq. (describing monism as pyramid).

[7] See *F. C. Mayer*, The European Constitution and the Courts, in: A. von Bogdandy/J. Bast (eds.), Principles of European Constitutional Law, 2006, 281 et seq.; *L. Garlicki*, Cooperation of Courts: The Role of Supranational Jurisdictions in Europe, I.CON 6 (2008), 509 et seq. See also *H. Sauer*, Jurisdiktionskonflikte in Mehrebenensystemen, 2008 (proposing a system of mutual loyalty obligations as solution to conflicts of jurisdiction); *N. Lavranos*, Towards a Solange-Method between International Courts and Tribunals?, in: T. Broude/Y. Shany (eds.), The Shifting Allocation of Authority in International Law – Considering Sovereignty, Supremacy and Subsidiarity, 2008, 217 et seq. (interpreting the Solange-jurisprudence as means of cooperation between courts).

[8] See *J. Nijman/A. Nollkaemper*, Beyond the Divide, in: J. Nijman/A. Nollkaemper (eds.), New Perspectives on the Divide Between National and International Law, 2007, 341, 359 et seq.; *M. Rosenfeld*, Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism, I.CON 6 (2008), 415 et seq.; *A. von Bogdandy* (note 6); *N. Krisch*, The Open Architecture of European Human Rights Law, M.L.R. 71 (2008), 183 et seq. For a pluralistic interpretation of the relationship between EU law and the law of the EU member states, see *A. von Bogdandy/S. Schill*, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, CML Rev. 48 (2011), 1417 et seq.

contributions, *Eyal Benvenisti* has recently argued that courts act strategically in the application of international law in the domestic order.[9] On the one hand, they try to shield domestic political branches from external pressure; on the other, they want to ensure their own independence. In order to attain these goals, they often seek the cooperation with domestic courts from other legal systems and international tribunals. According to this reasoning, national courts thus often adhere to international decisions in order to establish "a united, coordinated judicial front".[10] *Benvenisti* welcomes this development and argues that the cooperation of domestic courts in order to reduce the external pressures of globalization strengthens domestic democracy and increases the accountability of international regulatory institutions.[11]

Although we often observe instances of judicial cooperation, *Benvenisti's* account only tells part of the story. With regard to the adherence of national courts to international court decisions, there is evidence that courts do not always follow the international courts in order to establish a coordinated judicial front. Instead, constitutional courts take different approaches in dealing with the implementation of international decisions. These differences cannot exclusively be explained by strategic considerations. It will be argued that the readiness to accept the direct effect of international decisions equally depends on the perceived legitimacy of the international authority. These legitimacy deliberations interact in different ways with strategic considerations. It will be shown that constitutional courts apply three different concepts of legitimacy when dealing with the implementation of decisions of international authorities in the domestic legal system.

In the following, I will first sketch the theoretical framework, highlighting that there are different standards for evaluating legitimacy. In order to exemplify the theoretical model, the jurisprudence of three different constitutional courts will be analyzed, each applying a different strategy for judging legitimacy. I will compare the jurisprudences of the US Supreme Court, the European Court of Justice and the German *Bundesverfassungsgericht*. This analysis will show that the traditional accounts do not offer suitable explanations for the observed developments in constitutional jurisprudence. Therefore, a legitimacy-based categorization will be proposed, which

[9] *E. Benvenisti*, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, AJIL 102 (2008), 241 et seq.; *E. Benvenisti/G. W. Downs*, National Courts, Domestic Democracy, and the Evolution of International Law, EJIL 20 (2009), 59 et seq.

[10] *E. Benvenisti* (note 9), 249.

[11] *E. Benvenisti* (note 9), 272 et seq.; *E. Benvenisti/G. W. Downs*, Court Cooperation, Executive Accountability and Global Governance, N.Y.U. J. Int'l L. & Pol. 41 (2009), 931 et seq.

should be more accurate in its explanations than the traditional monism-dualism-approach.

II. The Exercise of International Public Authority and the Problem of Legitimacy

The question of legitimacy is none that greatly concerns legal scholars in the domestic context. In democratic societies, we find an institutional setting that guarantees – through parliamentary legislation and judicial control – that the exercise of public authority is, in general, legitimate. Legality can thus be considered as a presumption for legitimacy.[12] This presumption has a rationalizing function: Courts are relieved of the need to control every sovereign act on its legitimacy. Because the system is assumed to be legitimate as a whole, they can concentrate on the formal control of legality.[13] However, such a presumption cannot be made at the international level, where legal standards regarding legitimacy and the rule of law have not yet been sufficiently developed.[14] Jurisprudence and legal scholarship thus cannot confine themselves to a formal control of the legality of international public authority.[15] They rather have to take considerations of legitimacy into account. However, legitimacy is a contested concept that is subject to many prominent debates in legal and political science scholarship. There are basically three strategies to cope with the challenge of legitimizing public authority in the international arena, which shall be sketched in more detail in the following.[16]

[12] *U. Schliesky*, Souveränität und Legitimität von Herrschaftsgewalt, 2004, 167.

[13] *M. Goldmann*, Der Widerspenstigen Zähmung, oder: Netzwerke dogmatisch gedacht, in: S. Boysen *et al.* (eds.), Netzwerke, 2007, 225, 234.

[14] See *M. Kumm*, Democratic Constitutionalism Encounters International Law: Terms of Engagement, in: S. Choudhry (ed.), The Migration of Constitutional Ideas, 2007, 256, 261 et seq. (emphasizing that the presumption in favor of compliance with international law can be rebutted if international law violates jurisdictional, procedural or outcome-related principles).

[15] *A. von Bogdandy/P. Dann/M. Goldmann* (note 4), 1389.

[16] This classification is inspired by the account of *A. von Bogdandy*, Globalization and Europe: How to Square Democracy, Globalization, and International Law, EJIL 15 (2004), 885, 895 et seq.

1. The State Sovereignty Paradigm and the Illegitimacy of International Authority

The first strategy – we will call it the sovereignty paradigm – is to deny the legitimacy of international institutions at all.[17] According to this position, legitimacy is inextricably linked to democracy, and democracy can only be exercised within the nation state because it presupposes the existence of a *demos*. The underlying idea is that nation state democracy is the only form of state that best preserves individual freedom and self-determination. Political self-determination requires the belonging to a specific political community, which is most often the nation state. Decisions that are taken outside this polity cannot be legitimate because either its citizens have not participated at all in the decision, or the latter has at least decisively been influenced by non-citizens. Authority is, at least partly, exercised by foreign actors. Under this reading of democracy, state sovereignty is thus not only a concept to protect statehood, but also to preserve democracy and the self-rule of political communities.

Every international decision-making procedure that does not require the consent of each individual state would consequently be illegitimate. Because of this illegitimacy, decisions of international institutions or international courts can never have a direct effect within the domestic legal order. They only become effective in the domestic sphere if they have been transformed into domestic law by the competent political institutions of the legislature or the executive. Through the formal act of transformation, the national institutions acquiesce to the decision of the international institution and legitimize their application by domestic courts.

[17] See, e.g., *P. Weil*, Vers une normativité relative en droit international?, RGDIP 86 (2004), 5 et seq.; *J. Isensee*, Abschied der Demokratie vom Demos – Ausländerwahlrecht als Identitätsfrage für Volk, Demokratie und Verfassung, in: FS Paul Mikat, 1989, 705 et seq.; *C. A. Bradley/J. L. Goldsmith*, The Current Illegitimacy of International Human Rights Litigation, Fordham L. Rev. 66 (1997), 319 et seq.; *P. B. Stephan*, International Governance and American Democracy, Chi. J. Int'l L. 1 (2000), 237 et seq.; *R. P. Alford*, Misusing International Sources to Interpret the Constitution, AJIL 98 (2004), 57 et seq.

2. The Internationalist Paradigm and the Focus on International Procedures

The opposite conception is the internationalist paradigm.[18] The internationalists do not focus on the nation state. Rather, they examine the legitimacy of the international decision-making procedures on the basis of their proper architecture. In contrast to the sovereignty paradigm, the authority is not legitimate or illegitimate merely because of having been exercised by an international institution. In the domestic context, legitimacy concepts are often input-oriented and focus on whether citizens have at least indirectly participated in the political decision-making process. However, scholars adhering to the internationalist paradigm claim that it is impossible to apply domestic legitimacy standards to the international arena without modifications.[19] Therefore, factors have to be identified that disassociate legitimacy from the nation state *demos*.[20] Instead of focusing on participation, internationalists often try to identify factors that control the output of the political decision-making process.[21] Therefore, they do not primarily focus on whether the affected citizens have – indirectly – participated in the political process, but whether the design of the decision-making procedures allows us to expect the decisions to meet certain qualitative standards.[22]

From an output-oriented perspective, political decisions bear two major risks:[23] On the one hand, political actors or public officials may misuse their power and act in their private and not in the public interest; on the other hand, the substantive quality of the decisions may be insufficient because the officials are either incompetent or lack the necessary information. The

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[18] See *B. Kingsbury/N. Krisch/R. Stewart* (note 3), 37 et seq.; *T. Macdonald/K. Macdonald*, Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry, EJIL 17 (2006), 89 et seq.; *E. de Wet*, Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review, GLJ 9 (2008), 1987 et seq.

[19] *A. Buchanan/R. O. Keohane*, The Legitimacy of Global Governance Institutions, Ethics & Int'l Aff. 20 (2006), 405, 416 et seq.

[20] *J. H. H. Weiler* (note 5), 560.

[21] On the distinction between input and output, see *D. Easton*, An Approach to the Analysis of Political Systems, Wld. Pol. 9 (1957), 383 et seq. (generally referring to political systems); *F. W. Scharpf*, Demokratietheorie zwischen Utopie und Anpassung, 1970, 21 (on the specific issue of legitimacy).

[22] For an attempt to justify the shift from input- to output concerns in the international context, see *M. Jachtenfuchs*, Theoretical Perspectives on European Governance, ELJ 1 (1995), 115, 128 et seq.; *F. W. Scharpf*, Governing in Europe: Effective and Democratic?, 1999, 10 et seq.

[23] See *F. W. Scharpf* (note 22) 188.

danger that political agents may misuse their power occurs if the private and the public interest diverge, and the agents do not have incentives to act for the benefit of the common good. The principal mechanism to align the incentives with the public interest is holding political actors accountable.[24] Within nation states, accountability is primarily achieved through elections and a hierarchical organization of the bureaucracy.[25] Political actors who do not act in the public interest have to fear that they may not be reelected, and the actions of public officials in the executive are controlled by their superiors.

As there are no elections in the international or supranational arena, this model cannot easily be transferred to international decision-making processes.[26] However, there are alternative ways of shaping the incentives of political agents in the international context.[27] Accountability is a gradual concept that not only allows either-or-judgments, but comes in different shades and degrees. Even if some mechanisms, such as elections, are not available on the international level, this does not mean that international actors cannot be held accountable to a certain degree, e.g., through disciplinary actions or reputational sanctions.

The second element of output legitimacy, the quality of political decisions, can be understood in substantive as well as in procedural terms. With regard to substantive standards, it is difficult to formulate political standards for political decisions in advance. However, certain standards are derived from legal norms,[28] which constitute the outer limits of political decisions. These norms include, in particular, the respect of the fundamental human rights and the principle of proportionality.[29] Concerning the procedure, there is a controversial debate in political theory on whether it is possible to formulate any qualitative standards for political decisions that go beyond the requirement of accountability.[30] However, this debate has so far

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24 *R. Mulgan*, Holding Power to Account. Accountability in Modern Democracies, 2003, 10.

25 See *J. L. Mashaw*, Structuring a "Dense Complexity": Accountability and the Project of Administrative Law, Issues in Legal Scholarship 6 (2005), 1, 20.

26 *T. Macdonald/K. Macdonald* (note 18), 92 et seq.

27 On these criteria, see *B. Kingsbury/N. Krisch/R. Stewart* (note 3), 37 et seq.

28 *R. U. Grant/R. O. Keohane*, Accountability and Abuses of Power in World Politics, Am. Polit. Sci. Rev. 99 (2005), 35.

29 *B. Kingsbury/N. Krisch/R. Stewart* (note 3), 40 et seq.

30 One prominent attempt to introduce procedural safeguards for the quality of political decisions is the theory of deliberative democracy, see *J. S. Fishkin*, Democracy and Deliberation: New Directions for Democratic Reform, 1991; *J. Habermas*, Between Facts and Norms, MIT Press 1996 (William Rehg trans.), 287 et seq.; *J. Ferejohn*, Instituting Deliberative Democracy, in: I. Shapiro/S. Macedo (eds.), Designing Democratic Institutions, 2000, 75 et seq.

barely resonated with the scholarship in international law and international relations.

What is discussed in the legal literature are more modest procedural safeguards, such as effective legal remedies in order to ensure compliance with the legal norms or an obligation to hear individuals affected by decisions of international bodies in order to ameliorate the informational basis on which these decisions are taken.[31] These procedural safeguards can work in both directions: On the one hand, they can ensure the accountability of international decision-making processes, but on the other hand, they can also enhance the quality of the actual decisions.

Consequently, a court adhering to the internationalist paradigm examines the decision-making procedure of an international institution in order to decide whether it attributes direct effect to it. Executive and legislative decisions can typically be regarded as legitimate if their adoption process contains certain procedural safeguards that ensure the accountability of the decision-makers and a certain substantive quality of the decisions. In judicial decisions, accountability is difficult to achieve, as the independence of judges is often seen as a crucial element of adjudication. Therefore, domestic courts additionally apply a substantive standard, reviewing whether the jurisprudence of the international court does, in general, conform with the fundamental values of the domestic society, which are contained in the domestic constitution. A decision of an international court is attributed direct effect if its jurisprudence as a whole is considered as legitimate. However, there is no substantive review of every individual decision.

A second approach tries to account for the quality of decisions by partially delegating them to expert bodies, see *G. Majone*, Independence vs. Accountability? Non-Majoritarian Institutions and Democratic Government in Europe, in: J. J. Hesse/T. A. J. Toonen (eds.), The European Yearbook of Comparative Government and Public Administration, 1994, 117 et seq.; *C. Joerges*, "Good Governance" Through Comitology?, in: C. Joerges/E. Vos (eds.), EU Committees: Social Regulation, Law and Politics, 1999, 311 et seq.; *M. Shapiro*, "Deliberative", "Independent" Technocracy vs. Democratic Politics: Will the Globe Echo the E.U.?, L. & Contemp. Probs 68 (2005), 341 et seq. Finally, there are authors who argue that it is impossible to introduce qualitative decision-making standards beyond the mechanism of accountability, see *I. Shapiro*, The State of Democratic Theory, 2006, 39 et seq.

[31] *B. Kingsbury/N. Krisch/R. Stewart* (note 3), 37 et seq., 40.

3. The Cooperation Paradigm and the Chain of Legitimization

In between these two positions, we find the cooperation paradigm.[32] The cooperation paradigm shares with the sovereignty-centered approach that the nation states remain the central building blocks of the international legal order. The national citizenry is the ultimate source of legitimacy, and thus every political decision has, to a certain extent, to be attributable to the electorate of the nation state.[33] The emergence of authority beyond the nation state is not excluded *per se*, but the evaluation of international authority is based on different criteria than under the internationalist paradigm. While the latter is concerned with the concrete design of international decision-making procedures and primarily evaluates them according to their expected output, the cooperation paradigm focuses on the share of (indirect) participation by the national citizens.

The exercise of authority is legitimate if it can be attributed to the citizenry by formal chains of attribution.[34] International decisions can be attributed to the national *demos* in two ways: On the one hand, attribution is derived from an effective parliamentary control of the acts that delegate sovereign authority to supranational entities and the participation of legitimate representatives of the state in the international decision-making procedures. According to this understanding of legitimacy, supranational legislation, e.g., in the context of the European Union (EU), is legitimate to the extent that either the national government or elected representatives of the nation state had a vote in the decision-making process.[35]

However, the concept of the formal chain of attribution only works for political decisions, but cannot be conferred to decisions of international courts and tribunals because judicial decisions usually do not derive their legitimacy from the indirect participation of citizens. National courts rather exercise a substantive review of each individual judgment of international courts, in which they assess whether the decision conforms to the funda-

32 See *C. Walter*, Constitutionalizing (Inter)national Governance, GYIL 44 (2001), 170 et seq.; *R. Wolfrum*, Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations, in: R. Wolfrum/V. Röben (eds.), Legitimacy in International Law, 2008, 1 et seq.; *S. Kadelbach*, Demokratische Legitimation als Prinzip zwischenstaatlichen Handelns, in: S. Vöneky/C. Hagedorn/M. Clados/J. von Achenbach (eds.), Legitimation ethischer Entscheidungen im Recht – interdisziplinäre Untersuchungen, 2009, 147 et seq.

33 *E.-W. Böckenförde*, Demokratie als Verfassungsprinzip, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts II, 3rd ed. 2004, ch. 24, margin number 3.

34 *E.-W. Böckenförde* (note 33), margin number 11.

35 *M. Kaufmann*, Europäische Integration und Demokratieprinzip, 1997.

mental values of the domestic society, which are expressed by the national constitution.

This approach differs both from the sovereignty and the internationalist paradigm. Under the sovereignty paradigm, a court would not accept the direct effect of a court judgment, unless it had been explicitly endorsed by the legislature. In contrast, a court adhering to the internationalist perspective would not make a substantive review of each individual judgment of an international court. Instead, it would take a broader approach and assess whether the overall case law is consistent with the fundamental values of the domestic society in general.

III. Three Case Studies on the Perception of Legitimacy by Domestic Courts

In this section, we will try to analyze three lines of constitutional jurisprudence according to the outlined theoretical classification. While the US Supreme Court adheres to the sovereignty paradigm and insists on the positive implementation of international decisions by the national legislature, the approach of the European Court of Justice focuses on the design and the output of the international institutions. The position of the German *Bundesverfassungsgericht* is in between these two perspectives. Although still performing a substantive examination of the exercise of international public authority, the Constitutional Court does not necessarily require such decisions to be implemented by the German legislature.

1. The State Sovereignty Paradigm – the US Supreme Court and Its Judgments in *Medellín* and *Sanchez-Llamas*

There are numerous decisions of the US Supreme Court that deal with the effect of international treaties in US domestic law.[36] However, there are only very few instances in which the court had to deal with the domestic effect of decisions of international institutions. All of these concern judgments of the International Court of Justice (ICJ). This section will focus on the two leading decisions in this respect. While, in *Sanchez-Llamas v. Ore-*

[36] For an overview, see *P. J. Spiro*, Treaties, International Law, and Constitutional Rights, Stan. L. Rev. 55 (2003), 1999 et seq.; *C. M. Vázquez*, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, Harv. L. Rev. 122 (2008), 599 et seq.

gon, the Supreme Court had to deal with the authoritative effect of ICJ judgments when interpreting international legal norms,[37] the decision in *Medellín v. Texas*[38] concerned the direct effect of an ICJ judgment to which the United States had been party and which was therefore legally binding for the US.

In principle, the American Constitution establishes a monist concept with respect to international treaty norms in the domestic legal order. According to Art. VI para. 2,

> "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding".

However, the principle of direct effect has been narrowed early by the US Supreme Court. In *Foster & Elam v. Neilson*, the Court made a distinction between self-executing treaties having a direct effect in domestic law and non-self-executing treaties that are addressed to the political, not the judicial, institutions.[39] The latter type has to be transformed into domestic law before they can be applied by the courts.

Subject of both analyzed decisions was a violation of Art. 36 of the Vienna Convention on Consular Relations (VCCR).[40] According to Art. 36 (1) lit. b of the Convention, arrested foreign nationals have to be informed that they have the right to notify the consular representation of their home country of their arrest. In the course of this decade the United States had been convicted twice because of violations of this provision by the ICJ.[41] In *Sanchez-Llamas*, one of the applicants relied on the interpretation of Art. 36 (1) of the Vienna Convention in the two ICJ judgments in order to make a claim regarding US domestic law. In *Medellín*, the applicant was one of the individuals for whom Mexico had exercised diplomatic protection in the *Avena* case so that the ICJ judgment was directly legally binding for the US.

37 *Sanchez-Llamas v. Oregon*, 548 US 331 (2006).
38 *Medellín v. Texas*, 128 S. Ct. 1346 (2008).
39 *Foster & Elam v. Neilson*, 27 US 253, 314 (1829).
40 Vienna Convention on Consular Relations, 24.2.1963, 596 U.N.T.S. 262.
41 *LaGrand*, ICJ Rep. 2001, 466; *Avena and Other Mexican Nationals*, ICJ Rep. 2004, 12.

a) The Decision in *Sanchez-Llamas*

In *Sanchez-Llamas*, one of the applicants, *Mario Bustillo* from Honduras, had been convicted of first-degree murder. After the conviction had been confirmed on appeal and had become final, *Bustillo* filed a petition for writ of *habeas corpus* in a state court. There, for the first time, he argued that the American authorities had violated Art. 36 VCCR as they had not informed him about his right to contact the Honduran consulate. With the help of the consulate, it would have been much easier for him to prove his innocence during the criminal proceedings. The state *habeas court* dismissed *Bustillo's* claim as procedurally barred. He would have had to raise his claim based on the Vienna Convention before the conviction became final.

Appealing to the US Supreme Court, *Bustillo* argued that the application of this procedural default rule by the Virginia courts violated Art. 36 VCCR. In an earlier judgment, *Breard v. Greene*, the US Supreme Court had already decided that a violation of Art. 36 VCCR did not bar the application of the procedural default rule.[42] If the claim had not been raised in the state court proceedings, Art. 36 VCCR did not require states to modify their criminal procedure law.[43] *Bustillo* argued that *Breard* was not applicable to his case because there had been two judgments of the International Court of Justice in the meantime,[44] according to which the cure of a violation of the Vienna Convention must not be rendered impossible by procedural default rules.

The US Supreme Court, however, rejected this argumentation. The interpretation of American domestic law is a task of American courts. Determining the domestic effect of an international treaty is a matter of domestic law.[45] Thus, the judgments of the ICJ have no directly binding force. They deserve, at best, "respectful consideration".[46] However, the ICJ judgments do not take into account the importance of procedural default rules in an adversary system. While, in inquisitorial systems, mistakes are attributed to the judges, they fall into the responsibility of the parties in adversary systems. If Art. 36 VCCR was interpreted in a way that the application of the procedural default rule was excluded, this interpretation

42 *Breard v. Greene*, 523 US 371 (1998) (per curiam).
43 *Breard v. Greene* (note 42), 375.
44 The judgments in the cases *LaGrand* and *Avena*, see note 41.
45 *Sanchez-Llamas v. Oregon*, 548 US 331, 353-54 (2006).
46 *Sanchez-Llamas v. Oregon* (note 45), 355.

> "reads the 'full effect' proviso in a way that leaves little room for Article 36's clear instruction that Art. 36 rights 'shall be exercised in conformity with the laws and regulations of the receiving state.'"[47]

Therefore, the Supreme Court did not take the interpretation of the ICJ into account in the case of *Mario Bustillo*.

b) The *Medellín* Decision

The judgment in *Sanchez-Llamas* paved the way for the *Medellín* decision, which was issued two years later. The applicant in *Medellín* had been sentenced to death because of murder and joint rape. After his conviction, he filed a *habeas corpus* petition and claimed that he had not been informed of his rights under Art. 36 (1) *lit*. b of the Vienna Convention. During the *habeas* proceedings, the ICJ issued the *Avena* decision, in which the Court found that the United States had violated the Vienna Convention on Consular Relations. *Medellín* had been one of the 51 Mexican nationals for whom Mexico had filed the procedure before the ICJ. In its decision, the Court asked the United States

> "[to] provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention".[48]

As *Medellín* was among the beneficiaries of Mexico's application, the judgment was binding for his proceedings in terms of international law. After the rendition of the judgment, President *George W. Bush* issued an executive order in which he asked the American courts to give effect to the ICJ decision.[49] Despite the ICJ judgment and the memorandum of *George Bush*, the Fifth Circuit rejected the *habeas* application of *Medellín*.[50] In his proceedings before the Supreme Court, the applicant hence claimed that the Fifth Circuit had violated the Supremacy Clause of the American Constitution. In its decision, the Court had therefore to decide whether judgments of the International Court of Justice have direct domestic effect. The central international norm in this respect is Art. 94 (1) of the UN Charter,[51] according to which

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47 *Sanchez-Llamas v. Oregon* (note 45), 357.
48 *Avena and Other Mexican Nationals* (note 41), margin number 153.
49 Memorandum of President *George W. Bush*, 28.2.2006, App. to Pet. for Cert. 187a.
50 *Medellín v. Dretke*, 371 F.3d 270 (2004).
51 Charter of the United Nations, 26.7.1945, T.S. 993.

"[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is party".

On the face, the Supreme Court based its decision on the text of the United Nations (UN) Charter. The term "undertakes to comply" emphasizes, in the opinion of the Court, that a state only enters into an obligation to react on a judgment by political means.[52] This interpretation is supposed to be supported by the context of the norm. Art. 94 (2) of the UN Charter provides a political and no legal remedy: If states do not comply with an ICJ judgment, they have to refer to the UN Security Council.[53]

In substance, however, the judgment is motivated by considerations stemming from constitutional theory or, more precisely, the doctrine of the division of powers. As the field of external relations is very sensitive, decisions on the implementation of international law should be left to the political, not the judicial, organs.[54] The Court underlines that "it is not for the federal courts to impose one [particular remedy] on the States through *lawmaking of their own*".[55] This judicial self-restraint can be interpreted in a twofold way. One might be inclined to read the reasoning of the court from an *ex ante* perspective, according to which it is the function of the courts to abide by the law. The courts have to implement the intent of the political bodies, and this approach can best be implemented by a close adherence to the text of the norm created by the political institutions.

However, such an approach has several flaws. Linguistic expressions do not have only one single meaning. Their interpretation always depends on the interpreter and his cultural and social imprint.[56] This is highlighted by Justice *Breyer's* dissenting opinion in *Medellín* that consults dictionary definitions and refers to the Spanish version of the UN Charter in order to show that the term "undertakes to comply" employed by Art. 94 can also express an immediate legal obligation.[57] Furthermore, it is particularly unrealistic in the realm of international treaties to expect the text to say anything about the domestic effect of the treaty.[58] The implementation of international norms differs from state to state. The differentiation between self-executing and non-self-executing is only significant from the viewpoint of

52 *Medellín v. Texas* (note 38), 1358.
53 *Medellín v. Texas* (note 38), 1359.
54 *Medellín v. Texas* (note 38), 1364.
55 *Medellín v. Texas* (note 38), 1361 (emphasis added).
56 See *H.-G. Gadamer*, Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik, 6th ed. 1990, 270.
57 *Medellín v. Texas*, 128 S. Ct. at 1384 (*Breyer* J. dissenting).
58 *Medellín v. Texas* (note 38), 1363 et seq.

the domestic legal order, but not from the angle of international law, as the latter demands unconditional compliance anyway.[59]

Medellín has thus to be read as a proposition of an *ex post* control model. According to this model, decisions of international institutions with domestic effect are subject to political control. The Supreme Court emphasizes that it is not the task of the judiciary to exercise such control.[60] Furthermore, the Court holds that the president did not have the power to order an implementation of the judgment by means of an executive memorandum.[61] The implementation of the decision of an international tribunal thus requires a positive act of the United States (US) Congress or state legislature, which have full political control over how to implement the decision in question.[62] Consequently, international decisions cannot have any direct effect in the US legal order unless they have been positively embraced by the legislature, so that all political decisions finally have to be made within the arena of the nation state. The US Supreme Court therefore implicitly adheres to the state sovereignty paradigm.

2. The Internationalist Paradigm – The Jurisprudence of the European Court of Justice

The opposite approach is represented by the jurisprudence of the ECJ. To be sure, the European Union is not a state and the ECJ thus not a constitutional court in the statist sense of the notion. However, the problem of attributing direct effect to law that originated in a distinct legal order is not exclusively a problem of domestic law. In recent decades, some supranational legal orders have developed, in which the process of law creation differs considerably from the traditional sources doctrine of international law. The most notable example in this respect is the European Union, whose legal order has developed into a constitutional order, showcasing all relevant

59 *C. M. Vázquez* (note 36), 634; *K. Kaiser*, Treaties, Direct Applicability, in: R. Wolfrum (ed.) MPEPIL, margin number 6.

60 *Medellín v. Texas* (note 38), 1364 ("it is hardly that the judiciary should decide which judgments are politically sensitive and which are not").

61 *Medellín v. Texas* (note 38), 1368 et seq. But see *C. M. Vázquez*, Less Than Zero?, AJIL 102 (2008), 563 (criticizing the reasoning of the Supreme Court).

62 The consistency of this reasoning has been criticized by some scholars as it limits the *ex ante* autonomy to enter into treaties in the name of the ex post autonomy to be independent of treaties. See *S. Charnovitz*, Revitalizing the US Compliance Power, AJIL 102 (2008), 551, 557 ("The Court seems to have overlooked the compelling US interest of assuring uniformity in US foreign policy.").

characteristics of such a system.[63] Its law-making process is closer to legislation within nation-states than to the diplomatic, consensus-oriented bargaining in the international arena so that the coordination with the international legal order poses similar problems as in domestic law.

In several instances, the ECJ had to decide on the status of decisions of international institutions in the EU legal order. In its decisions, the ECJ primarily adopts an internationalist standpoint. In the following, this shall be highlighted by focusing on three different strands of the ECJ jurisprudence. First, there is a considerable amount of judgments dealing with the importance of decisions of the European Court of Human Rights (ECtHR) for the interpretation of human rights within the EU legal system. Second, the ECJ has, over a series of decisions, developed a standpoint on the direct effect of decisions of the World Trade Organization (WTO) dispute settlement system within the European Union (EU) order. Finally, the recent *Kadi* decision[64] of the ECJ had to answer the question whether it is possible to review acts transforming resolutions of the UN Security Council with regard to principles forming part of the European constitutional order.

a) Interpretation of Human Rights and the Strasbourg Jurisprudence

The relationship of the ECJ to human rights has not always been an easy one. In the first years of European integration, the ECJ did not refer to human rights at all. There seemed to be no need in this respect, as the founding treaties of the European Communities did not contain an explicit human rights catalogue. However, the Court quickly realized that it had to take into account the individual rights dimension of the cases brought before it, if it wanted to ensure the acceptance of its jurisprudence by the courts of the Member States.[65] It thus started to develop a human rights jurisprudence, which has been acknowledged by Art. 6 (3) of the EU Treaty,[66] which requires the EU institutions to respect fundamental rights as guaranteed by the European Convention on Human Rights (ECHR) and as they result from the common traditions of the Member States. However, as the

[63] ECJ Case 294/83, ECR 1986, 1357, margin number 23 – *Les Verts*, and Case 1/91, ECR 1991, I-6099, margin number 21 – *EEA Agreement*. For a detailed discussion of this issue, see *N. Petersen*, Europäische Verfassung und europäische Legitimität – ein Beitrag zum kontraktualistischen Argument in der Verfassungstheorie, ZaöRV 64 (2004), 429 et seq.

[64] ECJ joined Cases C-402/05 P and C-415/05 P, ECR 2008, I-6351 – *Kadi*

[65] Cf. BVerfGE 37, 271; Corte cost., 27.12.1973, CML Rev. 14 (1974), 372 (*Italy*).

[66] Treaty on European Union, 30.3.2010, consolidated version: OJ C 83/13 [hereinafter: TEU].

European Union did not, until very recently, have a legally binding human rights catalogue,[67] the ECJ always had to "import" human rights from other legal systems. In practice, the ECJ principally refers to the provisions of the European Convention on Human Rights[68] as expressions of the common traditions of the EU Member States.

The institution mandated with the coherent interpretation of the Convention, however, is the European Court of Human Rights, not the ECJ. Therefore, there has been much debate on whether the ECJ has to take the jurisprudence of the ECtHR into account when applying the rights of the Convention in the context of the EU.[69] Although the European Union is not formally bound by the Convention, there would be potential for serious conflict if the ECJ interpreted its guarantees in a different way than the ECtHR.

The ECJ has never expressly clarified its relationship to the ECtHR and whether it feels bound by the latter's jurisprudence.[70] However, it has implicitly recognized the Strasbourg jurisprudence as authoritative. When interpreting provisions of the ECHR, the Luxembourg Court frequently refers to and cites judgments of the ECtHR.[71] In *Schmidberger*, e.g., the ECJ cites the ECtHR for the statement that the freedom of expression and the freedom of assembly are no absolute guarantees under the ECHR, but that they may be subject to restrictions.[72] In *RTL Television*, the Court referred to the margin of appreciation doctrine of the ECtHR in order to justify a restriction of Art. 10 ECHR.[73]

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67 Through the Treaty of Lisbon, the Charter of Fundamental Rights has become part of EU primary law, Art. 6 (1) TEU.

68 Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.1950, 213 U.N.T.S. 222.

69 See, e.g., *M. Bronckers*, The Relationship of the EC Courts with other International Tribunals: Non-Committal, Respectful or Submissive?, CML Rev. 44 (2007), 601 et seq.; *G. Harpaz*, The European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy, CML Rev. 46 (2009), 105, 115 et seq.

70 *G. Harpaz* (note 69), 109 et seq.

71 *S. Douglas-Scott*, A Tale of Two Courts: Luxembourg, Strasbourg, and the Growing European Rights Acquis, CML Rev. 43 (2006), 629, 644 et seq; *P. Alston/J. H. H. Weiler*, An 'Ever Closer Union' in Need of a Human Rights Policy, EJIL 9 (1998), 658, 686; *M. Ruffert*, Die künftige Rolle des EuGH im europäischen Grundrechtsschutzsystem, EuGRZ 31 (2004), 466, 471. For an, albeit not comprehensive, overview of cases, in which the ECJ has cited the ECtHR see *S. Douglas-Scott* (note 71), 644 et seq. at note 68.

72 Case C-112/00, ECR 2003, I-5659, margin number 79 – *Schmidberger*.

73 Case C-245/01, ECR 2003, I-12489, margin number 73 – *RTL Television*.

There are no examples in which the ECJ openly opposed a decision from Strasbourg.[74] Even if Luxembourg did not follow Strasbourg, it was rather because it had probably overlooked that there was Strasbourg case law in this respect than because of disagreement.[75] The ECJ has even changed its own jurisprudence in several occasions if the ECtHR took a different position on issues that had already been decided by the ECJ.[76] In *Hoechst*, e.g., the ECJ found that there was no case law of the ECtHR on the inviolability of business premises and held that the right to privacy established by Art. 8 ECHR did not apply to businesses.[77] When the ECtHR extended the protection of Art. 8 ECHR to businesses in a later judgment,[78] the ECJ changed its jurisprudence in *Roquette Frères* and acknowledged that business premises could also be protected under Art. 8 ECHR.[79]

This strategy of the ECJ *vis-à-vis* the jurisprudence of the ECtHR fits into the patterns of the internationalist paradigm. By frequently citing the ECtHR and adopting its standards, the ECJ basically accepts Strasbourg's human rights jurisprudence. As the ECJ does not explicitly discuss the status of the ECtHR jurisprudence in EU law, it is possible to come up with different explanations for this observation. One might be inclined to argue

74 There are certain instances of potentially conflicting jurisprudence, though. This concerns, in particular, the issue of the right to non-self-incrimination. See, on the one hand, Case 374/87, ECR 1989, 3289 – *Orkem* and, on the other hand, *Funke v. France*, ECtHR 16 (ser. A No. 256-A), 297 (1993). However, the two cases do not refer to exactly the same situation, as the latter case also involved criminal proceedings. Therefore, it is doubtful that there is an actual conflict: see *V. Skouris*, Introducing a Binding Bill of Rights for the European Union, in: A. Blankenagel/I. Pernice/H. Schulze-Fielitz (eds.), Verfassung im Diskurs der Welt, 2004, 261, 270 et seq. Some people also see a conflict in the question whether parties should have a right to respond to the opinion of the Advocate General, which was declined by the ECJ, see Case C-17/98, ECR 2000, I-667 – *Emesa Sugar*. The ECtHR later saw a violation of Art. 6 (1) ECHR in not giving a right to response in French administrative proceedings, after which the ECJ system is modeled: see *Kress v. France*, ECtHR 2001-VI. However, the main reason why the Court found the violation was that the French government commissioner participated in the deliberations of the Conseil d'Etat, which is not the case for the European Advocate General.

75 See *D. Spielmann*, Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities, in: P. Alston (ed.), The EU and Human Rights, 1999, 757, 770 (referring to two cases, in which the ECJ did not respect the precedents of the ECtHR, but "took for granted that there is no case-law of the European Court of Human Rights on the subject").

76 *S. Douglas-Scott* (note 71), 649; *R. C. A. White*, The Strasbourg Perspective and Its Effect on the Court of Justice: Is Mutual Respect Enough?, in: A. Arnull/P. Eeckhout/T. Tridimas (eds.), Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs, 2008, 139, 142.

77 ECJ Joined Cases 46/87 and 227/88, ECR 1989, 2859 – *Hoechst*.

78 *Niemitz v. Germany*, EHRR 16 (ser. A No. 251-B), 97 (1992).

79 ECJ Case C-94/00, ECR 2002, I-9011, margin number 29 – *Roquette Frères*.

that the reasons are of a purely strategic nature, assuming that Luxembourg wants to avoid any conflict with Strasbourg. However, the ECJ does not shy away from conflicts with other judicial organs, such as the WTO Appellate Body,[80] so that there has to be at least an additional explanation for the conduct of the ECJ. The most plausible interpretation of this conduct is that the Court implicitly regards the judgments of the ECtHR as legitimate. The standard of assessment would be a substantive one – human rights, or, more precisely, the particular human rights understanding of the ECJ. This would also explain why the ECJ has not yet taken a clear stance on this issue and expressly accepted the unconditional supremacy of the ECtHR. As there is no guarantee that the substance of the ECtHR jurisprudence may not vary, it formally reserves itself the right to deviate if circumstances should change and major disagreements arise.

b) WTO Dispute Settlement and Strategical Considerations

The direct effect of World Trade law in the EU legal order has been subject to much debate in legal scholarship. Many authors have seen parallels to the integration process within the European Communities and thus claimed that the ECJ should give direct effect to World Trade law in the same way as it requires the EU member states to give direct effect to legal norms of the EU order.[81] The ECJ has, however, been reluctant in this respect. Even before the establishment of the WTO, it held that provisions of the General Agreement on Tariffs and Trade[82] do not have direct effect in the community legal order.[83] It affirmed this line of jurisprudence also for the context of the WTO,[84] and extended this rationale to decisions of the WTO dispute settlement system.

While, in *Biret International*, the ECJ had still left open whether the Appellate Body decision has a direct effect in the Community legal order,[85] the Court held that decisions of the WTO dispute settlement system did not

[80] On this issue, see below, III. 2. b) .

[81] See *E.-U. Petersmann*, Application of GATT by the Court of Justice of the European Communities, CML Rev. 20 (1983), 397 et seq.; *S. Griller*, Judicial Enforceability of WTO Law in the European Union, JIEL 3 (2000), 441, 450 et seq. See also *P. Eeckhout*, The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems, CML Rev. 34 (1997), 11, 53 (emphasizing that WTO obligations should have a direct effect in the community legal order of the violation of WTO law is established by the DSB).

[82] General Agreement on Tariffs and Trade, 30.10.1947, 55 U.N.T.S. 194.

[83] ECJ Case 21-24/73, ECR 1972, 1219 – *International Fruit Company*.

[84] ECJ Case C-149/96, ECR 1999, I-8395 – *Portugal v. Council*.

[85] ECJ Case C-94/02 P, ECR 2003, I-10497 – *Biret International*.

have a direct effect in the EU legal order in its *Van Parys* judgment.[86] In this case, the inconsistency of the European Community (EC) regulations on the import of bananas with certain provisions of the General Agreement on Tariffs and Trade (GATT)[87] did not make these regulations automatically inapplicable. The Court principally put forward two arguments: first, it underlined that the WTO dispute settlement system was not a fully developed judicial system, but that it attributed considerable importance to negotiation between the parties – even after a Dispute Settlement Body (DSB) decision has been issued.[88] If DSB decisions had direct effect, this would deprive the political organs of the EU of their room for negotiation under the procedural provisions of the Dispute Settlement Understanding.[89] Second, the WTO system is built upon the principle of reciprocity. There are some member states of the WTO that deny the direct effect of World Trade law within their domestic legal order so that direct effect in the EU would again deprive the political organs of the EU of considerable room for maneuver.[90]

The ECJ confirmed this case law in later judgments. In *IKEA*, the Court denied the reimbursement of customs duties that had been paid under regulation 2398/97[91] that violated the Anti-Dumping Agreement[92] of the WTO.[93] According to the Court, the Community had made it clear by regulations subsequent to regulation 2398/97 that it intended to exclude repayments. In the *FIAMM* judgment, the Court denied to grant damages for losses incurred under trade sanctions that were imposed because of the EU's non-compliance with the Appellate Body decision in the banana litigation.[94] The Court argued that there could not be different considerations for actions for compensation than for annulment.[95]

Considered in isolation, the ECJ jurisprudence *vis-à-vis* the effect of WTO law in the community legal order resembles the discussed judgments

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86 ECJ Case C-377/02, ECR 2005, I-1465, margin number 41 – *Van Parys*.

87 Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (9.9.1997).

88 *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (note 87), margin number 42.

89 *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (note 87), margin number 48.

90 *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (note 87), margin number 53.

91 Council Regulation (EC) 2398/97 (28.11.1997).

92 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping), 15.4.1994, 1868 U.N.T.S. 201.

93 ECJ Case C-351/04, ECR 2007, I-7723 – *IKEA*.

94 ECJ Joined Cases C-120/06 P and C-121/06 P, ECR 2008, I-6513 – *FIAMM and Fedon*.

95 *FIAMM and Fedon* (note 94), margin number 124.

of the US Supreme Court. As the latter, the ECJ relies on the will of the political institutions and thus denies any direct effect of decisions of the WTO dispute settlement system. However, there are significant differences. While the US Supreme Court is reluctant to accept the direct effect of decisions of international institutions in general, the ECJ always stresses the particularity of the WTO dispute settlement.[96] This concerns especially the political nature of the world trade system and the resulting importance of the principle of reciprocity.

The Court thus seems to fear that the European Union would be at a disadvantage compared to the United States if decisions of the WTO Appellate Body had direct effect in EU law. This would make trade law more effective within the European legal order and thus deprive the Commission of a bargaining chip in its negotiations with the US and other members of the WTO. Unlike the US Supreme Court in *Medellín*, which explicitly mentions legitimacy concerns, the jurisprudence of the ECJ is clearly driven by strategic considerations. Even if there might be legitimacy concerns,[97] these are not explicitly mentioned by the ECJ. The WTO jurisprudence of the ECJ is thus an illustration that legitimacy is not the only concern of courts dealing with decisions of international institutions. In some cases, legitimacy considerations may rather be overridden by strategic concerns.

c) The UN Security Council and the *Kadi* Decision

In a recent decision, *Kadi v. Council and Commission*, the ECJ had to decide about the effect of resolutions of the UN Security Council in the EU legal order. The constellation in *Kadi* is slightly different than the ones discussed before. While the ECJ usually has to decide whether decisions of an international authority have an immediate effect in domestic law without any further implementation by the legislature, the ECJ had to decide whether a positive act of the European legislature was immune against con-

[96] See *R. Uerpmann-Wittzack*, The Constitutional Role of Multilateral Treaty Systems, in: European Constitutional Law (note 7), 145, 158 (emphasizing that the ECJ uses procedural arguments for rejecting direct applicability of WTO law).

[97] Such concerns are voiced, e.g., by *R. Howse/K. Nicolaïdis*, Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far, in: R. B. Porter *et al.* (eds.), Efficiency, Equity, and Legitimacy. The Multilateral Trading System at the Millennium 2001, 227, 245; *A. von Bogdandy*, Legal Equality, Legal Certainty and Subsidiarity in Transnational Economic Law – Decentralized Application of Art. 81.3 EC and WTO Law: Why and Why Not, in: A. von Bogdandy/P. C. Mavroidis/Y. Mény (eds.), European Integration and International Co-ordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann, 2002, 13, 29.

stitutional review because it had been determined by a decision of an international institution. The European Union had issued a Council regulation in order to implement a resolution of the UN Security Council within the European Union. However, in order to decide whether EU law that is predetermined by international obligations can be subject to judicial review, the ECJ still had to determine the effect of international law within the Community legal order. Namely, it had to judge whether the Security Council decision was superior to EU primary law.

The starting point of the case was a resolution of the UN Security Council directed against terrorism and specifically against Al-Qaida. After the attacks on the US embassies in Nairobi and Dar es Salaam in 1998, the Security Council issued Resolution 1267 requesting all states to freeze all funds and other financial resources directly belonging or otherwise related to the Taliban.[98] The resolution also established a Sanctions Committee in order to manage these sanctions. One year later, Resolution 1333 authorized the Sanctions Committee to maintain an updated list of individuals and organizations designated as associated with the Taliban.[99] In order to implement these resolutions into EU law, the Council issued Regulation 881/2002, which ordered the freezing of the funds of all persons contained on the list of the UN Sanctions Committee.[100] The listed individuals did not have an opportunity for an independent review of their status.

In its decision, the ECJ held that even those legislative acts of the European Union that were predetermined by international law had to be subject to review under the constitutional principles of the EU. The Court established that the values enshrined in Art. 6 (1) of the pre-Lisbon version of the Treaty on European Union[101] – liberty, democracy, and the respect for human rights and fundamental freedoms – were the foundation of the European Union, from which no derogation was possible.[102] United Nations law could thus only have primacy over secondary Community law, but that primacy could not extend to constitutional provisions, in particular the fundamental rights guaranteed by the Union.[103]

The ECJ went on to examine whether the listing procedure of the UN Sanctions Committee had violated fundamental rights, in particular the right to defense, the right to an effective judicial review and the right to property. The rights to defense and judicial review contain, in particular, a

98 S.C. Res. 1267, UN Doc. S/RES/1267 (15.10.1999).
99 S.C. Res. 1333, UN Doc. S/RES/1333 (19.12.2000).
100 Council Regulation (EC) 881/2002 (27.5.2002).
101 Treaty on European Union, 19.12.2006, consolidated version: O.J. C 321E.
102 (note 64), margin number 303.
103 *Kadi* (note 64), margin numbers 307 et seq.

right to be informed about the reasons for the imposition of the measure in question.[104] As the applicants had not been informed about the reasons for their inclusion in the list of the UN Sanctions Committee, these guarantees were violated.[105] With regard to the right to property, the Court held that the freezing of funds and other economic resources could not be regarded as inappropriate *per se* in order to fight against persons connected to terrorism.[106] However, the confiscation of property had to include certain procedural guarantees. As the contested regulation did not furnish any guarantee enabling the applicants to put their case to the competent authorities, the ECJ considered the right to property to be violated.[107]

In *Kadi*, the ECJ did not review an individual decision to impose a sanction against a specific individual, but the whole sanctioning system established by the Security Council as such. In evaluating this system, the Court adopted an internationalist perspective.[108] Unlike the sovereignty and the cooperation paradigm, which derive the legitimacy of international decision-making to a certain extent from the participation of domestic authorities, internationalists focus on the procedural guarantees of the international decision-making process.[109] And here the ECJ found certain fundamental flaws. The EC regulation was annulled because the procedure before the sanctions committee did not respect certain procedural rights that were supposed to enhance the accountability and the quality of the committee's decisions. The persons who were listed by the UN Sanctions Committee had neither been heard before the decision was taken, nor given reasons for

104 *Kadi* (note 64), margin number 336.
105 *Kadi* (note 64), margin number 353.
106 *Kadi* (note 64), margin number 363.
107 *Kadi* (note 64), margin numbers 368 et seq.
108 But see *T. Tridimas*, Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order, E.L.Rev. 34 (2009), 103, 111, who qualifies the approach of the ECJ as "firmly a sovereignist one". The difference in the evaluation is probably due to the different use of the term "sovereignist", as *Tridimas* asserts that the ECJ had to take this step for legitimacy reasons (*T. Tridimas* [note 108], 126). Furthermore, the evaluation of this contribution runs counter to some commentaries that lauded the decision of the Court of First Instance for its respect of international law and would thus be critical of the ECJ judgment. See, e.g., *A. von Arnauld*, UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz, AVR 44 (2006), 201 et seq.; *C. Tomuschat*, Case Comment, CML Rev. 43 (2006), 537 et seq. However, the standards of evaluation are different, as this contribution does not focus on legality, but rather on legitimacy. For a critique of the constitutionalist starting point of these case comments, see *J. d'Aspremont/F. Dopagne*, Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders, ZaöRV 69 (2009), 939.
109 See supra, II. 2

their treatment, nor did they have an effective legal remedy.[110] Certainly the standard of review was neither some abstract legitimacy considerations nor originating in international documents, but EU fundamental rights.[111] However, as courts are judicial bodies, they have to express legitimacy considerations in legal terms in order not to undermine their own legitimacy.[112] At the same time, the procedural rights examined by the ECJ are not specific to the EU context, but are often also discussed in the framework of general legitimacy concepts.[113]

Finally, the Court did not exclude reducing the extent of its own judicial review if an appropriate review mechanism was installed on the international level. In the proceedings, the Commission had argued that the ECJ must not exercise judicial review as long as the individuals concerned have an acceptable opportunity of independent review forming part of the United Nations system. The Court did not reject this argument in principle, but only on factual grounds, as adequate judicial protection was not guaranteed.[114] Immunity was not unjustified *per se*. Instead, the ECJ deemed it unjustified "for clearly that re-examination procedure does not offer the guarantees of judicial protection".[115] The Court thus indicated that it would not interfere with the substantial considerations of concrete decisions of the UN Sanctions Committee if a legitimate procedure were put in place.[116]

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110 *Kadi* (note 64), margin number 348 et seq. See also *J. Almqvist*, A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions, ICLQ 57 (2008), 303 et seq.; *M. Kumm* (note 14), 289, who both criticize the violation of procedural guarantees.

111 This has been critiqued by several authors: see *L. M. Hinojosa Martínez*, Bad Law for Good Reasons: The Contradictions of the Kadi Judgment, International Organizations Law Review 5 (2008), 339, 344; *G. de Búrca*, The European Court of Justice and the International Legal Order after Kadi 47 (Jean Monnet Working Paper 01/09); *P. J. Cardwell/D. French/N. White*, European Court of Justice, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission (Joined Cases C-402/05 P and C-415/05 P) Judgment of 3.9.2008, ICLQ 58 (2009), 229, 237.

112 See *A. Stone Sweet*, Governing with Judges, 2000, 200; *M. Shapiro/A. Stone Sweet*, On Law, Politics, and Judicialization, 2002, 165.

113 See note 31. In favor of the approach of the ECJ, therefore, *N. Lavranos*, The Impact of the Kadi Judgment on the International Obligations of the EC Member States and the EC, YEL 28 (2009), 616, 624.

114 *Kadi* (note 64), margin numbers 319 et seq.

115 *Kadi* (note 64), margin number 322.

116 Accord *E. Cannizzaro*, Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case, YEL 28 (2009), 593, 596 et seq. (qualifying the passage as "Solange argument, forged in ECJ style"); *M. Payandeh/H. Sauer*, European Union: UN Sanctions and EU Fundamental Rights, I.CON 7 (2009), 306, 314. But see also the contrary interpretation of the same passage of *D. Halberstam/E. Stein*, The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order, CML Rev. 46 (2009), 13, 60.

This shows that the court did not want to retain the complete substantive control of the decisions of the Committee. Instead, it only wanted to ensure the general legitimacy of the decision-making procedure.

d) Evaluation

The case law of the ECJ on the effect of decisions of international authority within the EU legal system is not entirely homogenous. While the Court basically accepts the jurisprudence of the ECtHR when interpreting the guarantees of the European Convention of Human Rights, it does not concede direct effect to decisions of the WTO Dispute Ssettlement Body as well as to resolutions of the UN Security Council. Contrary to the jurisprudence of the US Supreme Court, however, this is not a rejection of a direct effect of international "secondary" law *per se*. The Court attributes the reason for not granting direct effect to the character of the specific régime. In *Kadi*, the Court is clearly driven by legitimacy concerns when it makes the resolution of the Security Council subject to judicial review under EU primary law. The WTO decisions are, in principle, motivated by political considerations. Here, legitimacy considerations are pushed aside because of strategic concerns, as the ECJ fears that the European institutions might have a disadvantage *vis-à-vis* other WTO members if decisions of the Appellate Body were granted direct effect.

With the exception of the WTO jurisprudence, the Court thus adopts an internationalist perspective. It neither accepts unconditional direct effect of international decisions, nor does it reject direct effect *per se*. The legitimacy standards applied by the court take into account the concrete design of the respective institution and focus on its output. In its human rights jurisprudence, the court follows the decisions of the ECtHR because the history of the jurisprudence suggests that the judgments are, in principle, acceptable in their substance; in *Kadi*, the court intervened because the listing procedure did not respect certain procedural guarantees necessary to ensure legitimate decisions.

3. The Cooperation Paradigm – The Case Law of the German *Bundesverfassungsgericht*

The jurisprudence of the German *Bundesverfassungsgericht* can be situated somewhere in between the two strategies highlighted so far. When ana-

lyzing the decisions of the Federal Constitutional Court, two strands have to be distinguished. On the one hand, there is the jurisprudence on the relationship to the European Union and the European Court of Justice, which is characterized by the special nature and the high degree of integration of the EU legal order. In this respect, the Constitutional Court basically accepts the supremacy of secondary community law and generally recognizes that the European Court of Justice has the exclusive right to review the legality of all acts of EU institutions. On the other hand, there is a different strand of judgments concerning the direct effect of decisions of other international courts and tribunals. Two recent judgments concerning decisions of the European Court of Human Rights and the International Court of Justice show that the *Bundesverfassungsgericht* is much more reluctant in this respect.

a) The Jurisprudence in the Context of the European Union

The relationship between the European Court of Justice and the German Federal Constitutional Court has not been free of tension. While the ECJ has always claimed that all community law should have direct effect in national legal orders,[117] the Federal Constitutional Court has never accepted the unconditional supremacy of EU law. However, after reserving itself the right to full constitutional review of acts of community organs in the beginning,[118] the German Court has developed an equal protection doctrine, according to which it only guards the legitimacy of the system as a whole, but does not control the constitutionality of each individual act.

This conditional supremacy of community law has two dimensions. In principle, the *Bundesverfassungsgericht* accepts that political decisions of the EU institutions, in particular EU secondary legislation, are superior to domestic law. In its *Maastricht* decision, the Court pointed out that delegating ultimate decision-making authority to the European Union did not infringe upon the democracy principle contained in the German constitution.[119] In its reasoning, the Court followed the cooperation paradigm. It did not examine whether the institutional design of the European Union was legitimate *per se*. It rather derived the legitimacy via a formal chain of

[117] ECJ Case 26/62, ECR 1963, 1 – *Van Gend & Loos*. But see also *A. von Bogdandy/S. Schill* (note 8), who argue that the new Art. 4 (2) TEU is an instrument to overcome absolute conceptions of primacy and direct effect from a European perspective.

[118] BVerfGE 37, 271.

[119] BVerfGE 89, 155.

legitimization retraceable to the German "people".[120] The EU was considered legitimate because the German citizens could indirectly influence the EU decision-making process through two channels. On the one hand, they were able to elect a significant number of the members of the European Parliament, and, on the other hand, they could elect the German Government, which takes part in the decision-making process in the Council.[121]

This jurisprudence has been confirmed in the recent *Lisbon* judgment of the Constitutional Court.[122] The Court held that it was basically possible to transfer sovereign power to the EU even if the supranational institutions have the competency to shape politics within certain limits,[123] and to accept the albeit conditional[124] supremacy of community law.[125] However, the Court demanded to increase the legitimacy of EU law-making by strengthening the position of the German parliament in the decision-making process. In certain areas, which are supposed to belong to the core competencies of German statehood, the German representative in the Council, the principal legislative organ of the EU, is only allowed to act if he is backed by a formal authorization of the German parliament.[126]

The second dimension concerns the constitutional review of community legislation. The German Constitutional Court generally refuses to review acts of EU institutions under two conditions. On the one hand, the ECJ has to guarantee by its jurisprudence that the effectiveness of the human rights protection under the EU treaty is comparable to that under the German constitution.[127] On the other hand, the decisions of the ECJ shall not be *ultra vires*.[128] The German constitutional court thus intends to prevent the

120 BVerfGE 89, 155, 183 et seq.

121 For a critique of this reasoning, which focuses on the retraceability of decisions to the German citizenry and not on the soundness of the decision-making process as such, see *B.-O. Bryde*, Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie, Staatswissenschaften & Staatspraxis 5 (1994), 305 et seq.; *J. H. H. Weiler*, Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision, ELJ 1 (1995), 219 et seq.

122 BVerfGE 123, 267. English translation at <http://www.bundesverfassungsgericht.de>.

123 BVerfG (note 122), margin number 237.

124 Cf. BVerfG (note 122), margin number 240 (stating that the limits of supremacy were ultra-vires-acts of EU institutions and such acts that infringe upon the unalterable core guarantees of the German constitution).

125 BVerfG (note 122), margin number 331.

126 BVerfG (note 122), margin numbers 319, 365 et seq., 369, 388, 400, 413.

127 BVerfGE 73, 339. The Court has confirmed this position in later judgments, where it held that two applications for constitutional review were inadmissible because the applicant had failed to show that the human rights protection by the ECJ lacked effectiveness. See BVerfG, NJW 2000, 2015 and BVerfGE 102, 147. English translations at <http://www.bundesverfassungsgericht.de>.

128 BVerfGE 89, 155, 188.

application of the decision of the ECJ in the domestic context if it believes that the European court has transgressed its competence. However, it has interpreted the notion of *ultra vires* restrictively in its recent *Honeywell* decision.[129] In order not to undermine the task of the ECJ to interpret the treaty text coherently, only obvious violations of the competence of the ECJ that gravely violate the principle of limited attribution of competences are considered as a violation of the German constitution.[130]

Contrary to the *Maastricht* decision, the Federal Constitutional Court does not try to derive the legitimacy of the ECJ decisions from domestic concepts and institutions, but concentrates on the supranational institution itself. In this context, the jurisprudence of the Court thus meanders between the internationalist and the cooperation paradigm. The Court adopts a substantive standard of legitimacy. With regard to human rights, the decisive yardstick is the effectiveness of the human rights protection by the ECJ. The formal supremacy of the ECJ seems to be acceptable to the German Court because there is a considerable amount of material convergence in the human rights understanding of both courts so that fundamental conflicts are unlikely.[131] With regard to other decisions of the ECJ, it controls whether the ECJ has acted within the limits of its competence. While this might potentially lead to a control of every individual decision, the standard of review is sufficiently broad, as only obvious and grave violations of the principle of limited attribution of competences will be quashed by the Court.[132]

While these judgments all refer to community law, the Constitutional Court had to decide on the effect of framework decisions issued under the third pillar on Police and Judicial Cooperation in Criminal Matters in the *European Arrest Warrant* case.[133] In this case, the German parliament had issued a European Arrest Warrant Act, implementing a framework decision of the European Union establishing the European Arrest Warrant[134]. The Constitutional Court held that the German statute violated two fundamental rights of the German Constitution – the right of German citizens not to be extradited and the right to judicial review.

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[129] BVerfG, NJW 2010, 3422 (6.7.2010). English translation at <http://www.bundesverfassungsgericht.de>.

[130] BVerfG (note 129), margin number 61.

[131] See *M. Rosenfeld* (note 8), 424.

[132] For a pluralist interpretation of this tendency of the German Constitutional Court, see *A. von Bogdandy/S. Schill* (note 8), 1451 et seq.

[133] BVerfGE 113, 273. English translation at <http://www.bundesverfassungsgericht.de>.

[134] Council Framework Decision 2002/584/JHA (13.6.2002).

However, at first glance, the Court did not challenge the supremacy of EU law. It only critiqued that the German legislature did not utilize the range of implementation attributed by the European decision.[135] If it had done so, there would have been no violation of fundamental rights.[136] This reasoning implicitly respects the primacy of the framework decision because otherwise it would not have been necessary for the court to examine whether there is a range of implementation. It could have fully reviewed the German statute without considering the range of determination by the European decision.

However, upon close reading, we find an unharmonious undertone in an *obiter dictum* of the decision. The Constitutional Court detects a democracy deficit in the third pillar because the European Parliament is not actively involved in the legislative process of the Police and Judicial Cooperation in Criminal Matters.[137] The Court resolves this deficit by attributing a right to politically redesign the framework decision in the implementation process to the national parliaments.[138] According to the Court, they are allowed fully to deny implementation, although such a right to denial cannot be found in the text of the treaty. This position could be aligned with an internationalist reading, as the Court seems to be concerned with the legitimacy of the EU legislative process. However, the *Bundesverfassungsgericht* does not engage in a thorough examination of the latter – it only makes a brief statement. What really seems to be important to the Court is that the national parliament keeps its ability for political structuring in the absence of a significant German influence in the supranational decision-making process.

The jurisprudence of the Constitutional Court thus shows traces of both the internationalist and the cooperation perspective. While the *Maastricht* decision and the case on the *European Arrest Warrant* can best be read in a cooperationist way, the Court seems to be willing to give up this position with respect to fundamental rights protection. Here, the Federal Constitutional Court does not abstain from any control, but this control only refers to the effectiveness of European human rights protection as a whole.

135 BVerfG (note 133), margin numbers 80, 94, 96.
136 See *N. Nohlen*, Germany: The European Arrest Warrant Case, I.CON 6 (2008), 153, 158.
137 BVerfG (note 133), margin number 81.
138 BVerfG (note 133), margin number 81.

b) The Position *vis-à-vis* International Courts Outside the European Union

The situation is different with regard to decisions of international tribunals outside the European Union, such as the European Court of Human Rights or the International Court of Justice. The German Constitutional Court has pointed out in two recent judgments that it does not privilege decisions of international tribunals with the restricted review standard of the "equal protection" doctrine that it applies in the context of the European Union. Rather, it reserves itself the right to make a full constitutional review.

In the *Görgülü* decision, the Federal Constitutional Court held that decisions of the ECtHR were binding on domestic courts, but that this binding effect was not unconditional.[139] The applicant in this case was a father, whose son was living with foster parents and who had been denied to see his child on a regular basis by the competent Regional Court of Appeal. Upon complaint, the ECtHR decided that the decision of the German court was contrary to the provisions of the ECHR.[140] However, the Regional Court of Appeal upheld its decision and argued that the judgment of the ECtHR had no direct effect in the domestic legal order and was thus not binding for the individual courts.[141]

In the constitutional complaint procedure, the Federal Constitutional Court held that domestic courts were not bound to apply judgments of the ECtHR unconditionally. It argued that domestic courts had to deal with multipolar fundamental rights situations and that they were obliged to find a sensitive balance between the competing rights and interests. As not all parties to the domestic proceedings were also represented before the ECtHR, the judgment of the latter could not be transplanted into the German legal order without potential modifications.[142]

However, this does not mean that judgments of the ECtHR are not binding for the German courts. Rather, they have to take into due consideration judgments that establish a violation of the ECHR by Germany.[143] If they want to deviate, they have to justify coherently why they do not follow the precedent of the ECtHR. In the case at hand, the Constitutional Court

139 BVerfGE 111, 307. An English translation is available at <http://www.bverfg.de>.
140 *Görgülü v. Germany*, EuGRZ 31 (2004), 700 (Eur. Ct. H.R., 26.2.2004).
141 Oberlandesgericht Naumburg (Regional Court of Appeal Naumburg), FamRZ 51 (2004), 510, (30.6.2004).
142 BVerfG (note 139), margin number 50.
143 BVerfG (note 139), margin number 50.

found that the Regional Court of Appeal had not taken the argumentation of the ECtHR into account and thus violated the German Constitution.[144]

In the second decision,[145] the effect of the interpretation of treaty provisions by the ICJ was at stake. The occasion of the procedure was a decision of the German Supreme Court (*Bundesgerichtshof*),[146] in which the Court had interpreted Art. 36 of the Vienna Convention of Consular Relations in a different way than the ICJ in its *LaGrand* decision[147]. The Constitutional Court found that the right to a fair procedure guaranteed by the German constitution had to be interpreted in light of Art. 36 of the Vienna Convention of Consular Relations.[148] In order to avoid future determinations by an international tribunal that the Convention had been violated, international treaty norms have to be interpreted in accordance with the jurisprudence of the competent court even if the judgments are not directly binding for the Federal Republic of Germany.[149] As the Supreme Court had not respected the argumentation of the International Court of Justice in the *LaGrand* Case, it had thus violated the right to a fair procedure.[150]

However, the Constitutional Court again did not establish an unconditional obligation to comply with judgments of international tribunals. Remanding the case to the Federal Court of Criminal Justice, it did not order the latter to apply Art. 36 of the Vienna Convention without exception. Rather, it demanded to balance the guarantee set forth by the Convention against competing principles within the rule of law, such as procedural efficiency.[151] The Constitutional Court thus confirms its *Görgülü* decision by leaving the opportunity to deviate from judgments of international courts, in particular if there are competing constitutional principles.

In a recent decision on the constutionality of preventive detention, the Constitutional Court decided that a judgment of the ECtHR could be a ground for overturning an earlier precedent.[152] It overturned its own earlier 2004 decision[153] and declared the regulation on preventive detention unconstitutional after the ECtHR had decided that the German regulation was incompatible with the ECHR. However, the Constitutional Court kept its

144 BVerfG (note 139), margin number 67.
145 BVerfG, JZ 62 (2007), 887 (19.9.2006).
146 BGH, NStZ 22 (2002), 168 (7.11.2000).
147 See note 41.
148 BVerfG (note 145), 888.
149 BVerfG (note 145), 889.
150 BVerfG (note 145), 890.
151 BVerfG (note 145), 890.
152 BVerfG, NJW 64 (2011), 1931, (4.5.2011), margin number 82.
153 BVerfGE 109, 133.

room for maneuver. It did not accept the ECtHR decision unconditionally, but again confirmed that it is only an important factor in the interpretation of the German constitution.[154]

With its reasoning, the German *Bundesverfassungsgericht* follows the cooperation paradigm.[155] On the one hand, it acknowledges that decisions of international institutions may have a direct effect in the domestic legal order. However, this effect is not unconditional. The Court rather reserves a right to control every individual decision on its compatibility with the German constitutional order.[156] This control is, on the other hand, a substantive, not a procedural one. The German Court thus wants to remain, at least on the face, in full substantive control of the implementation of international decisions into the domestic legal order.

To be sure, the court does not require the German citizens to have an indirect influence in the international decision-making procedure as it requires for the case of the European Union. This, however, is due to the nature of judicial decisions, which are not subject to political participation. The German court tries to balance this perceived deficiency by imposing an ex-post-control. Unlike in the case of the US Supreme Court, this ex-post-control is not exercised by the legislature, but it is the Court itself that controls the implementation of the international judgments.

c) Evaluation

Although not entirely homogenous, the jurisprudence of the *Bundesverfassungsgericht* basically follows the cooperation paradigm. This is most obvious with regard to the implementation of judgments of international tribunals like the ECtHR or the ICJ. Here, the Constitutional Court acknowledges that such decisions may have a direct effect in the domestic order. However, they stand under the proviso of a substantive control by the German Court. In the context of the European Union, the Court meanders at times between the internationalist and the cooperation paradigm. In particular with regard to fundamental rights, it basically accepts the jurispru-

154 BVerfG (note 152), margin numbers 91 et seq.

155 Cf. also *A. L. Paulus*, The Emergence of the International Community and the Divide between International and Domestic Law, in: The Divide between National and International Law (note 8), 216, 243 et seq. (describing the relationship of the German Constitutional Court and the international tribunals, such as the ECtHR and the ICJ, as a cooperational relationship).

156 Cf. *N. Krisch* (note 8), 197 (noting that this control strategy is common among European constitutional courts).

dence of the ECJ, refraining from further substantive control. However, this internationalist approach is probably due to the special nature of the European Union. Not having accepted the – albeit conditional – supremacy the ECJ jurisprudence would have provoked major conflicts and endangered the whole integration process.[157] Furthermore, judgments like the *Maastricht* decision reveal the rather cooperationist mind-set of the German Court because the reason for accepting the supremacy of EU law is not the legitimacy of the institutional design of the EU as such, but is derived from the indirect participation of the German people in the legislative process.

IV. A New Perspective on the Monism-Dualism-Dichotomy

The coordination of different legal systems has become a complex issue that cannot easily be integrated into the old monism-dualism-dichotomy.[158] The international legal order has moved away from being one monolithic system. Rather, we observe the emergence of a certain heteronomy of international tribunals and institutions varying in the extent of their competences and the design of their decision-making procedures. The reception of decisions of these institutions by national legal orders cannot be subject to a one-fits-all approach. Rather, the task of domestic constitutional judges has become more complex. When determining the status of international secondary law, judges cannot solely rely on formal legal norms, but also have to take political considerations, particularly the legitimacy of the external legal order, into account. Instead of distinguishing monist from dualist legal orders, we should thus rather focus on the strategy a constitutional court chooses in order to cope with this challenge. This contribution has identified three different approaches – a state sovereignty centered, a cooperation based, and an internationalist perspective.

This distinction is at odds with the traditional monism-dualism-dichotomy. Even an internationalist approach does not imply a monist perspective. Monism would require an unconditional acceptance of decisions of international institutions – an approach that was followed by the European Court of First Instance in the *Kadi* and *Yusuf* decisions.[159] In contrast, although qualified as internationalist here, the ECJ is certainly not a monist

157 *F. Schorkopf*, Grundgesetz und Überstaatlichkeit, 2007, 150.

158 Accord *J. Nijman/A. Nollkaemper* (note 8), 341; *A. L. Paulus* (note 155), 217.

159 See ECJ Case T-315/01, ECR 2005, II-3649 – *Yassin Abdullah Kadi* and Case T-306/01, ECR 2005, II-3533 – *Ahmed Ali Yusuf and Al Barakaat International Foundation*.

court.[160] But this is precisely the point. Under the traditional distinction, the approaches of all three examined courts would be qualified as dualist, although there are significant differences between the reasoning of the US Supreme Court and the reasoning of the European Court of Justice.[161] It is these differences that the classification proposed in this contribution tries to capture.

How do we explain the differences in the national jurisprudence? A formalist will be inclined to trace them back to the different texts of the relevant constitutional provisions. But neither the German constitution nor the EC treaty tell us very much about the domestic effect of international treaties. And an unprejudiced glance at Art. VI para. 2 of the American constitution would probably have suggested a much more internationalist position than the one developed by the US Supreme Court in *Medellín*. Furthermore, a formalist perspective cannot explain why certain courts do not treat international decisions in a uniform way. The ECJ, e.g., readily accepts the conditional supremacy of judgments of the European Court of Human Rights on the interpretation of human rights. On the other hand, it challenged the applicability of a UN Security Council resolution in the *Kadi* case.

The explanation, therefore, has to be a different one. In particular, one reason is worth to be explored. The variation in the jurisprudence can be due to a different level of trust into international institutions.[162] The more the international decision-making procedures embrace the rule of law, the more the trust in these procedures will be enhanced. Formal guarantees are not everything, though. The performance of a decision-making procedure equally depends on the mind-set of the actors operating within this procedure.[163] The extent to which a constitutional court places trust in the actors involved in international procedures also depends on the own cultural predetermination.[164] Judges with an international perspective and a greater ex-

[160] This is underlined by the recent *Intertanko* decision of the Court. See ECJ Case C-308/06, ECR 2008, I-4057 – *Intertanko*.

[161] But see *C. Tomuschat*, The Kadi Case: What Relationship Is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?, YEL 28 (2009), 654, 662 (observing close resemblances between both decisions).

[162] See *J. H. H. Weiler*, The Constitution of Europe, 1999, 318.

[163] It is thus not without reason that the literature on democratization focuses on trust as an important factor in order to enhance democratization processes. See *C. Tilly*, Trust and Rule, 2005, 132 et seq.

[164] See *P. W. Kahn*, American Hegemony and International Law, Chi. J. Int'l L. 1 (2000), 1, 17 (claiming that the American narrative of popular sovereignty makes some American constitutional lawyers suspect to decisions taken outside the national realm). See also *N. Krisch* (note 8), 212 for the observation that national judges have often internalized the values

posure to international cooperation will probably put more trust into international decision-making procedures than judges coming from a more isolationist tradition.

However, different conceptions of legitimacy cannot fully explain the positions of constitutional courts that we observe. In some cases, strategic considerations and the exigencies of the political framework play a crucial role. On the one hand, they may be one of the reasons why courts adopt a certain conception of legitimacy. This would, e.g., explain why the German Constitutional Court adopts a different attitude towards the human rights jurisprudence of the ECJ than towards judgments of the ECtHR or the ICJ. The United States, in contrast, are not involved in a dense network of international integration, so that the US Supreme Court can take a more reserved perspective with regard to the implementation of international law.[165] On the other hand, strategic concerns may, at times, even override legitimacy considerations. This can best be observed at the case law of the ECJ *vis-à-vis* the direct effect of decisions of the WTO Appellate Body. Here, the reasoning of the court is clearly framed in strategic terms without paying much attention to the legitimacy of the WTO system.

Both of these factors are probably contributing to the development that we observe in the field of coordinating international and domestic law. From both perspectives, it is no surprise that the ECJ, which is a hybrid body somewhere in between a constitutional court and an international tribunal itself, takes the most internationalist stance of the three examined courts. But even the internationalist perspective does not require an unconditional supremacy of international law. This is expressed by the *Kadi* judgment, where the Court dismissed a UN sanctions system that does not even come close to resembling a procedure guided by the rule of law. The ECJ followed a prudent strategy addressing signals to two different kinds of actors. With regard to the international system, it did not close the door, but entered into an institutional dialogue by leaving open the opportunity of accepting a revised sanctioning system in the future.[166] Concerning the

of their own legal system to such an extent that they consider them to be superior to foreign solutions.

[165] *E. Benvenisti* (note 9), 242. However, this development comes at a price. There is evidence that the influence of the US Supreme Court on other constitutional courts is decreasing. See *A. Liptak*, US Court Is Now Guiding Fewer Nations, N.Y. Times, 18.9.2008.

[166] Similarly *J. d'Aspremont/F. Dopagne*, Kadi: The ECJ's Reminder of the Elementary Divide between Legal Orders, International Organizations Law Review 5 (2008), 371, 377 et seq.; *A. Nollkaemper*, Rethinking the Supremacy of International Law, ZÖR 65 (2010), 65, 84 et seq. (all arguing that the *Kadi* case may put pressure on the Security Council to bring its procedures in conformity with human rights standards). Contra *A. Gattini*, Case Comment, CML Rev. 46 (2009), 213, 226 et seq.; *G. de Búrca* (note 111), 58 et seq. (both criticizing that

Constitutional courts of the EU member states, the ECJ took one important step in order to strengthen their trust in its adherence to fundamental rights and the rule of law.[167]

the ECJ did not enter into a dialogue with other actors in the international arena). *Gattini* claims that the Court should have sought the solution by analyzing the legality of the UN Security Council resolutions under international law, in particular *ius cogens*. However, *ius cogens* alone may not provide us with sufficient standards in order to examine the legitimacy of the actions of the UN Security Council.

[167] Accord *H. Sauer*, Rechtsschutz gegen völkerrechtsdeterminiertes Gemeinschaftsrecht?, NJW 61 (2008), 3685, 3687. See also *T. Tridimas/J. A. Gutierrez-Fons*, EU Law, International Law, and Economic Sanctions against Terrorism: The Judiciary in Distress?, Fordham Int'l L. J. 32 (2009), 660, 728 (arguing that the approach of the ECJ strengthened the internal legitimacy vis-à-vis the citizens).