

On the Correlation between National and International Law

Results of a Joint German-Russian Research Seminar

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Foreword

The Philipps-University Marburg (Germany) and the Immanuel Kant Baltic Federal University Kaliningrad (Russian Federation) are connected with each other by a long and fruitful partnership. This holds in particular true for the respective Departments or Institutes of Law that have been working closely together for twenty years in the field of legal education. We offer our students (undergraduates and graduates) various possibilities to participate in transnational lectures, common study programmes, semesters abroad, and summer schools, where they acquire a deeper understanding of European and international law and its methodology, discuss fundamental and contemporary problems of law and expand their international network. These efforts aim to help budding lawyers enhancing their professional skills, developing a critical thinking approach and improving their discursive competences in transnational legal issues.

In 2019, we have enriched our cooperation with the initiation of a “Joint Research Seminar in Law”. From 15 to 19 September 2019, a group of German and Russian law Professors, Postdocs, PhD and Master students met in Kaliningrad and discussed various aspects of the “Correlation between National and International Law”. The overall goal of the seminar was to shed a light on the interaction between the different legal orders and to analyse the challenges arising from the processes of constitutionalising of international law on the one hand and the internationalisation of national law on the other.

The seminar followed basically a case-law oriented approach. After some introductory lectures, which prepared the ground for further discussion by illuminating the problem horizon and exemplifying the interdependence between international and national norms in different areas of law, the PhD and Master students presented case law studies on how national and international courts deal with competing claims of different legal orders or discrepancies between national and international norms. The following discussion highlighted similarities and differences between the German and Russian solution approaches and proved the worth of comparative legal analysis which may generate new insights and add to better and deeper understanding of common legal problems.

We as editors are honoured to present in this volume a selection of revised papers presented at the Joint Research Seminar. As we are convinced that the German-Russian-Legal-Dialogue is the basis for increasing mutual understanding and thus of utmost importance for the future constructive development of the relationship between the two countries, we are looking forward to further strengthening the research cooperation in law between Marburg and Kaliningrad – *inter alia* with regular Joint Seminars. Our thanks go to our Kaliningrad partners, especially to Oleg Zayachkovsky, Vadim Voinikov, and Anastasia Turkina.

Marburg, in April 2020

Hans-Detlef Horn, Stefanie Bock

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Introductions and Foundations

1 International and Constitutional Law Doctrines on the Correlation between National and International Law

Hans-Detlef Horn

1.1 Introduction

This introductory presentation provides an overview of the international and constitutional law doctrines or discussions respectively on the relationship between national and international law. And by doing, so I am following a general and fundamental approach. The aim is to give the problem outline and to highlight the concepts and strategies that determine the issue in question. Since the subsequent lectures serve largely the same purpose, namely the consideration of overarching structural aspects, together with them we achieve something like an illuminated horizon, which – according to the methodological concept of our comparative law seminar – provides the background for both, firstly to the analyses of selected case law in judicial practice undertaken in the panels,¹ and second, to better understand and be able to critically evaluate these legal cases.

My explanations proceed in three steps. The first stage clarifies the starting point which makes the question of the relationship between national and international law a problem. Three factors can be identified as responsible here: first, the crucial importance of this relationship for the functioning of the international legal order, but its dependence on how States are handling it; second, the current relevance of this relationship in a world of increasing international legal cooperation; and third, the ambivalent function of international law seen from the perspective of the States, which at the same time testifies to the need for a balancing concept. The second stage deals with the two grand legal theories of dualism and monism and shows their limited explanatory power and moreover their irrelevance in practice. The third stage, finally, identifies new academic approaches dealing with the problem of the relationship between national and international law in the way of either a constitutionalist or a pluralist approach.

1.2 Preconditions and Challenges

1.2.1 One State Sovereignty, two Legal Systems, no Collision Rule

The correlation or relationship between international and national law addresses a fundamental legal issue. Fundamental in the sense of: it is of crucial relevance for the functioning of international law and thus for the efficiency of the international legal order. What is the reason for? And on what does that depend?

¹ See in this compilation, contributions No. 5 et seq.

Since there is no world government – and any imagination of a fully integrated world order will remain pure utopia –, the world consists of a “pluriversum” of States.² The States are still the “primary areas”³ of the political existence of people. Accordingly, the State being constructed as a legal subject and acting through its organs is the primary source of the legal order, under which human coexistence is organized. That’s what we usually call the internal sovereignty of a State. Since the Enlightenment, the guarantee of a legal order, not just any order, but an order whose purpose it is to ensure peace and equal freedom in the coexistence of all, has been the fundamental reason why the State, characterized by its monopoly on violence over residents of its territory,⁴ can claim to be in principle a legitimate institution.

However, while internal (national) law regulates domestic relations – between the official authorities of a State and between these authorities and the individuals, as well as the relations between the individuals themselves –, in a global perspective the State at the same time is not a single political entity, but inevitably stands in the midst of a multitude of States. This necessarily directs the attention to the legal order of their relations with each other.

In the past, relations between States were mainly characterized by demarcation, conflict and war. With the emergence of modern international law, however, the demand for a “good” legal order for human coexistence has expanded from the national to the cross-national or international level. With this claim, however, international law is not only created by a State, but it always originates from the interaction of States – whether they conclude international treaties, whether they establish customary international law through their constant practice and legal conviction, or whether they establish International Organisations with the power to enact legal acts. And traditionally, this international law does not regulate the internal affairs of a State, but the rights and obligations originated therefrom apply in principle only in relations between States (and International Organisations). In this context the States act as the born legal subjects of international law based on what is called their external sovereignty.

Hence, international law lacks any legal sovereignty of its own, it does not originate from any independent, sovereign single power. It therefore cannot refer to any legal reason for its validity that is detached from the States. Rather, the validity, i.e., the existence, of any norms of international law including the rules of their creation always and completely derives from the sovereignty of the States. Thus, the origin from the sovereign legal power of the States cannot be ignored without the validity of the sources of international law being lost. And of course, the same applies to any claim of supremacy of international law in the case of a collision with national law.

² Isensee, J., Die vielen Staaten in der einen Welt – eine Apologie. In: *Zeitschrift für Staats- und Europawissenschaften* 1 (2003), pp. 7-31; reprinted in: J. Isensee, *Staat und Verfassung*. Ed. by O. Depenheuer. C.F. Müller: Heidelberg 2018, pp. 643-663.

³ Cf. regarding the Member States in relation to European Union: Federal Constitutional Court of Germany, Judgement of 30 June 2009, 2 BvE 2/08 et al., ECLI:DE:BVerfG:2009:es20090630.2bve000208, BVerfGE 123, 267 (382), at para. 301: “the Member States are the constituted primary political area of their respective polities”.

⁴ Cf. for the Three-Element Doctrine classical Jellinek, G., *Allgemeine Staatslehre*. 3rd edn., Häring: Berlin 1914, at pp. 394-434; see also Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933.

This is, by the way, the reason why as regard to the special relation between the law of the European Union (EU) and national law of Member States there are prominent attempts to establish the “autonomy” of the EU legal order integrating and preceding the domestic law of Member States.⁵ But herewith the fact is denied that the EU is not a state but an “association of sovereign states” (*Staatenverbund*).⁶ The states, as the “masters of the Treaties”, hold the European legal order in their hands; without these treaties there is no EU; its legal sovereignty, like that of other International Organisations, is always derived sovereignty.⁷

So resulting from this, we have to see first of all that from the perspective of State’s sovereignty we have two legal systems. And the distinction is clear: both systems differ according to the respective origin of the law. It depends on who has issued the respective norm.⁸

However, as far as the relation between the two legal systems is concerned, it is equally clear that they cannot be regarded as separate systems which are completely unconnected. This is already shown by the simple consideration that the State as a legal entity in both jurisdictions remains identical. The State, which is with others a source and addressee of international law, is none other than that of national law. In other words: Internal and external sovereignty always refer to the same State.

In regard to a single State, therefore, we always deal with a simultaneous and double legal subjectivity, or figuratively speaking: with a legal subject standing on two legs, with one leg moving the national legal order and the other moving the international legal order. There is thus the latent question of how the rights and obligations arising from one legal order relate to those of the other. The question becomes virulent if both legal regimes contradict each other, because they concern the same issue or matter, but regulate them differently, be it in the scope or in the legal consequences. Just to give one evident example: The obligations of the protection of human rights under international law can by nature only be fulfilled within the States. There, however, the State authorities also meet the regulations of internal national law.

Here we now must face the crucial point, that is, so to speak, the “mother of the problem”: As there is no overarching “sovereign”, no ultimate authority, consequently there is no ultimate source of a “collision rule” that regulates the relation between national and international law.

What we instead need to realise is this: As States are the sole bearers of sovereign legal power the functioning of the international legal order is necessarily dependent on the contributions made to it by the States based on their national law, both in terms of the emergence

⁵ Cf. initially Court of Justice of the European Union (CJEU), Judgement of 15 July 1964, *Costa v. E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66; established case law of the CJEU. The “autonomy” of the EU legal order, by the way, at the same time argues against to accept the same in relation to international law, cf. CJEU, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, on the accession of the EU to the European Convention of Human Rights (ECHR).

⁶ Cf. Federal Constitutional Court of Germany, Judgement of 30 June 2009, 2 BvE 2/08 et al., ECLI:DE:BVerfG:2009:es20090630.2bve000208, BVerfGE 123, 267, first key statement.

⁷ Cf. clearly Federal Constitutional Court of Germany, Judgement of 30 June 2009, 2 BvE 2/08 et al., ECLI:DE:BVerfG:2009:es20090630.2bve000208, BVerfGE 123, 267 (381, 382), at paras. 298 et seq.

⁸ Cf. Kunig, P., *Völkerrecht und staatliches Recht*. In: W. Graf Vitzthum and A. Proeßl (eds.), *Völkerrecht*. 7th edn., De Gruyter: Berlin/Boston 2016, pp. 61-131 at pp. 66 et seq. at mn. 2, 4.

of international law and its enforcement in relation to national law. In other words, and to pick up the image used previously: One leg of State sovereignty, which is of the national legal order, is the supporting leg that sets the other leg the conditions of possibility for the emergence and effect of international law.

The above considerations could be understood as what is commonly referred to as the dualistic theory. However, both the so-called dualism and the counter-theory, the monism, do explain the relation between international and national law only from the perspective of legal theory. While dualism assumes the existence of two separate legal systems, monism stands for the idea of that all law forms a unity. We will come back to this later.⁹ But what we can record for now is this: Both views, including monism, which is theoretically universal, ultimately come down to nothing more than legal-theoretical concepts that States can adopt from their legal sovereignty. Thus, there are so-called “dualist States” and there are “monist States”. Within the States that accepted monism international law is automatically treated as part of national law, whereas in dualist States international law need to be incorporated by a decision of the national legal order.

1.2.2 Open Statehood

Against the background of this starting point, the topic of the relationship between international and national law addresses an increasingly practical and sensitive issue. The more the phenomena of globalisation and the interdependence among States raises social, economic and political issues of cross-border character, the more the legal systems of national and international law need to face and to process the resulting challenges of their own regulatory concerns.

The modern living conditions of the people – especially in terms of freedom of movement, economy, trade, finance, transport, environmental protection, climate, communication, threats from terrorism and war, migration movements, and other social and humanitarian challenges – do not end at the borders of a State, but today are internationalised to a large extent. As a result, international relations are becoming increasingly intertwined. And this necessarily goes hand in hand with an increasing international legal cooperation, namely in bilateral treaties, multilateral conventions, and International Organisations.

For this reason, it is said, international law has developed from a mere order of juxtaposition of States, the so-called “Westphalian system”, which is supposed to guarantee sovereign immunity, friendly relations and peaceful settlement of disputes, to an order of cooperation. At the same time this increase of policy coherence on the level of the international law triggers an increasing interaction with the domestic legal order.

⁹ See below, under point 1.3.2.

First of all, national law needs to allocate and to regulate an authority to efficiently contribute to the emergence, maintenance and development of international law. This requires the legal empowerment of a government agency of foreign affairs in its means and its limits.

The second bridge-building task goes the reverse direction. To be able to live up to internationally assumed obligations the national legal systems must correspond to them. In particular, the State's constitutions need to hold mechanisms that ensure the internal effectiveness of international legal norms.

The extent to which a State is supporting this interaction with and the adoption of the international legal system is more or less internationally or nationally oriented, more or less following the idea of openness to international law¹⁰ or the idea of State's internal sovereignty. In other words: It is the principles of "reception" and "autonomy" and the tension between them that form the cornerstones of the relation between national and international law.

It should also be pointed out in this context that this tension is also reflected in the requirements of the democratic principle. From a modern constitutional perspective, the question of the weight of international law in the national legal area does not concern State sovereignty in the formerly monolithic sense of omnipotence or a "closed shop" which is long outdated. Rather, it is about the function of State sovereignty to ensure the sovereignty of the people and the democratic legitimacy of all policies and legislation that are effective within one's own jurisdiction.

1.2.3 Need for a Balanced Legal Design

Regarding the situation described, it is neither surprising that in recent times the relationship between international and national law, especially the question of supremacy of the one or the other, has increasingly become the subject of judicial decisions and academic debate, nor that opposing views and positions have emerged to this. An increasing number of adjudications had to deal with questions like: What is the status of the rules of international law before a national court? How do rules of international law take effect in the internal law of a State? Which rule does prevail in a case of conflict between the two laws?

However, academic support by providing consolidated structures or rules that help to solve these questions is few. Seen from a legal science point of view the relationship between

¹⁰ For the constitutional concept of open statehood or openness to international law resp. under German Basic Law (*Grundgesetz*) see classical Vogel, K., *Die Verfassungsentscheidung des Grundgesetzes für die internationale Zusammenarbeit*, 1964; from recent literature with further references Herdegen, M., Internationalisierung der Verfassungsordnung. In: O. Depenheuer and C. Grabenwarter (eds.), *Verfassungstheorie*. Mohr Siebeck: Tübingen 2010, § 7 pp. 271-286; Tomuschat, C., Staatsrechtliche Entscheidung für die internationale Offenheit. In: J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*. 3rd edn., Vol. XI: Internationale Bezüge, C. F. Müller: Heidelberg 2013, § 226, pp. 3-61; Schorkopf, F., *Grundgesetz und Überstaatlichkeit*. Mohr Siebeck: Tübingen 2007; also him, *Staatsrecht der internationalen Beziehungen*. C. H. Beck: München 2017, at pp. 26-27, pp. 37-38; see further von Bogdandy, A., Cruz Villalón, P., and Huber, P. M. (eds.), *Handbuch Ius Publicum Europaeum*. Vol. II.: Offene Staatlichkeit – Wissenschaft vom Verfassungsrecht, C. F. Müller: Heidelberg 2008.

international and national law is far away from being fully clarified. And, by the way, that also applies as far as supranational law of the EU is concerned.

Recent research attempts to cope with, and we are going to have a look on them later,¹¹ show not only the increasing complexity of the issue, but more generally the difficulty of arriving at a coherent treatment and systematic concept. Instead, the discussion is continuously characterised by irreconcilable opposites – with resulting in long and sometimes bitter arguments.¹² In the meantime a significant exhaustion seems to have occurred. In other words, the discussion is bogged down.

Cum grano salis, one can say that there are two opposed camps: On the one hand, there are the international lawyers who have a natural tendency to stress the self-evident validity and supremacy of international law. Constitutional law experts, on the other hand, believe that everything that concerns the effectiveness and legitimacy of law in the domestic sphere has its roots in constitutional law.

Anyway, what has been certainly missing so far is an intensive exchange between German or European lawyers respectively and lawyers from Russia on this topic. There are a lot of political prejudices and accusations against each other. But a genuine jurisprudential dialogue about this is lacking and must be regarded as an academic desideratum. And insofar, I would like to highlight a thought that seems to me noteworthy:

Unlike the impression that might have just been created, the relation between international and national law should not be deemed a question of fundamental opposition, not an either-or, either internationalisation or nationalism, either open Statehood or closed Statehood – with a “*tertium non datur*”. Extremely polarising like this might be the business of ideological hardliners but it is not of rationalists of good will. International law must not be misunderstood as an unfriendly attack against the sovereignty of States.

Of course, equal sovereignty of each State is the foundational principle of the world’s political structure. It ensures a global balance of power and respects the primary political sphere, in which people develop their cultural identity and live according to the habits of their homeland. On the other hand, however, even in classical international law this has never implied the understanding of sovereignty as absolute, justifying everything the State does outside and inside and at the end of the day by denying all obligations under international law. While international law protects the sovereignty of States including the inviolability of borders and non-interference into internal affairs, according to modern understanding, this does not occur for its own sake. The purpose is rather, firstly, to guarantee a stable order between States, but secondly, also to ensure a functioning, essentially humane order within State’s jurisdiction.¹³ And in regard to this purpose, international law also acts as a system that offers

¹¹ See below, under point 1.4.

¹² Cf. e.g. aptly Morina, V., Korenica, F., and Doli, D., The relationship between international law and national law in the case of Kosovo: A constitutional perspective. In: *International Journal of Constitutional Law* 9 (2011), pp. 274-296 at p. 275.

¹³ Emphasized by Kempen, B., *Staat und Raum*. Schöningh: Paderborn 2014, at pp. 28-31.

States to represent their domestic interests in the struggle of different beliefs and values, political goals, social and legal systems, ideologies or religions, wherever regulatory matters of international interest arise that involve national interests at the same time.

This understanding of international law as an offering order (*Völkerrecht als Angebotsordnung*) does not overlook the fact that the development of international law can have a momentum of its own, tending to assert its own autonomy, independence, supremacy. This could well be seen as a sign of advanced cooperation and integration of States. On the other hand, internationalism and multilateralism can also call into question national interests, political identities, legal cultures or constitutional identities to such an extent that alienation tendencies arise. Therefore, the legal design of the internationalisation of national law must take the people and the States with it. This means: The “opening up of Statehood” to international law must be brought into good balance with the own “identity of Statehood”, just as like international law not only secures the “existence” of the Statehood of each State, but must also leave scope to the “identity” of each State. Otherwise cooperation and integration cannot succeed, otherwise confrontation and rejection threaten, which lose sight of the purpose of all legal order that is to secure peace, freedom and the well-being of all.

According to that, we should acknowledge that we are not facing two poles that are in a contradictory opposition to each other. It is not about a fight between enemies, but, so to say, a competition of “brothers in spirit”. It is the enforcement of a human legal order, which is the common purpose of both legal systems. In this they agree, and in this the States are demanded to work together – even if they have different views on what should be legally valid in the individual case.

Having all this in mind we are now ready to look at the problem from a strict legal theory point of view.

1.3. The Monism/Dualism Dichotomy and its Irrelevance in Practice

1.3.1 It's up to the States

According to the previous considerations we know that it is up to the States and their rules to regulate the relationship between international and national law. States are free to decide how to include their international obligations into their national law and to determine which legal status these have internally.

Of course, under international law States are generally obliged to act in conformity with the rules of international law. And this implies to bring national law into conformity with their obligations under international law. This belongs to the essential function of international law, as already indicated. Its normative expectation is precisely that the states implement in their domestic law what they have created under international law. In this respect, international law

is based on a specific, universally agreed image of the State: namely that the States, as the bearers of the international legal order, do not speak with a forked tongue, but act coherently.

However, international law does not and cannot regulate its own status in the domestic legal order (or the legal orders of International Organisations like the European Union). As in the case of international treaties, for example: Albeit the principle of “pacta sunt servanda”, recognized as a general rule of international law, may call for internal measures in order to comply with international treaty obligations, it only establishes a specific obligation between the contractual partners, while it does neither regulate the validity nor the rank of the treaty provisions within the national legal order of the contracting States. The same applies for the Vienna Convention on the Law of Treaties (VCLT) codifying customary law for the most part. It only requires the States to perform in good faith the treaties they have approved (Art. 26 VCLT), and precludes them from invoking national law to justify breaches of treaty obligations on the level of public international law (Art. 27 VCLT).

We must therefore seek the legal concepts by which States determine compliance with international law within their borders. Here we come back to the already before mentioned dualism/monism dichotomy.

1.3.2 The two Grand Theories

The dualist theory proceeds from the premise that from a strict legal-theory point of view international and domestic law form two separate legal systems, independent of one another and having their own objects of regulation, subjects, and sources of law. With other words: There is an elementary difference between the both. Consequently, international rules can only become an integral part of the national legal system through a national legal norm. Instead, monism regards both as components of a legal order that can only ever be conceived as a unit. In this view, the object, subject, and sources of all law have merged into a self-contained legal order, with pursuing the identical goal of regulating the behaviour and well-being of people. Hence, the monist theory follows natural law thinking and the idea of a world society. By requiring that international rules have to be considered as part of the national law order, like if they were national law, it accuses the dualistic theory of adhering to positivism.¹⁴

However, those grand theories provide us only with a general approach to the correlation in question. Correlation in action, which means the concrete interaction that is at stake in everyday practice, is regulated by domestic law anyway, in fact at the highest level, the constitution of the State – or the primary law of International Organisations like the European Union respectively. Thus, the identification of a national legal order as “monist” or “dualist” (in its

¹⁴ Overview of these theories e.g. Schweisfurth, T., *Völkerrecht*. Mohr Siebeck: Tübingen 2006, at pp. 194-212; Kunig, P., *Völkerrecht und staatliches Recht*. In: W. Graf Vitzthum and A. Proeßl (eds.), *Völkerrecht*. 7th edn., De Gruyter: Berlin, Boston 2016, pp. 61-131 at pp. 77-89; Schorkopf, F., *Staatsrecht der internationalen Beziehungen*. C. H. Beck: München 2017, at pp. 17-26.

relation to international law) at the end of the day depends on how the respective Courts jurisdiction is interpreting these constitutional regulations in regard of concrete cases.

For example: What does it exactly mean Article 25, sentence 1, of the German Basic Law (*Grundgesetz* – GG) saying: “The general rules of international law shall be an integral part of federal law”? Or regarding the European Union: What does it mean Article 216, paragraph 2, of the Treaty on the Functioning of the EU (TFEU) saying that “international agreements concluded by the Union are binding upon the institutions of the Union and on its member States”? Or Article 15, paragraph 4, Russian Constitution stipulating that the “universally-recognised norms of international law and international treaties of the Russian Federation shall be component part of its legal system”?

Legal scholarship offers three possibilities of interpretation. First, theory of adoption, which follows the monistic concept: According to it international law is simply incorporated and has automatically effect in the national law sphere, i.e., without that any additional national legal act is required. It can be directly applied by a national judge, and can be directly invoked by citizens. If a conflict of norms occurs, international rules regularly have priority. This is the position, of course, which gains the sympathy of international lawyers.

On the other hand, based upon the dualistic view, there we have, second, the transformation theory and third, the theory of implementation. According to them international norms can only operate in the national legal area just with and in accordance with the permission of domestic law. That is what in German jurisdiction is called the need of a “national order giving effect to international law” (*nationaler Rechtsanwendungsbefehl*).¹⁵ Unlike the pure transformation theory this concept of implementation does not turn or translate international law into national law but keep its nature or form within the national legal sphere.

The latter mechanism of application can be regarded as the most appropriate, and also represents the view currently prevailing in the constitutional expert’s literature. It is respecting both the role of the sovereignty of States and the own character of international law, at the same time stressing the task of national law to assist the proper fulfilment of international law.

1.3.3 No Uniformity in Practice

In today’s world, however, neither a uniform treatment of the relationship between international and national law can be identified, nor a practice that is clear-cut, based either on one theory or doctrine or the other. What we see in reality is such a variety of different and monist-dualist mixed mechanisms that as a result the ability of the theories to explain and to guide the complex interaction between international and national law seems to have completely

¹⁵ See e.g. Federal Constitutional Court, Decision of 15 December 2015, 2 BvL 1/12, ECLI:DE:BVerfG:2015:ls20151215.2bvl000112, BVerfGE 141, 1 (16), at para. 37; Decision of 8 April 1987, 2 BvR 687/85, BVerfGE 75, 223 (244), at paras. 61 et seq.

disappeared. Each State decides autonomously, with no “causal linkage” to *ex ante* theories,¹⁶ whether or not it incorporates norms laid down in the international legal order and, if so, how such an incorporation is performed and which legal status these have internally: The variety concerns the question of validity, and in particular the questions of direct applicability and of rank or supremacy of international legal norms. And moreover, the answers to these questions vary, firstly, depending on the nature of the international norm, above all whether international customary law or international treaties are concerned, and secondly, and most remarkably, depending on the content of the norms involved.

To show the flexible state of interaction and mutual influence of international and national law (or EU law), a few examples may suffice:

While in the early 1970’s the Court of Justice of the European Union (CJEU) extensively considered binding international law as integral part of the Union’s legal order ranked between primary and secondary law, the standing case law denying direct effect of WTO law¹⁷ and even more the recently jurisdiction on the cases of *Kadi*¹⁸ came with a different view limiting the internal effectiveness of international law in relation to preceding values of European legal principles.

Also, the judicial practice of the German Federal Constitutional Court shows according to its interpretation of the Basic Law (*Grundgesetz*) a differentiated commitment of international law. Since the effectiveness of international law in the German legal order depends on the regulation of several constitutional provisions, it can also be differently limited by the constitution.¹⁹ And this may lead (which is an inevitable consequence from the dualistic perspective) to discrepancies between the law effective in the national legal order and the State’s international obligations. However, such discrepancies concern at most “normal” international treaties, in regard to which the Court recently holds a “treaty override” by later statutory law – along the principle of *lex posterior derogat legi priori* (“later law removes the earlier”) – to be consistent with the Basic Law.²⁰ Apart from that, the principle of openness to international law deriving

¹⁶ Keller, H., and Stone Sweet, A. (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford University Press, Oxford, 2009, at pp. 685-686.

¹⁷ Cf. CJEU, Judgement of 22 June 1989, *Fédération de l’industrie de l’huilerie de la CEE (Fediol) v. Commission*, C-70/87, ECLI:EU:C:1989:254; Judgement of 7 May 1991, *Nakajima All Precision Co. Ltd v. Council*, C-69/89, ECLI:EU:C:1991:186. For details see below, contribution of Graf, L., The Scope of International Organisation Law within the Legal Framework of the European Union according to the Case Law of the CJEU. In this volume, Chapter 7, pp. 70-77.

¹⁸ Cf. CJEU, Judgement of 3 September 2008, C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461; Judgement of 18 July 2013, *Commission et al. v. Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518. For details see below, contribution of Graf, L., The Scope of International Organisation Law within the Legal Framework of the European Union according to the Case Law of the CJEU. In this volume, Chapter 7, pp. 70-77.

¹⁹ See in general on the limits of the application of international law in German law Talmon, S., Die Grenzen der Anwendung des Völkerrechts im deutschen Recht. In: *JuristenZeitung* 68 (2013), pp. 12-21.

²⁰ See Federal Constitutional Court of Germany, Decision of 15 December 2015, 2 BvL 1/12, ECLI:DE:BVerfG:2015:ls20151215.2bvl000112, BVerfGE 141, 1 (20), at paras. 50 et seq.; for further details see below, contribution of Manoharan, J., The Federal Constitutional Court of Germany on the Openness of National Law to International Treaty Law. In this volume, Chapter 5, pp. 58-65.

from the overall constitutional system governing the relationship between Germany and the international community regularly stipulates the binding force of international norms within the domestic sphere. This is particularly true in view of the general rules of international law, especially customary international law. As far as the rights of the European Convention on Human Rights and the judgements of the European Court of Human Rights (ECtHR) are concerned, they must be “taken into account” by each national authority when applying the law, i.e., they require to be treated like constitutional law of the highest rank, even though formally they only have the rank of ordinary law.²¹ It is only but at least in exceptional cases, i.e., to prevent a violation of fundamental, unalterable principles that are part of constitutional identity (see Article 79, paragraph 3, of the Basic Law [*Grundgesetz*]), that the national authorities are constitutionally obliged to disregard obligations under international law; however, this presupposes a corresponding decision by the Federal Constitutional Court.

It should be noted on that occasion, that the latter also applies to the relation between German law and the supranational legal order of the EU.²² At all, there is a tangible similarity between the debate concerning the status of EU legal norms in relation to domestic legal orders of Member States²³ and the relation between international law and EU law or national law respectively.

Another case of interest in this context might be the Italian Constitutional Court’s decision no. 238 from 2014.²⁴ In that decision the Court refused to give effect to the judgment of the International Court of Justice (ICJ), in which the ICJ had upheld the principle of State immunity against allegations of serious human rights violations of German State organs committed during World War II. The Court ironically argued exactly in line with the German Federal Constitutional Court, and what the CJEU and other Constitutional Courts of European Member States have done before too, namely that the openness of the national legal order to general recognized norms of international law finds its limits by the necessity to preserve its constitutional identity, which consists primarily of the fundamental values of the constitutional

²¹ See Federal Constitutional Court of Germany, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (315-330), at paras. 30-63. For further details see below, contribution of Peters, K., Consideration of the ECHR in German and European Jurisprudence. The Interplay of ECtHR, FCC and CJEU. In this volume, Chapter 8, pp. 78-87.

²² Cf. in particular the jurisdiction of the Federal Constitutional Court of Germany since the judgement on the Lisbon-Treaty, Judgement of 30 June 2009, 2 BvE 2/08 et al., ECLI:DE:BVerfG:2009:es20090630.2bve000208, BVerfGE 123, 267; followed by the judgements on the Euro-Crisis, particularly Judgement of 12 September 2012, 2 BvR 1390/12 et al., ECLI:DE:BVerfG:2014:rs20140318.2bvr139 012, BVerfGE 132, 195; Judgement of 21 June 2016, 2 BvE 13/13, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813, BVerfGE 142, 123. For further details see below, contribution of Sikora, J., The Relationship between European Union Law and the German Legal Order in the View and under the Review of the Federal Constitutional Court of Germany. In this volume, Chapter 13, pp. 114-126. – On the concept and the limits of the association of states of the European Union under the perspective of people’s sovereignty and the constitutional principle of democratic legitimacy see Horn, H.-D., *Vom Staat der Demokratie*. Schöningh: Paderborn, 2015.

²³ See for this generally, instead of many Grabenwarter, C., National Constitutional Law Relating to the European Union. In: A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*. 2nd edn., Hart, C. H. Beck: Oxford, München 2010, pp. 83-129.

²⁴ Constitutional Court of Italian Republic, Judgement No. 238 of 22 October 2014, English translation available at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf.

order and inalienable human rights – and this applies of course without, in principle, calling into question the constant “external” compliance of the state with international law.²⁵ It is worthwhile to note that this disobedience to international law is concerned with respect for fundamental rights of individuals whereas human rights law usually vice versa constitutionally demands the obedience towards the international legal order.

Lastly, as to the jurisdiction of the Constitutional Court of the Russian Federation we can observe a recent development which does not yet show clearly as far as the question is concerned who finally decides over human rights interpretation.²⁶ Initially coming from the Maslov case²⁷ and others in which the Russian Constitutional Court repeatedly stressed the obligation to bring the application of national law in line with the individual rights laid down in the European Convention on Human Rights and the respective judgements of the ECtHR, it has been the Markin case that caused increasing tensions between the two Courts in 2012/2013.²⁸ The decision in this case then was followed by the fundamental decision of 14 July 2015,²⁹ according to which the Constitutional Court takes the exclusive competence to review ECtHR judgments against the standard of the Russian Constitution.³⁰ This does not call into question the primacy of international law, as laid down in Article 15, paragraph 4, of the Russian Constitution, in principle. However, this primacy is made dependent on the compatibility with the national constitution in a purely dualistic manner, without, however, establishing general dogmatic rules on the scope of this primacy of the constitution.

²⁵ See extensively Peters, A., Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order. In: *European Journal of International Law: Talk!*, of 22 December 2014, see [here](#); also on [Verfassungsblog.de](#), see [here](#).

²⁶ As for the jurisdiction of the Russian Constitutional Court see in details below, contributions of Gerasimova, E., Constitutional Law Doctrine on the Relation between National and International Law. Based on Decisions of the Constitutional Court of the Russian Federation. In this volume, Chapter 2, pp. 22-28; Vaulin, V., The Russian Federation and the Concept of Monism in the Development of the Case Law of the Constitutional Court of the Russian Federation. In this volume, Chapter 6, pp. 66-69; A. Voronina and A. Leshchenko, The Russian Constitutional Court and the Problematic Aspects of the Compliance of Russian Law with Article 6 and Article 13 of the European Convention on Human Rights. In this volume, Chapter 10, pp. 96-99.

²⁷ Constitutional Court of the Russian Federation, Judgement of 27 June 2000, No. 11-P, <http://www.ksrf.ru/en/Decision/Judgments/Documents/2000%20June%2027%2011-P.pdf>.

²⁸ See Constitutional Court of the Russian Federation, Judgement of 6 December 2013, No. 27-P, <http://www.ksrf.ru/en/Decision/Judgments/Documents/2013%20December%206%2027-P.pdf>; previous Grand Chamber ruling of the ECtHR, Judgement of 22 March 2012, *Konstantin Markin v. Russia*, 30078/06.

²⁹ Constitutional Court of the Russian Federation, Judgement of 14 July 2015, No. 21-P, only resume available at <http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-%D0%9F.pdf>.

³⁰ After the ruling of the Russian Constitutional Court of 14 July 2015 the Federal Constitutional Law on the Constitutional Court of the Russian Federation has been supplemented by a provision (in Article 101) obligating ordinary courts to submit the question of constitutionality of decisions “by an inter-State body for the protection of human rights and freedoms” to the review of the Constitutional Court, cf. <http://www.ksrf.ru/en/Info/LegalBases/FCL/Pages/default.aspx>; see also the comment of the President of the Constitutional Court of the Russian Federation V. D. Zorkin, Challenges of Implementation of the Convention on Human Rights. A speech given at the International Conference on “Enhancing national mechanisms for effective implementation of the European Convention on Human Rights”, Saint Petersburg 22-23 October 2015, available at <https://rm.coe.int/16806fe1a5>.

1.3.4 Common Underlying Assumptions

The above overview of judicial practice served to give us an impression of the fact that in reality we do not have a uniform but rather a pluralistic handling by states of the question of how and to what extent international law is implemented in the domestic legal sphere; sometimes we can even speak of an ad hoc case-by-case approach. However, States practice also reveals common underlying assumptions which deserve to be highlighted.

First, the national handlings of implementation offer (dogmatically seen) the way out of the dilemma that there is no super-arbiter system that regulates the correlation between the two separate systems of national and international law.

Second, there cannot be a hierarchy between the two legal systems in the strictly dogmatic sense. There can be a hierarchy of norms within a legal system, but not across legal systems. Thus, the supremacy which may be claimed by either international or national law cannot be regarded as legally binding for the respective other legal system. This can only be effected within the respective system, i.e., in an “internal setting”.³¹ Consequently, for to solve the problem of the relationship between international and national law the international law needs to be a part of the national legal order.

Third, the dualistic programme implies that international law cannot, for logical reasons, dominate constitutional law, because constitutional law is the bridge over which international law flows into the national legal order. Therefore, constitutional law can reduce its primacy by requiring the openness to international law, but it cannot abandon it altogether. Here the concept of constitutional identity, which comprises the fundamental principles of the constitutional order, draws the final line.

Fourth, regarding the differentiation between validity, direct effect and rank or supremacy of international law within the domestic legal order the validity, precisely seen, is not a problem that concerns the correlation between both. The crucial question is about supremacy. Insofar, the validity within in the national legal system forms the condition but does not settle the hierarchical position of international law in relation to other provisions of national legal order. Thus, the acceptance of the supremacy of an international legal norm implies its validity, while the refusal of prior effect of the international norm goes hand in hand with the refusal of its validity to which the alleged supremacy is linked to. (Here is to note, however, that this may be different in the opposite direction. Take the European Union, for example. The domestically accepted primacy of application of Union law does not eliminate the validity of a conflicting national norm, but only its applicability in the given case.)

Fifth, since the doctrines of monism and dualism treat the problem of priority as a problem of formal hierarchy, they seem to play less and less of a role for States. Instead, legal practice

³¹ Expression at Wessel, R. A., *Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?* In: E. Cannizzaro, P. Palchetti and R. A. Wessel (eds.), *International Law as Law of the European Union*. Martinus Nijhoff: Boston, Leiden 2011, pp. 7-33 at p. 21.

tends to solve the problem not on the basis of formal ranking criteria, but independently of these, by orienting it towards content and results.

1.4 New Approaches of Legal Pluralism and International Constitutionalism

The latter observation is the reason why even in academia the two grand theories are no longer deemed to have any significant explanatory value. To quote a harsh critic: “Monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law. Perhaps they can continue to be useful in depicting a more open or more hesitant political disposition toward international law. But from a scholarly perspective, they are intellectual zombies of another time and should be laid to rest, or deconstructed”.³²

The argument leaves us with the question: What then? Must we be content with the recognition that in practice there is a great diversity in the way the relationship between international and national law is handled, based on the pluralist assumption of diverse orders dealing with different issues, even in so-called monist countries, and that their relationship to one another is therefore essentially governed by constitutional principles and rules of the respective national legal order?

However, merely describing the pluralism of interaction between international and national law is not only unsatisfactory from a scientific point of view, but also implies accepting what is often called the “fragmentation” of international law – a phenomenon that may be used by a State not to comply with international obligations, or that at least tends to concern the rule of law principle and the State’s accountability in international affairs.

Therefore, one should, firstly consider the task and work of comparative law research as being essential and indispensable. Comparative law studies not only sharpen our insights and professional competences, but also serve the cross-border dialog. It is the language of law that provides us with a reliable means of inter-State communication, of mutual understanding and international stability.

As far as the matter itself is concerned, a new approach or concept is being increasingly discussed in legal scholarship, which claims to be able to better generally reflect the relationship between international and national law. Since the pure description of pluralistic practice misses any normative vision, this concept undertakes a more substantive consideration by detecting a more value-based determination of the correlation between national and international law.³³ According to this, the legal practice of States shows that the formal hierarchical method of

³² Von Bogdandy, A., Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law. In: *International Journal of Constitutional Law* 6 (2008), pp. 397-413 at p. 400.

³³ Overview on the pluralism/constitutionalism debate: Wessel, R. A., Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach? In: E. Cannizzaro, P. Palchetti and R. A. Wessel (eds.), *International Law as Law of the European Union*. Martinus Nijhoff: Boston, Leiden 2011, pp. 7-33 at pp. 22 et seq.

resolving conflicts of law has widely been replaced by a concept which, in the specific case, does not focus on the legal nature or origin of the conflicting norms but on their content which as a result leads to the solution of the supremacy problem by “weighing of constitutional principles”. So, the fundamental idea is that what counts is the substance, not the formal category of conflicting norms. Consequently, less significant provisions in State constitutions give way to important international norms, while fundamental human rights, whether guaranteed on the international or the national level, should prevail over other norms.

Obviously, this view aims to add a monistic connotation to pure dualistic doctrine. Firstly, it raises the theory of “legal pluralism”³⁴ to the international level and, secondly, aiming to explain the order of this legal pluralism, it follows “constitutional logic”. Thought through to the end, it stands for the idea of an “international constitutional order” that connects international and national law. The core argument is that there exists a “hierarchical superior value system across different regimes [which can] reduce the potential for inter-regime normative conflict”.³⁵

One can certainly say that this approach does not always offer strict guidance, because it is always debatable which norms are more “important” than others in terms of substance. However, insofar as the concept of “international constitutional law”³⁶ is derived from jointly negotiated principles and common values determining the resolution of legal conflicts, the concept could be able to contribute to a sustainable global order of States.³⁷

³⁴ See von Bogdandy, A., Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law. In: *International Journal of Constitutional Law* 6 (2008), pp. 397-413 at p. 400 with further references.

³⁵ De Wet, E., The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?. In: *European Constitutional Law Review* 5 (2009), pp. 284-306 at p. 288.

³⁶ Cf. from the immense amount of literature: De Wet, E., The International Constitutional Order. In: *International and Comparative Law Quarterly* 55 (2006), pp. 51-76; von Bogdandy, A., Constitutionalism in International Law: Comments on a Proposal from Germany. In: *Harvard International Law Journal* 47 (2006), pp. 223-242; Kleinlein, T., *Konstitutionalisierung im Völkerrecht. Konstruktion und Elemente einer idealistischen Völkerrechtslehre*. Springer: Heidelberg 2012; Peters, A., Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures. In: *Leiden Journal of International Law* 19 (2006), pp. 579-610; also herself, Constitutional Fragments – On the Interaction of Constitutionalization and Fragmentation in International Law. In: *Centre for Global Constitutionalism Working Paper* No. 2 (2015); Tschentscher, A., and Krieger, H., Verfassung im Völkerrecht – Konstitutionelle Elemente jenseits des Staates? In: *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* 75 (2016), pp. 407-438, pp. 439-472; Köbler, J., International Constitutional Law – Inclusive, but Still Selective? In: *Vienna Journal on International Constitutional Law* 11 (2017), pp. 387-408.

³⁷ Latest reading recommendation: J. d’Aspremont and S. Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought*. Edward Elgar: Cheltenham 2019.

2 Constitutional Law Doctrine on the Relation between National and International Law. Based on Decisions of the Constitutional Court of the Russian Federation

Evgeniya Gerasimova

According to the Constitution of the Russian Federation, universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied (Article 15, paragraph 4, of the Russian Federation).¹

Even the preamble of the Constitution contains provisions on the domestic rule of law and openness to international law: “We, the multinational people of the Russian Federation, united by a common fate on our land, establishing human rights and freedoms, civil peace and accord, preserving the historically established State unity, proceeding from universally acknowledged principles of equality and self-determination of peoples, revering the memory of ancestors who have passed on to us their love for the Fatherland and faith in good and justice, reviving the sovereign statehood of Russia and asserting the firmness of its democratic basis, striving to ensure the well-being and prosperity of Russia, proceeding from the responsibility for our Fatherland before present and future generations, recognizing ourselves to be a part of the world community...”.

The provision on the universally recognized principles and norms of international law is also included in Articles 17, 63, 69 of the Russian Constitution. Under Article 17, in the Russian Federation, human and civil rights and freedoms shall be recognized and guaranteed according to the universally recognized principles and norms of international law and this Constitution. Article 63 rules that the Russian Federation shall grant political asylum to foreign citizens and stateless persons in accordance with the universally recognized norms of international law. Also under the constitutional provisions, Russian Federation shall guarantee the rights of indigenous small peoples in accordance with the universally recognized principles and norms of international law and international treaties of the Russian Federation (Article 69 of the Russian Constitution).

The universally recognized principles and norms become binding on the state and subjects of national law in the case of ratification. In the Russian Federation, norms of international law are ratified in accordance with the Federal Law “On the International Treaties of the Russian Federation”².

¹ The Constitution of the Russian Federation. December 12th, 1993, see [here](#).

² Federal Law “On the International Treaties of the Russian Federation” No. 101-FZ of 15 July 1995.

Analyzing the provisions of Article 15, paragraph 4, of the Constitution, the constitutional scholars say that they are much richer than interpreted usually.³ For example:

- 1) These provisions represent a general transformation of universally recognized principles and norms of international law as binding on subjects of Russian law. These principles, by virtue of the direct effect of the Constitution, directly oblige the legislator, the executive branch, and justice.
- 2) The universally recognized principles and norms of international law are associated with the constituent function of the Constitution.
- 3) The Constitution discloses the main features of these principles and norms, including the imperativeness of the decrees contained in them as following from the will of the people of Russian Federation as a constitutional legislator.
- 4) The universally recognized principles and norms of international law are included in the constitutional provisions in the frame of Chapter 1 “The Basis of the Constitutional System”. This chapter has a higher constitutional protection. The Parliament cannot change it. So the provisions about principles and norms cannot be excluded from the Constitution.

Of considerable practical interest is the question of how the conflict between the international treaty and the Constitution should be resolved. In this case, the rule on the higher legal force of the Constitution applies, since international treaties are an integral part of the legal system of the state, and within the framework of this system there are no acts that would stand above the Constitution by legal force.

The universally recognized principles and norms of international law express universal values and correspond to the interests of all peoples. They are not considered as something external to the Constitution, but as a part of the Russian constitutional system. These principles guide the foreign policy of the state; they consolidate human rights protection in the light of the interpretation of these principles.

In addition to the above discussed articles, for the first time in Russian history the present Constitution recognizes the right of everyone to the jurisdiction of international courts regarding violation of rights and freedoms (Article 46, paragraph 3). On this legal basis, as well as in connection with Russia’s accession to the Council of Europe and the recognition of the jurisdiction of the European Court of Human Rights, there has been a widespread practice of the European Court of Human Rights in cases against Russia regarding the protection of the fundamental rights provided for in the Convention.

Due to the two-level system of human rights protection – national and international – some collisions could appear in this area. At the same time, the judicial protection of rights and freedoms based on the principles and norms of international law should be carried out in the

³ See V. D. Zorkin (ed.), *Kommentarijk Konstitucii Rossijskoj Federacii* [Commentary on the Constitution of the Russian Federation]. Norma, Moscow: 2011, at pp. 158-162.

frame of the subsidiarity principle. As the Chief Justice of the Constitutional Court of Russia Valeriy Zorkin emphasised, the principle of subsidiarity means that "...problems should be transferred to the very lowest level at which there are resources and opportunities to solve them".⁴ Thus, the European Convention and the European Court of Human Rights should intervene only if domestic mechanisms for protecting rights and freedoms prove to be insufficient.

The Constitutional Court of Russia plays an important role in the issue of the national and international law interaction. Under the Constitution and the Federal Constitutional Statute, the Constitutional Court of the Russian Federation is a judicial body of constitutional review, which independently exercises judicial power by means of constitutional judicial proceedings.⁵

The status of the Constitutional Court of Russia in the field of ensuring the interaction of international and domestic law is enshrined in the Constitution (Article 125). For example, according to Article 125, paragraph 2: "The Constitutional Court of the Russian Federation, at the request of the President of the Russian Federation, the Council of Federation, the State Duma, one fifth of the members of the Council of Federation or of the deputies of the State Duma, the Government of the Russian Federation, the Supreme Court of the Russian Federation, and bodies of legislative and executive power of constituent entities of the Russian Federation, shall decide cases on conformity to the Constitution of the Russian Federation of: ... d) international treaties of the Russian Federation pending their entry into force".

In 2012 the Constitutional Court dealt with the case concerning the review of constitutionality of an international treaty of the Russian Federation which have not yet come into force – the Protocol on the Accession of the Russian Federation to the Marrakesh Agreement establishing the World Trade Organisation (WTO).⁶ The Court stated that the protocol was signed and approved in accordance with a procedure that does not contradict the constitutional order. The WTO entry obliged the country to cut current protectionist import duties and open key sectors of the economy to foreign investment.

Russian legal literature quite often draws attention to the limited capabilities of the Constitutional Court in ensuring the direct application of the universally recognized principles and norms of international law in Russia, and their enforcement. According to the Federal Constitutional Law, judges have the right to apply only the Constitution; the oath of a judge upon taking office obliges him to obey only the Constitution (Article 10, paragraph 2, of the Russian Constitution). At the same time, nowadays the Court considers cases by using the provisions of the Constitution enshrining the rights and freedoms of man and interpret them in accordance with generally recognized principles and norms of international law. In so far the Constitutional Court refers to international norms and principles in the reasoning part of its

⁴ V. D. Zorkin (ed.), *Kommentarijk Konstitucii Rossijskoj Federacii* [Commentary on the Constitution of the Russian Federation]. Norma, Moscow: 2011, at pp.158-162.

⁵ Federal Constitutional Law "On the Constitutional Court of the Russian Federation" No. 1-FZ of 21 July 1994. URL: <http://www.ksrf.ru/en/Info/LegalBases/FCL/Pages/default.aspx>.

⁶ Constitutional Court of the Russian Federation, Judgement of 9 July 2012, No. 17-P. URL: <http://www.ksrf.ru/en/Decision/Judgments/Documents/2012%20July%209%2017-P.pdf>.

decisions. In fact, every third decision contains references to the norms of the European Convention and the decisions of the European Court of Human Rights.

The draft Constitution received a positive assessment of the Venice Commission of the Council of Europe in 1993. The Constitution has consistently enshrined the entire list of rights and freedoms defined by the Convention. So, do we have a situation of pure understanding and cooperation between national courts, the Constitutional Court of Russia and the European Court of Human Rights in the human rights protection field? The legal reality proved that in some particular cases, and there were different approaches to the substance and human rights restrictions from the national and international points of views.

For example, we should note the case of Konstantin Markin. Under Russian statutes, civilian fathers and mothers are entitled to three years' parental leave to take care of their minor children and to a monthly allowance for part of that period. The right is extended to female military officers, but there is no such provision in respect of male. The applicant, Mr. Markin, a divorced radio intelligence operator in the armed forces, applied for three years' parental leave to bring up the three children of the marriage, but this was refused on the grounds that there was no basis for his claim in domestic law. He lodged a complaint with the Constitutional Court and claimed that the legislation was incompatible with the constitutional guarantee of equal rights. The Constitutional Court held that the prohibition on military men taking parental leave was based on the special legal status of the military and the need to avoid large numbers of military personnel becoming unavailable to perform their duties.

In 2012, the applicant won a case in the European Court of Human Rights. The applicant had been subjected to discrimination on grounds of sex without reasonable or objective justification. The Court ruled that in view of the fundamental importance of the prohibition of discrimination on grounds of sex, the fact that he had signed a military contract could not constitute a waiver of his right not to be discriminated against.⁷

After the European Court judgement, the national courts were uncertain about its execution. Upon the request of the Presidium of Leningrad Circuit Military Court under Markin case, the Constitutional Court has pointed out that, when the court of general jurisdiction comes to the conclusion of impossibility of implementation of the judgement of the European Court in respect of which the Constitutional Court earlier established absence of violation of constitutional rights of the petitioner in a particular case, this is not conforming to the Constitution of the Russian Federation. The Court is entitled to suspend the proceeding and petition the Constitutional Court with respective request.⁸

In July 2015, the Constitutional Court also checked constitutionality of the provisions of Article 1 of the Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto" and additional national laws

⁷ European Court of Human Rights, Judgement of 22 March 2012, *Konstantin Markin v. Russia*, 30078/06.

⁸ Constitutional Court of the Russian Federation, Judgement of 6 December 2013, No. 27-P. URL: <http://www.ksrf.ru/en/Decision/Judgments/Documents/2013%20December%206%2027-P.pdf>.

concerning the consequences of the European Court's judgements execution.⁹ The Court ruled that to eliminate uncertainty about the execution of the European Court of Human Rights judgement the case has to be brought under its consideration.

After the rulings of the Constitutional Court, in December 2015 the legislator added new power to the Federal Constitutional Law: Chapter XIII, Article 101. Consideration of cases on the possibility of implementing decisions of the interstate body for the protection of human rights and freedoms.¹⁰ The ground for the consideration of such a case is the discovered uncertainty in the question of the possibility to execute the judgement of the interstate body for human rights protection, e.g., the European Court of Human Rights, in accordance with the Constitution of the Russian Federation.

As a result of the consideration of the case, the Constitutional Court of the Russian Federation shall adopt one of the following decisions:

- 1) on the possibility of the execution in whole or in part in accordance with the Constitution of the Russian Federation of the decision of the interstate body for the protection of human rights and freedoms, adopted on the basis of the provisions of the international treaty of the Russian Federation as interpreted by the interstate body for the protection of human rights and freedoms, in connection with which a request was submitted to the Constitutional Court of the Russian Federation;
- 2) on the impossibility of implementing in whole or in part in accordance with the Constitution of the Russian Federation the decision of the interstate body for the protection of human rights and freedoms, adopted on the basis of the provisions of the international treaty of the Russian Federation as interpreted by the interstate body for the protection of human rights and freedoms, in connection with which a request was submitted to the Constitutional Court of the Russian Federation.

If the Constitutional Court of the Russian Federation adopts a decision provided for in clause 2 of part one of this article, any actions (acts) aimed at the implementation of the relevant decision of the interstate body for the protection of human rights and freedoms in the Russian Federation cannot be carried out (adopted).

The Constitutional Court considered a few cases brought upon the request of the Ministry of Justice of the Russian Federation: Judgement of 19 April 2016¹¹ and Judgement of 19 January 2017¹².

⁹ Constitutional Court of the Russian Federation, Judgement of 14 July 2015, No. 21-P. URL: <http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-%D0%9F.pdf>.

¹⁰ Federal Constitutional Law "On the Constitutional Court of the Russian Federation" No. 1-FZ of 21 July 1994. URL: <http://www.ksrf.ru/en/Info/LegalBases/FCL/Pages/default.aspx>.

¹¹ Constitutional Court of the Russian Federation, Judgement of 19 April 2016, No. 12-P. URL: http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf.

¹² Constitutional Court of the Russian Federation, Judgement of 19 January 2017, No. 1-P. URL: http://www.ksrf.ru/en/Decision/Judgments/Documents/2017_January_19_1-P.pdf.

The example from the first case deals with the question of the possibility to execute the Judgement of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia*¹³ in accordance with the Constitution of the Russian Federation.

According to Article 32, paragraph 3, of the Constitution of the Russian Federation citizens who are recognized as incapable by a court, and citizens who are kept in places of deprivation of liberty (“imprisonment”) under a court sentence shall not have the right to elect and be elected. The European Court of Human Rights in the judgement of 4 July 2013 (final as of 9 December 2013) arrived at a conclusion that a restriction on electoral rights of citizens who are kept in places of deprivation of liberty under a court sentence, envisaged under Article 32, paragraph 3, of the Russian Constitution, violated the right to take part in elections ensured by Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Constitutional Court ruled that it was impossible to execute the judgement of the European Court of Human Rights and to change Russian Constitution: the Article 32, paragraph 3, of the Constitution having supremacy and supreme legal force in Russia’s legal system means an imperative ban, according to which all convicted persons serving sentence in places of deprivation of liberty defined by the criminal law have no electoral rights without any exceptions.¹⁴ At the same time, the Court underlined that with regard to measures of general character, ensuring justice, proportionality and differentiation of application of the restriction of electoral rights, changes are possible and realizable in Russia’s legislation and judicial practice. However, in respect of the citizens, *Anchugov and Gladkov*, the execution of the European Court judgement was impossible, since these citizens were sentenced to deprivation of liberty for long terms for the commission of particularly grave crimes, and therefore could not count, even according to criteria elaborated by the European Court of Human Rights, on access to electoral rights.

In September 2019, the Committee of Ministers of the Council of Europe considered the introduction of a new punishment, forced labor, to be sufficient to implement the decision of the European Court of Human Rights. Currently in Russia prisoners sentenced to forced labor can vote, although not entitled to leave special centers without permission.

In another case, the case of *OAO Neftyanaya Kompaniya Yukos v. Russia*, the Constitutional Court stated the execution of the judgement of the European Court of Human Rights of 31 July 2014 in accordance with the Constitution of the Russian Federation being impossible, i.e. along Article 57 in conjunction with Articles 15, paragraph 1, 2, and 4,

¹³ European Court of Human Rights, Judgement of 4 July 2013, *Anchugov and Gladkov v. Russia*, 11157/04, 15162/05.

¹⁴ Constitutional Court of the Russian Federation, Judgement of 19 April 2016, No. 12-P. URL: http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf.

Article 17, paragraph 3, Article 19, paragraph 1 and 2, Article 55, paragraph 2 and 3, and Article 79.¹⁵

To summarize, I would like to underline that the Constitutional Court plays an important role in the interaction of national and international law. The Court applies the norms and principles of international law in the decisions, and guides other courts to move in this direction. Decisions of the Constitutional Court are obligatory throughout the territory of the Russian Federation for all representative, executive and judicial bodies of state power, local self-government, enterprises, agencies, organizations, public officials, citizens and their associations.

Differences in understanding of certain rights and freedoms are possible in the practice of national and international courts. This conclusion is confirmed by the practice of the Constitutional Court of Russia and the European Court of Human Rights, cited in the frame of this study. At the same time, the courts share a common goal of protecting human rights and freedoms.

¹⁵ Constitutional Court of the Russian Federation, Judgement of 19 January 2017, No. 1-P. URL: http://www.ksrf.ru/en/Decision/Judgments/Documents/2017_January_19_1-P.pdf.

3 The Internationalisation of Criminal Law

Stefanie Bock

3.1 Criminal Law as a “*domaine réservé*”?

Criminal law is traditionally perceived as a purely national matter.¹ The right to define what conduct constitutes a criminal wrong (jurisdiction to prescribe) and thus the right to decide which interests or goods are worthy of criminal protection² as well as the right to punish persons for noncompliance with criminal norms (jurisdiction to enforce) are an integral part of state sovereignty.³ At the outset, criminal law is intrastate regulatory law (*innerstaatliches Ordnungsrecht*)⁴ originally designed to protect national interests⁵ and to defend and enforce the domestic legal order.⁶ Accordingly, criminal law has sometimes been called a *domaine réservé*, an internal domestic area, in which states are by and large free from international obligations.⁷ It already becomes apparent that this view is oversimplified if one looks at the assertion of extraterritorial jurisdiction. The wish of one state to apply its criminal law over an action committed abroad may be regarded as an undue intervention into internal affairs by the territorial state.⁸ Thus, the need arises to regulate and limit the right of states to determine the geographical scope of their criminal jurisdictions.

Moreover, in an increasingly globalised world, perpetrators often use the new freedoms of movement for criminal purposes. If crimes are committed across borders and if organised groups even specifically try to benefit from differences between national legal systems or law enforcement practices, purely national measures become ineffective. The globalisation of crime

¹ Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 1 mn. 1.

² On the protection of “Rechtsgüter” and the prevention of harm as the overall function of (international) criminal law see only Ambos, K., *Treatise on International Criminal Law – Volume I: Foundations and General Part*. Oxford University Press: Oxford 2013, at pp. 60 et seq.

³ Cryer, R., International Criminal Law vs State Sovereignty: Another Round? In: *European Journal of International Law* 16 (2005) pp. 979-1000 at p. 986.

⁴ For German criminal law see Federal Court of Justice, Decision of 26 July 1967, 4 StR 38/67, BGHSt 21, 277 (280); from a comparative perspective Oehler, D., *Internationales Strafrecht*. 2nd edn., Carl Heymanns Verlag: Köln 1983, at mn. 568.

⁵ Cf. Sinn, A., Das Strafanwendungsrecht als Schlüssel zur Lösung von Jurisdiktionskonflikten? Rechtsvergleichende Betrachtungen. in: A. Sinn (ed.), *Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität – Ein Rechtsvergleich zum Internationalen Strafrecht*. V&R unipress: Göttingen, pp. 501-529 at pp. 507-508; Böse, M., Meyer, F., and Schneider, A., Comparative Analysis. in: M. Böse, F. Meyer and A. Schneider (eds.), *Conflicts of Jurisdiction in Criminal Matters in the European Union. Volume I: National Reports and Comparative Analysis*. Nomos: Baden-Baden 2013, pp. 411-463 at pp. 436-437.

⁶ Ambos, K., *Treatise on International Criminal Law – Volume I: Foundations and General Part*. Oxford University Press: Oxford 2013, at p. 57.

⁷ Cf. Bock, S., Rechtskulturelle Differenzen in der internationalen Rechtshilfe in Strafsachen. In: *Zeitschrift für Internationale Strafrechtsdogmatik* 14 (2019) pp. 298-307 at p. 298.

⁸ See Cryer, R., International Criminal Law vs State Sovereignty: Another Round? In: *European Journal of International Law* 16 (2005) pp. 979-1000 at p. 987; Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 4 mn. 2.

raises the need for a state-overlapping response and thus the desire for internationally harmonised criminal norms (which may serve as a common basis for combatting transnational crime) and improved international cooperation regimes.⁹ Another aspect of the internationalisation of criminal law is the establishment of international criminal courts and tribunals for the prosecution of the international core crimes, namely genocide, crimes against humanity, war crimes and the crime of aggression. These institutions do not form a closed enforcement system; rather, they interact with national agencies and influence national criminal justice systems at least by demanding cooperation and assistance in their fight against impunity.

This paper aims to sketch out in more detail how criminal law is influenced by international law and how the two legal orders are interrelated. It focuses on four areas:

- the prescriptive criminal jurisdiction of states,
- restrictions on national criminal law,
- mutual assistance in criminal matters and
- the international criminal justice system.

3.2 Prescriptive Criminal Jurisdiction

Until the beginning of the 20th century, it was the prevailing view that states have the unfettered right to determine freely the geographical scope of their criminal jurisdiction and to apply their criminal norms to any conduct they wish.¹⁰ This sovereignty-based approach was put to test in the famous Lotus case decided by the Permanent Court of International Justice (PCIJ) – the predecessor of the International Court of Justice (ICJ) – in 1927.¹¹ In August 1926, the French steamship Lotus collided with the Turkish steamship Boz-Kourt on the high seas. The Boz-Kourt was cut in two and sank; eight Turkish nationals died. A few days later, the Turkish authorities arrested the first officer of the Lotus, D, a French citizen, put him on trial and sentenced him to 80 days imprisonment for involuntary manslaughter. France argued that French Courts have exclusive jurisdiction over French nationals¹² and that Turkey had violated international law by prosecuting D.¹³ The Court, to the contrary, found that international law does not prohibit states “to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory”. Rather, states were said to enjoy broad discretion in defining their jurisdiction, which “is only limited in certain cases by

⁹ Bock, S., Rechtskulturelle Differenzen in der internationalen Rechtshilfe in Strafsachen. In: *Zeitschrift für Internationale Strafrechtsdogmatik* 14 (2019) pp. 298-307 at p. 299 with further references.

¹⁰ Cf. Mills, A., Rethinking Jurisdiction in International Law. In: *British Yearbook of International Law* 84 (2014) pp. 187-239 at pp. 192–193; Ambos, K., *Treatise on International Criminal Law – Volume III: International Criminal Procedure*. Oxford University Press: Oxford 2016, at p. 206.

¹¹ PCIJ, Judgement of 7 September 1927, *France v. Turkey, Case of the S.S. ‘Lotus’*, PCIJ Series A No. 10.

¹² Cf. PCIJ, Judgement of 7 September 1927, *France v. Turkey, Case of the S.S. ‘Lotus’*, PCIJ Series A No. 10 at p. 15: France would have disputed Turkey’s jurisdiction even if the crime had been committed on Turkish territory.

¹³ PCIJ, Judgement of 7 September 1927, *France v. Turkey, Case of the S.S. ‘Lotus’*, PCIJ Series A No. 10 at pp. 10 et seq.

prohibitive rules; as regards other cases, every State remains free to adopt principles which it regards as best and most suitable". At the same time, however, the Court emphasised that a state "should not overstep the limits which international law places upon its jurisdiction".¹⁴ In the *Lotus* case, these limits were respected as "the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory" and the prosecution of D was "justified from the point of view of the so-called territorial principle".¹⁵

The *Lotus* ruling seems "somewhat ambiguous"¹⁶, since the Court on the one hand leaves states a wide discretion to determine their jurisdiction, but on the other hand argues that the application of national laws to acts which have taken place abroad requires "a permissive rule derived from international custom or from a convention."¹⁷ Meanwhile, the International Court of Justice has clarified that the exercise of jurisdiction generally presupposes a "real link" or a "genuine connection" between the case at hand and the state claiming jurisdiction.¹⁸ In the same vein, the German Federal Court of Justice (*Bundesgerichtshof*) argues that national rules on criminal jurisdiction must respect the sovereignty and equality of other states. Accordingly, states may only prosecute crimes committed abroad if they have a legitimate interest to do so. This in turn – and here the German Federal Court of Justice implicitly adheres to the jurisprudence of the International Court of Justice – requires the existence of a sufficient jurisdictional link recognised by international law.¹⁹ Classical and well-established factors, which – as a rule – legitimise the exercise of jurisdiction even if this affects the interests of other states, are the place of the offence, the nationality of the offender and the victim as well as the endangerment of essential state interests.²⁰

Although it is meanwhile commonly accepted that the competence to establish criminal jurisdiction is limited by international law, it is less clear when exactly the use of extraterritorial jurisdiction violates the principle of non-intervention. I would like to illustrate this by an example from the recent German discussion. In 2017, Germany ratified the Convention of the Council of Europe on Preventing and Combating Violence Against Women and Domestic Violence, the so-called Istanbul Convention. Its Article 37 obliges the state parties to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.

¹⁴ PCIJ, Judgement of 7 September 1927, *France v. Turkey, Case of the S.S. 'Lotus'*, PCIJ Series A No. 10 at p. 19.

¹⁵ PCIJ, Judgement of 7 September 1927, *France v. Turkey, Case of the S.S. 'Lotus'*, PCIJ Series A No. 10 at p. 23.

¹⁶ Ambos, K., *Treatise on International Criminal Law – Volume III: International Criminal Procedure*. Oxford University Press: Oxford 2016, at p. 207.

¹⁷ PCIJ, Judgement of 7 September 1927, *France v. Turkey, Case of the S.S. 'Lotus'*, PCIJ Series A No. 10 at p. 19.

¹⁸ See ICJ, Judgement of 6 June 1955, *Liechtenstein v. Guatemala, Nottebohm Case*, ICJ-Reports 1955 at pp. 22, 25, 26 (concerning the right to grant diplomatic protection); cf. also ICJ, Judgement of 5 February 1970, *Belgium v. Spain, Case Concerning Barcelona Traction, Light and Power Company, Limited*, ICJ-Reports 1970 at p. 42.

¹⁹ German Federal Court of Justice, Judgement of 5 March 1998, 5 StR 494/97, BGHSt 44, 52 (57).

²⁰ Mills, A., Rethinking Jurisdiction in International Law. In: *British Yearbook of International Law* 84 (2014) pp. 187-239 at pp. 196 et seq.; Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 4 mn. 3; Ambos, K., *Treatise on International Criminal Law – Volume III: International Criminal Procedure*. Oxford University Press: Oxford 2016, at p. 209.

According to Article 44, paragraph 2, of the Istanbul Convention, states shall “endeavour” to criminalise forced marriages committed abroad if the offence is directed against one of their nationals or a person who has her or his habitual residence in their territory. This extension of jurisdiction shall not be made dependent on whether the act is also criminalised by the territorial state (Article 44, paragraph 3, of the Istanbul Convention). Germany has fully implemented these provisions and now allows²¹ for the prosecution of forced marriages²² even if committed abroad and regardless of the law in force at the location of the offence, provided (*inter alia*)²³ that the act is directed against a person who has her or his domicile or usual residence in Germany (Section 5, number 6, littera c), of the German Criminal Code [*Strafgesetzbuch*]).

This provision is not unproblematic. Imagine that M – an Afghan national, who has been living in Germany for 10 years – took her 16-year-old daughter D (who is also an Afghan national with permanent residence in Germany) for a holiday trip to Afghanistan. There she introduces D to the 20-year-old P and demands from D to marry P right on the spot. Otherwise, she would disown D and return to Germany without her. D is scared and agrees to marry P. Supposing that M’s behaviour is not criminal under Afghan national law, it seems questionable if Germany has the right to bring in other – foreign – norms as a kind of external evaluation standard. The German legislator deemed it necessary to expand the German law to such cases in order to avoid that the criminal prohibition of forced marriages (that aims to protect German residents) is undermined by such “holiday marriages”.²⁴ This approach seems understandable, but nevertheless, conflicts arise with the sovereign rights of Afghanistan, that is forced to tolerate a foreign exercise of jurisdiction – and thus an exercise of foreign state power – with regard to a (predominantly) domestic incident. Germany is linked to the case only by the residence of the victim D. This domicile principle is the modern variant or – to be more precise – expansion of the classical principle of personality, which allows states to prosecute crimes committed abroad by or against their nationals. The domicile principle replaces the traditional nationality requirement by introducing residence as a sufficient link.²⁵ It is based on the notion that in a modern globalised world, in which people enjoy broad freedoms of movement and residence, a meaningful material connection between a person and a certain state is established primarily by close personal and economic relations, that is, by the person’s centre of vital

²¹ The German Procedural Code (*Strafprozessordnung*) – although essentially based on the principle of mandatory prosecution – grants the prosecution broad discretion to discontinue the prosecution of crimes committed abroad, cf. Section 153c of the German Procedural Code (*Strafprozessordnung*).

²² Forced marriage is a punishable offence in terms of Section 237 of the German Criminal Code (*Strafgesetzbuch*), which reads as follows: “Whosoever unlawfully with force or threat of serious harm causes a person to enter into a marriage shall be liable to imprisonment from six months to five years. The act shall be unlawful if the use of force or the threat of harm is deemed inappropriate for the purpose of achieving the desired outcome.” Official translation of the StGB available at https://www.gesetze-im-internet.de/englisch_stgb/, accessed on 1 March 2020.

²³ Germany may also exercise extraterritorial jurisdiction over the crime of forced marriage if the perpetrator is a German national. As the principle of active personality is less controversial than the passive domicile principle, I will focus on the extraterritorial protection of German residents.

²⁴ Cf. Bundestag-Drucksache No. 18/3202 at p. 26.

²⁵ Ambos, K., *Treatise on International Criminal Law – Volume III: International Criminal Procedure*. Oxford University Press: Oxford 2016, at p. 219.

interests, and not so much by formal bounds like nationality. However, it is a relatively new concept, which can be found in some international instruments²⁶, but arguably does not yet enjoy full and unreserved recognition.

The sole reliance on the residence of the victim as a connecting factor becomes more questionable if – as in Germany for the offence of forced marriage – the expansion of the national jurisdiction is not limited by a double criminality requirement; that is, it is not made dependent on that the territorial state also qualifies the respective conduct as a criminal wrong. It could be argued that Germany undermines Afghanistan's sovereign decision not to criminalise forced marriages. This disrespect for the law of the territorial states – which has the closest connection to the case at hand – cannot be justified by reference to the Istanbul Convention. This is a mere regional instrument of the Council of Europe, which is not binding on Afghanistan (and has so far been ratified only by 34 states). Moreover, the Convention does not strictly oblige, but merely encourages the state parties to prosecute forced marriages on the basis of the passive domicile principle.²⁷ Other treaties recognise a right to marry (or not to marry) a person of one's choice,²⁸ but there is no international consensus that an infringement of this right constitutes a criminal wrong.²⁹ But even if one therefore concludes that the unrestricted prosecution of forced marriages contracted abroad violates the principle of non-interference, this does not automatically mean that the German rules on criminal jurisdiction (or a conviction of M based upon these rules) would be null and void. Rather, a law that is incompatible with international law may nevertheless be deemed effective in the domestic legal order.³⁰

3.3 Restrictions on National Criminal Law

Besides limiting the competence of national states to establish (extraterritorial) criminal jurisdiction, international law may also prohibit or require the criminalisation of certain conduct by national legislations.

²⁶ With regard to the active domicile principle see Ambos, K., *Treatise on International Criminal Law – Volume III: International Criminal Procedure*. Oxford University Press: Oxford 2016, at p. 220 with reference to various international instruments in footnote 105.

²⁷ See the differences between Article 44, paragraph 1, of the Istanbul Convention (“Parties *shall take* the necessary measures” to establish jurisdiction on the basis of the territorial principle etc.) and paragraph 2 (“Parties *shall endeavour to take* the necessary measures” to establish jurisdiction on the basis of the passive personality/domicile principle.).

²⁸ See, e.g. Article 23 of the International Covenant on Civil and Political Rights.

²⁹ Böse, M., § 5 StGB. In: U. Kindhäuser, U. Neumann and H.-U. Paeffgen (eds.), *Nomos-Kommentar zum Strafgesetzbuch*. 5th edn., Nomos: Baden-Baden 2017, at mn. 6.

³⁰ Federal Constitutional Court, Decision of 15 December 2015, 2 BvL 1/12, ECLI:DE:BVerfG:2015:ls20151215.2bvl000112, BVerfGE 141, 1. See in more detail Manoharan, J., *The Federal Constitutional Court of Germany on the Openness of National Law to International Treaty Law*. In this volume, Chapter 5, pp. 58-65.

3.3.1 International Law as Upper Limit for National Criminal Law

As a general rule, states can decide at their own, free discretion which conduct is severe enough to be forbidden by threat of punishment. Nevertheless, all Member States of the Council of Europe have obliged themselves to grant the rights contained in the European Convention on Human Rights (ECHR) to all persons within their jurisdiction, which ultimately means that they must not criminalise and sanction a conduct protected under the Convention.³¹ The ECHR thus serves as an upper limit for national criminal law.³² When examining whether or not a criminal law's interference with a Convention right is justified, the European Court of Human Rights (ECtHR), however, grants the state parties a wide margin of appreciation. This holds true in particular when cases involve "sensitive moral or ethical issues".³³ In 2012, for example, the Court had to decide on an application of a German citizen who had a sexual relationship with his biological sister and had been convicted by the German Courts for the crime of incest.³⁴ The applicant claimed a violation of his right to respect for private and family life (Article 8 of the ECHR) because the conviction as well as the criminal provision on incest would interfere with his sexual life – a central element of his private life.³⁵ The Court disagreed and stressed that there is "no consensus between the Member States as to whether the consensual commitment of sexual acts between adult siblings should be criminally sanctioned."³⁶ Against this background, the Court found the official German view that the imposition of criminal liability for incest is justified by a "combination of objectives", namely the protection of family structures, sexual self-determination and public health,³⁷ "not to be unreasonable"³⁸ and concluded that the right to respect for private and family life was not violated.

In a similar vein, the Court accepts criminal convictions for the denial of the holocaust and other genocides, provided that the interference with the freedom of expression (Article 10 of the ECHR) involved therewith was proportionate and necessary in a democratic society,³⁹ which is particularly the case where states have "a special moral responsibility to distance

³¹ Cf., e.g., ECtHR, Judgement of 12 April 2012, *Stübing v. Germany*, 43547/08, at para. 62.

³² Terminology based on Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 7 mn. 11.

³³ ECtHR, Judgement of 12 April 2012, *Stübing v. Germany*, 43547/08, at para. 60.

³⁴ The relevant Section 173 of the German Criminal Code (*Strafgesetzbuch*) reads as follows:

"(1) Whosoever performs an act of sexual intercourse with a consanguine descendant shall be liable to imprisonment not exceeding three years or a fine.

(2) Whosoever performs an act of sexual intercourse with a consanguine relative in an ascending line shall be liable to imprisonment not exceeding two years or a fine; this shall also apply if the relationship as a relative has ceased to exist. Consanguine siblings who perform an act of sexual intercourse with each other shall incur the same penalty."

³⁵ ECtHR, Judgement of 12 April 2012, *Stübing v. Germany*, 43547/08, at para. 34.

³⁶ ECtHR, Judgement of 12 April 2012, *Stübing v. Germany*, 43547/08, at para. 61.

³⁷ Cf. ECtHR, Judgement of 12 April 2012, *Stübing v. Germany*, 43547/08, at para. 63.

³⁸ ECtHR, Judgement of 12 April 2012, *Stübing v. Germany*, 43547/08, at para. 65.

³⁹ See the summary of the relevant case law in ECtHR, Judgement of 15 October 2015, *Perinçek v. Switzerland*, 27510/08, at paras. 196-197, specifically on the denial of the holocaust in paras. 209 et seq. (which is frequently regarded as a "use of the right to freedom of expression for ends contrary to the text and the spirit of the Convention", *ibid*, at para. 212).

themselves” from the mass atrocities,⁴⁰ where the respective conduct is capable of severely disturbing the public peace⁴¹ or infringes upon the rights or reputations of others⁴². Nevertheless, criminal law must not be used for censuring a person for voicing opinions that diverge from established ones or for challenging mainstream convictions. Accordingly, the ECtHR found in a seminal judgement of 2015 that Switzerland had overstepped its margin of appreciation (and violated Article 10 of the ECHR) when its court convicted a person for having denied the Armenian Genocide, although

- the statement was part of a long-standing political controversy of public interest,⁴³
- the statement did not amount to a call for hatred or intolerance,⁴⁴
- the statement could not be seen as having severely wounded the dignity of the Armenians⁴⁵ and
- the statement had no substantial effect on the public order in Switzerland (a country not directly linked to the events that took place in the Ottoman Empire in 1915 and the following years).⁴⁶

The effect of this judgement on the Swiss conviction depends on the national law and particularly on the rank that it attributes to the ECHR in the hierarchy of norms.⁴⁷ In any case, one must keep in mind that the ECtHR does not examine national provisions in the abstract, but only their application in the concrete case. Thus, the judgement in the Switzerland case does not concern the question if, and under which circumstances, the criminalisation of the denial of genocides can in principle be justified.⁴⁸ A finding of the EtCHR that there was a violation of the Convention does thus neither automatically nullify the national conviction nor the criminal provision on which it is based.

The law of the European Union, in contrast, has a more direct (and thus more severe) effect on the criminal laws of the Member States. The Court of Justice of the European Union (CJEU) assumes that Union law takes precedence over national laws⁴⁹ and derives from this “doctrine of supremacy” that conflicts between the two legal orders must always be solved in favour of Union law.⁵⁰ In the sphere of criminal law, this means that national authorities cannot impose

⁴⁰ ECtHR, Judgement of 15 October 2015, *Perinçek v. Switzerland*, 27510/08, at paras. 242 et seq.; ECtHR, Decision of 31 January 2019, *Williamson v. Germany*, 64496/17, at para. 27.

⁴¹ ECtHR, Decision of 31 January 2019, *Williamson v. Germany*, 64496/17, at para. 26.

⁴² ECtHR, Judgement of 15 October 2015, *Perinçek v. Switzerland*, 27510/08, at para. 227.

⁴³ ECtHR, Judgement of 15 October 2015, *Perinçek v. Switzerland*, 27510/08, at para. 231.

⁴⁴ ECtHR, Judgement of 15 October 2015, *Perinçek v. Switzerland*, 27510/08, at paras. 233, 280.

⁴⁵ ECtHR, Judgement of 15 October 2015, *Perinçek v. Switzerland*, 27510/08, at para. 252.

⁴⁶ ECtHR, Judgement of 15 October 2015, *Perinçek v. Switzerland*, 27510/08, at paras. 244, 280.

⁴⁷ Cf. Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 9 mn. 9. In more detail Peters, K., Consideration of the ECHR in German and European Jurisprudence. The Interplay of ECtHR, FCC and CJEU. In this volume, Chapter 8, pp. 78-87.

⁴⁸ ECtHR, Judgement of 15 October 2015, *Perinçek v. Switzerland*, 27510/08, at para. 226.

⁴⁹ The seminal case is CJEU, Judgement of 15 July 1964, *Flaminio Costa v. E.N.E.L.*, 6/64, ECLI:EU:C:1964:66.

⁵⁰ Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 7 mn. 79.

penalties on a person for disregarding a national provision which is incompatible with Union law.⁵¹ In other words, a domestic criminal law that contravenes a directly effective provision of Union Law shall not be applied; it is neutralised by Union Law.⁵² To illustrate this with an example: D, a German citizen with permanent residence in Germany, offered sports betting for the company C with seat in Great Britain. D accepted betting tickets from his clients, forwarded them to Great Britain and distributed the winnings in his German office. According to the applicable German law on Lotteries, this kind of professional activities requires an official permit, which D did not have. However, the company C had a bookmaker's licence under UK law.⁵³ D was charged by the German prosecution for "organising unlawful gaming",⁵⁴ but finally acquitted. The German Courts argued that imposing a penalty on D for organising gaming without the necessary German permit would constitute a non-justifiable restriction on the freedom to provide services as guaranteed (meanwhile) by Article 56 of the Treaty on the Functioning of the European Union (TFEU). Therefore, so the argument went, the respective German criminal provision was neutralised by Article 56 of the TFEU and rendered inapplicable in the proceedings against D.⁵⁵

3.3.2 International Duties to Penalise

International law may not only limit the punitive powers of states, but also obliges them to penalise certain conducts. In this vein, the EtCHR argues that the ECHR contains positive duties of protection and care. The right to life as enshrined in Article 2 of the ECHR, for example, does not merely oblige states to refrain from intentional, unlawful killings, but also to actively protect the lives of all persons within their jurisdiction.⁵⁶ This involves the duty to "secure the right to life by putting in place effective *criminal law provisions* to deter the commission of offences against the person."⁵⁷ States also have to provide for effective official investigations into alleged intentional killings which must be capable of leading to the establishment of the facts, a determination of whether or not a wrongful killing occurred and identifying and – if appropriate – punishing those responsible.⁵⁸ In fulfilling their positive obligations, however,

⁵¹ CJEU, Judgement of 14 July 1977, *Criminal proceedings against Concetta Sagulo, Gennaro Brenca and Addemadjid Bakhouché*, C-8/77, ECLI:EU:C:1977:131, at para. 6.

⁵² Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 7 mn. 78, 79.

⁵³ English summary of the case based on Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 7 mn. 77.

⁵⁴ The relevant Section 264 of the German Criminal Code (*Strafgesetzbuch*) provides: "Whosoever without the permission of a public authority publicly organises or operates a game of chance or makes equipment for it available shall be liable to imprisonment not exceeding two years or a fine."

⁵⁵ OLG München, Judgement of 26 September 2006, 5St RR 115/05, ECLI:DE:OLGMUEN:2006:0926.5STRR115.05.0A, In: *Neue Juristische Wochenschrift* 59 (2006), 3588.

⁵⁶ See, e.g., ECtHR, Judgement of 5 June 2015, *Lambert and Others v. France*, 46043/14, at para. 117.

⁵⁷ ECtHR, Judgement of 28 March 2000, *Kılıç v. Turkey*, 22492/93, at para. 62 (emphases added).

⁵⁸ ECtHR, Judgement of 30 March 2016, *Armani da Silva v. United Kingdom*, 5878/08, at paras. 230, 233.

state parties again enjoy a margin of appreciation.⁵⁹ In the context of euthanasia, for example, the ECtHR granted the states a broad (but not unlimited) discretion as to whether or not to permit “the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal”,⁶⁰ which indicates that states are free to decriminalise certain forms of euthanasia (e.g. passive euthanasia, that is, medical treatment to reduce pain, which has the side effect of speeding the patient’s death).

More concrete criminalisation obligations can be introduced by special international conventions dealing in more detail with the protection of certain rights. The already mentioned Istanbul Convention, to give but one example, requires states to criminalise – amongst other things – certain forms of psychological, physical and sexual violence, stalking, forced marriage and sexual harassment. In the light of these provisions, Germany has completely reformed and considerably tightened its legislation on sexual crimes. Nevertheless, the impact of such treaty obligations on national sovereignty is comparably weak. There are in general no hard enforcement mechanisms to sanction states for non-compliance. And, of course, it is the free political decision of each state whether or not to become party to a certain treaty. Russia, for example, has not yet ratified the Istanbul Convention and is thus in no way obliged to implement its (criminal law) provisions.

The case is different again within the European Union. Since the entry into force of the Lisbon Treaty in 2009, the EU enjoys broad competencies to harmonise national criminal laws by way of directives. Article 83 of the TFEU empowers the EU to introduce minimum rules concerning the definition of criminal offences and sanctions

- in areas of particularly serious crime with a cross-border dimension like terrorism, trafficking in human beings or computer crimes,
- in an area which has been subject to (non-criminal) harmonisation measures, provided that the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy. This is the so-called annex competence.

Meanwhile, the Union has inter alia directed the Member States to adopt criminal law measures in the areas of sexual exploitation of children and child pornography,⁶¹ market abuse,⁶² cybercrime⁶³ and fraud to the Union’s financial interests.⁶⁴ Notably, criminal law

⁵⁹ ECtHR, Judgement of 5 June 2015, *Lambert and Others v. France*, 46043/14, at para. 144.

⁶⁰ ECtHR, Judgement of 5 June 2015, *Lambert and Others v. France*, 46043/14, at para. 148.

⁶¹ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ EU L 334 of 17 December 2011 at p. 1.

⁶² Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), OJ EU L 173 of 12 June 2014 at p. 179.

⁶³ Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, OJ EU L 218 of 14 August 2013 at p. 8.

⁶⁴ Directive 2017/1371/EU of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law, OJ EU L 198 of 28 July 2018 at p. 29.

directives are – as a rule⁶⁵ – adopted in accordance with the ordinary legislative procedure, that is, by majority vote. This means that a Member State can be overruled and is then obliged to adapt its national criminal norms to the European requirements against its will. As a compensation measure, Article 83, paragraph 3, of the TFEU introduces a so-called emergency brake. Any Member State can veto a directive that would affect fundamental aspects of its criminal justice system. If, however, a directive has successfully passed the legislation process and a Member State fails to transpose its provisions into its national criminal law,⁶⁶ the European Commission may launch a formal infringement procedure before the CJEU.

3.4 Mutual Assistance in Criminal Matters

Another field increasingly influenced by international laws and obligations is the one of police and judicial co-operation. At a time when crimes are often committed across borders, states increasingly depend on mutual support in the gathering of evidence or the arrest of suspects. Nevertheless, traditional co-operation proceedings are quite complex and time-consuming. Requests for the extradition or other forms of assistance usually have to pass a two-stage proceeding – a legal-judicial admissibility test and a political-executive authorisation procedure⁶⁷ in which the competent national authority decides at its free discretion whether or not to grant the request. Within the framework of the Council of Europe, the European Convention of Extradition and its Additional Protocols aim to facilitate mutual assistance by establishing uniform rules with regard to extradition,⁶⁸ restricting classical obstacles to extradition⁶⁹ and simplifying extradition procedure.⁷⁰ Despite these regulations, the law on international co-operation in general and extradition in particular is still dominated by the sovereign freedom of the affected states.⁷¹

Within the European Union, the picture is different. Based on the principle of mutual recognition – the cornerstone of the Unions' co-operation system (Article 82, paragraph 1, of the TFEU) – the traditional process of admissibility and political authorisation was turned into

⁶⁵ See Article 83, paragraph 1, of the TFEU. In case the Union uses its annex competence, the directive is adopted by the same ordinary or special legislative procedure as was followed for the adoption of the respective non-criminal harmonisation measures, Article 83, paragraph 2, of the TFEU.

⁶⁶ Due to the principle of legal certainty, however, directives cannot directly establish or aggravate individual criminal liability; their effect always depends on a national implementation act, see only CJEU, Judgement of 12 December 1996, *Criminal Proceedings against X*, C-74/95 und C-129/95, ECLI:EU:C:1996:491, at para. 24; CJEU, Judgement of 7 January 2004, *Criminal Proceedings against X*, C-60/02, ECLI:EU:C:2004:10, at para. 61.

⁶⁷ Ambos, K., *European Criminal Law*. Cambridge University Press: Cambridge 2018, at p. 419.

⁶⁸ See, e.g., the definition of extraditable offences in Article 2 of the European Convention on Extradition or the common acceptance of amnesty as an obstacle to extradition in Article 3 of the Second Additional Protocol to the European Convention on Extradition.

⁶⁹ For political offences see Article 1 of the Additional Protocol to the European Convention on Extradition; for fiscal offences see Article 2 of the Second Additional Protocol to the European Convention on Extradition.

⁷⁰ See the Third Additional Protocol to the European Convention on Extradition.

⁷¹ Cf. also Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 8 mn. 26.

an administrative, executive proceeding.⁷² The basic idea is that a judicial decision rendered in one Member State must automatically be recognised and enforced in every other Member State.⁷³ This presupposes that “the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.”⁷⁴

Mutual recognition is – if fully implemented – very effective as it allows for a kind of “free movement of judicial decisions” and an unhampered cross-border enforcement of criminal law. It can be seen as a counterpart to, or a safeguard against the right to free movement, which is prone to misuse for criminal purposes.⁷⁵ At the same time, it produces tensions with the sovereign interests of the Member States, since a (more or less) unrestricted duty to automatically recognise a foreign decision necessarily entails a waiver of sovereign control powers.⁷⁶ The crucial question is if Member States can be obliged to accept and enforce foreign judicial decisions that contravene fundamental principles of their national legal order. From a German perspective, this is, for example, the case when national authorities are asked to grant legal assistance in a proceeding conducted *in absentia* or in the enforcement of a conviction based on a strict liability offence.⁷⁷ The German Constitutional Court held that all cooperation obligations – even those rooted in Union Law – are limited by the core identity of the German Constitution. In particular, German public authorities must not assist other states in violating human dignity, which means they must refuse co-operation if the respective (foreign) national proceeding does not meet the minimum standards required by Article 1 of the German Basic Law (*Grundgesetz*) – the right to human dignity.⁷⁸ This arguably conflicts with the approach of the CJEU which appears to be of the view that the principle of mutual recognition is only limited by an European *ordre public*; that is, Member States may reject a request for cooperation if there is objective, reliable and specific evidence that the proceedings or the enforcement practice in the requesting state are (or will be) incompatible with *European* human rights standards.⁷⁹ National basic values, like the German concept of human dignity, are – according to the view of the CJEU – seemingly irrelevant. It remains to be seen where the discussion on conflicts between cooperation duties and fundamental national principles will lead us.

⁷² Ambos, K., *European Criminal Law*. Cambridge University Press: Cambridge 2018, at p. 418.

⁷³ Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 8 mn. 26; Ambos, K., *European Criminal Law*. Cambridge University Press: Cambridge 2018, at p. 20.

⁷⁴ CJEU, Judgement of 11 February 2003, *Criminal Proceedings against Hüseyin Gözütok and Klaus Brügge*, C-187/01 and C-385/01, ECLI:EU:C:2003:87, at para. 33.

⁷⁵ Cf. also Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 8 mn. 26.

⁷⁶ Rightly emphasised by Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 8 mn. 28.

⁷⁷ Bock, S., Rechtskulturelle Differenzen in der internationalen Rechtshilfe in Strafsachen. In: *Zeitschrift für Internationale Strafrechtsdogmatik* 14 (2019) pp. 298-307 at pp. 300 et seq.

⁷⁸ Federal Constitutional Court, Decision of 15 December 2015, 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514, BVerfGE 140, 317.

⁷⁹ CJEU, Judgement of 5 April 2016, *Proceedings Relating to the Execution of European Arrest Warrants Issued in Respect of Pál Aranyosi and Robert Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

3.5 The International Criminal Justice System

Let me conclude with a few remarks on the international criminal justice system. The massive human rights violations committed in the war in former Yugoslavia and the Rwandan genocide in the early 1990s called for a quick and firm response of the international community. With the establishment of the two *ad hoc* Tribunals, the Security Council paved the way for an international criminal prosecution of the persons most responsible and initiated the re-birth of international criminal law, which had been put on hold after the historical Tribunals of Nuremberg and Tokyo had rendered their judgements against the major war criminals of the Second World War.⁸⁰ Meanwhile, there exist not only various internationalised or hybrid tribunals, but with the establishment of the International Criminal Court, the world has witnessed the creation of a permanent body with potential universal reach designed to end impunity for the worst crimes known to humanity.⁸¹ It is, however, clearly impossible for the international tribunals to prosecute all potential perpetrators of international crimes themselves. Rather, an efficient international criminal justice system requires that national states take their share in the prosecution of gross human rights violations and enforce international criminal law at the domestic level through domestic criminal proceedings.⁸² The co-existence of international and national enforcement mechanisms invites the questions of how the two are interrelated and how conflicts of jurisdictions or divergences in the interpretation and application of international law can be solved. Must national states adapt their legal systems according to the law and jurisprudence of the international tribunals? Can international tribunals overturn or disregard national decisions for non-prosecution? Do they have the power to take over national proceedings? And to which extent are states obliged to co-operate with international tribunals? Can they invoke constitutional constraints or conflicting international obligations as grounds to refuse co-operation?⁸³

3.6 Conclusion

Already this brief overview indicates that the former *domaine réservé* of criminal law is meanwhile affected in various ways by international laws and regulations. The general discussions on normative hierarchies and the relationship between different legal orders are thus of utmost importance for the modern criminal law discourse. They can benefit immensely

⁸⁰ On the history of International Criminal Law see Ambos, K., *Treatise on International Criminal Law – Volume I: Foundations and General Part*. Oxford University Press: Oxford 2013, at pp. 1 et seq.

⁸¹ In more detail Ambos, K., *Treatise on International Criminal Law – Volume I: Foundations and General Part*. Oxford University Press: Oxford 2013, at pp. 16 et seq.; Satzger, H., *International and European Criminal Law*. 2nd edn., C. H. Beck, Hart Publishing, Nomos: München, Oxford, Baden-Baden 2018, at § 11 mn. 18 et seq.

⁸² Cf. already the Preamble of the Statute of the International Criminal Court, which emphasises that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.

⁸³ Cf. Römer, T., *Scope of National Duties to Cooperate with International Tribunals and the International Criminal Court*. In this volume, Chapter 11, pp. 100-109.

from comparative analysis, which may generate new insights that go beyond the limits of pure national perspectives.

4 The Geographical Scope and Extraterritorial Application of European Competition Law Provisions in Accordance with the *Effects Doctrine*

Michael Kling

4.1 Preliminary Remarks on the Non-Existence of “International Competition Law”

The topic of this essay could easily lead to the false conclusion that there was a supranational international competition law, which could possibly bear certain similarities to the international trade law of the World Trade Organization (WTO). By implementing three major multilateral agreements (i.e. the General Agreement on Tariffs and Trade [GATT], the General Agreement on Trade in Services [GATS], and the Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS]) into international trade law, the WTO, which was founded in 1995, has indeed legally covered the essential areas of world trade (i.e. trade in goods and services and intellectual property) for some 25 years already. However, international trade law is directed at *states* as members of the WTO, whereas competition law, on the other hand, is directed at *companies* (although state institutions can be companies in the competition law sense if they act economically, i.e., as suppliers or buyers on an economic market).¹ However, both legal areas, international trade law and competition law, show strong parallelism in that they are particularly committed to the “classic” liberal ideas of free trade and thus open markets. It is therefore not surprising that when the GATT was founded in 1948, early efforts were made to integrate rules to fight restrictive practices by private and public companies into international trade law. But ever since, all these attempts have all failed politically, and the respective agreements have never been ratified. As the earliest attempt of such an agreement, one could identify Chapter 5 of the Havana Charter for an International Trade Organisation (ITO) of 1948. The last serious attempt was the Draft International Antitrust Code of 1995, which had been prepared with the participation of leading German scientists.² In particular, this Code provided for the inadmissibility of export cartels, thereby attempting at putting an end to a business practice which is often tolerated or encouraged by national governments. Subsequently, at its 1996 Singapore Ministerial Conference, the WTO decided to make competition policy the subject of further development. This initiative originated mainly in the European Union. However, work at WTO level soon came to a standstill.

Some years later, a new initiative was launched at the 4th Ministerial Conference in Dohar (Qatar) from 2001 onwards, which also covered competition policy, including the fight against

¹ Mestmäcker, E.-J., and Schweitzer, H., *Europäisches Wettbewerbsrecht*. 3rd edn., C.H. Beck: München 2014, at § 7 mn. 144.

² Namely Wolfgang Fikentscher and Ulrich Immenga, cf. Mestmäcker, E.-J., and Schweitzer, H., *Europäisches Wettbewerbsrecht*. 3rd edn., C.H. Beck: München 2014, at § 7 mn. 147.

hardcore cartels.³ However, these efforts, as well as the subsequent round of negotiations in Cancún, Mexico, in 2003, failed because of conflicting political interests.⁴ The USA in particular did object to the suggestions made.⁵ Among other things, the U.S. government feared that the international treaties under consideration could have repercussions on their own national competition law and, in particular, that the applicability of their own law could be limited to international situations.⁶

What remains until today are the two networks of the competition authorities at European and international level. Regarding these networks, the International Competition Network (ICN), founded on 25 October 2001 with the support of the USA,⁷ could be characterized more of a loose network which serves to exchange experience. The ICN has a rather virtual structure and does not have a permanent secretariat.⁸ This type of cooperation in turn corresponds to the ideas of the USA, because U.S. governments seem to prefer the principle of cooperation to supranational law-making.⁹ Therefore, such a network could merely serve the purpose of exchanging experience and, at best, coordinating the activities of the competition authorities, e.g. by drawing up non-binding recommendations concerning their cooperation (so-called *best practice*). One could say that they may eventually lead to some kind of *soft harmonisation*. However, they do not contain any substantive provisions, so I will not go into detail about this. I would rather like to focus on the application of the European competition rules of the Treaty on the Functioning of the European Union (TFEU) to various “foreign cases”, i.e., the extraterritorial application of the European competition law to companies based outside the European Union.

³ Immenga, U., Internationales Wettbewerbsrecht, Unilateralismus, Bilateralismus, Multilateralismus. In: C. Tietje, G. Kraft and R. Sethe (eds.), *Beiträge zum Transnationalen Wirtschaftsrecht – Heft 31*. Martin-Luther-Universität Halle-Wittenberg: Halle October 2004, at p. 14.

⁴ Immenga, U., Internationales Wettbewerbsrecht, Unilateralismus, Bilateralismus, Multilateralismus. In: C. Tietje, G. Kraft and R. Sethe (eds.), *Beiträge zum Transnationalen Wirtschaftsrecht – Heft 31*. Martin-Luther-Universität Halle-Wittenberg: Halle October 2004, at p. 14.

⁵ Mestmäcker, E.-J., and Schweitzer, H., *Europäisches Wettbewerbsrecht*. 3rd edn., C.H. Beck: München 2014, at § 7 mn. 153.

⁶ Mestmäcker, E.-J., and Schweitzer, H., *Europäisches Wettbewerbsrecht*. 3rd edn., C.H. Beck: München 2014, at § 7 mn. 153.

⁷ Not to be confused with the European Competition Network (ECN) of the European Union.

⁸ Immenga, U., Internationales Wettbewerbsrecht, Unilateralismus, Bilateralismus, Multilateralismus. In: C. Tietje, G. Kraft and R. Sethe (eds.), *Beiträge zum Transnationalen Wirtschaftsrecht – Heft 31*. Martin-Luther-Universität Halle-Wittenberg: Halle October 2004, at p. 16.

⁹ Mestmäcker, E.-J., and Schweitzer, H., *Europäisches Wettbewerbsrecht*. 3rd edn., C.H. Beck: München 2014, at § 7 mn. 155.

4.2 Territoriality Principle versus the Effects Doctrine – Territorial Scope and Extraterritorial Application of European Competition Law

4.2.1 Overview

The competition rules of the Treaty require that prohibited restrictions of competition are appreciable¹⁰ and that trade in the Common Market (or a substantial part of it) is affected in the internal market. Articles 101 et seq. of the TFEU apply to all companies that have their headquarters in one of the 27 EU Member States. The same applies to the EU Merger Regulation No. 139/2004 (ECMR).¹¹ But the scope of European competition law is not limited to “domestic” cases in that sense, and this is the case because of the application of the so-called “effects doctrine”.¹² As the authorities follow this principle when applying European competition law, measures taken from outside the territory of the European Union can also be qualified as violations of the competition rules. The scope and limits of this principle of European competition law will be discussed furthermore below.

4.2.2 The Case Law of the European Courts on the Application of European Competition Law to Companies Based Outside the European Union

4.2.2.1 Preliminary Remarks and Foundation in Public International Law – the *Lotus* Case of the PCIJ of 7 September 1927

In international criminal law, the question of whether a state can have jurisdiction over nationals of another state arose in the so-called *Lotus* case of the Permanent Court of International Justice (PCIJ) in 1927.¹³ It was questionable whether a Turkish court had jurisdiction to convict a French officer whose misconduct at sea had caused the death of eight Turkish sailors. Turkey had sentenced the French officer, who had disembarked in Constantinople, to 80 days in prison. France took action against this before the PCIJ on the grounds that no such competence can be inferred from international law. In contrast, Turkey assumed that the freedom of action of states in international law was basically unrestricted. The PCIJ decided in favor of Turkey.¹⁴ First, the Court stated that the principle of territoriality does apply in international law.

¹⁰ Kling, M., Bezweckte Wettbewerbsbeschränkung und Erheblichkeit: ein neuer Revisionsvorschlag aus der Schweiz im Vergleich zum unionskartellrechtlichen Regelungsmodell. In: *Zeitschrift für schweizerisches Recht* 138 (2019) pp. 513-537.

¹¹ Council Regulation 139/2004/EC of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ EU L 24 of 29 January 2004 at p. 1.

¹² Cf. Hoffmann, J. H., Wettbewerbsrecht. In: A. Dausen and M. Ludwigs (eds.), *Handbuch des EU-Wirtschaftsrechts*. 48th edn., C.H. Beck: München July 2019, at § 1 mn. 30.

¹³ See also Bock, S., The Internationalisation of Criminal Law. In this volume, Chapter 3, pp. 29-41.

¹⁴ PCIJ, Judgement of 7 September 1927, *France v. Turkey, Case of the S.S. 'Lotus'*, PCIJ Series A No. 10.

“Now the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”¹⁵

The PCIJ then argued that a State may exercise its jurisdiction in any matter within its territory, even if there is no specific rule of international law allowing it to do so. In these cases, the States have a wide margin of discretion which is limited only by the prohibition rules of international law:

“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will (...). Restrictions upon the independence of States cannot therefore be presumed. (...) Far from laying down a general prohibition (...), it leaves them (...) a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”¹⁶

4.2.2.2 The Long Way from the Territoriality Principle to the Effects Doctrine

In its case law on the European competition rules (especially on the prohibition of cartels) from the early 1970s onwards, the former European Court of Justice (ECJ), meanwhile the Court of Justice of the European Union (CJEU), also initially referred to the territoriality principle, which is characterized by the requirement that at least one of the essential elements of the infringed prohibition provision must have been fulfilled on the territory of the State claiming jurisdiction. In contrast to this,¹⁷ the Commission has applied the *effects doctrine* in its practice as early as 1969.¹⁸

The development of the relevant EU case law – with its interesting, step-by-step modifications – will first be traced here.

¹⁵ PCIJ, Judgement of 7 September 1927, *France v. Turkey, Case of the S.S. ‘Lotus’*, PCIJ Series A No. 10, at pp. 18-19.

¹⁶ PCIJ, Judgement of 7 September 1927, *France v. Turkey, Case of the S.S. ‘Lotus’*, PCIJ Series A No. 10, at p. 19.

¹⁷ Mestmäcker, E.-J., and Schweitzer, H., *Europäisches Wettbewerbsrecht*. 3rd edn., C.H. Beck: München 2014, at § 7 mn. 58.

¹⁸ Décision 69/243/CEE de la Commission, du 24 juillet 1969, relative à une procédure au titre de l’article 85 du traité C.E.E. (Matières colorantes), OJ EC L 195 of 7 August 1969 at p. 11; cf. also Règlement 975/72/CEE de la Commission, du 12 mai 1972, modifiant les prélèvements à l’importation de viandes bovines congelées, OJ EC C 111 of 13 May 1972 at p. 13; Commission Decision 85/202/EEC of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/ 29. 725 – Wood Pulp), OJ EC L 85 of 28 March 1985 at p. 1 (14); Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty, OJ EC L 74 of 17 March 1989 at p. 1; Commission Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty, OJ EC L 74 of 17 March 1989 at p. 21.

4.2.2.2.1 The *Dyestuffs* Case

The *Dyestuffs* case¹⁹ concerned a coordinated pricing policy of paint manufacturers in violation of the European ban on cartels (now regulated in Art. 101 of the Treaty on the Functioning of the European Union [TFEU]). The competition authorities had identified five different national markets for dyes, each of which had different price levels. Although their customers preferred to purchase the dyes on their domestic market and did not do so in another Member State, EU competition law was applicable. The European Court of Justice was able to base the applicability of the competition rules on the territoriality principle on the fact that the concerted practices of the EU foreign parent companies in dispute were practiced by their subsidiaries based *within* the European Union. The central statements of the CJEU read as follows:

“121. However, (...) the concerted practices, by seeking to keep the market in a fragmented state, were liable to affect the circumstances in which trade in the products in question takes place between the Member States...

123. The fact that the increases were uniform and simultaneous has in particular served to maintain the status quo, ensuring that the undertakings would not lose custom, and has thus helped to keep the traditional national markets in those goods ‘cemented’ to the detriment of any real freedom of movement of the products in question in the Common Market.”²⁰

4.2.2.2.2 The *Wood Pulp* Case

The justification applied in the *Dyestuffs* case did not exist in the *Wood Pulp* case²¹ decided 16 years later. The case concerned the application of the ban on cartels under Article 101 of the TFEU to pulp producers, all of whom were based outside the European Union. Initially, price competition between these companies that was worthy of protection by competition law had existed. However, this competition was cancelled out by price coordination measures between the pulp producers. These measures had the object and effect of restricting price competition on the relevant market. However, the application of the predecessor of Article 101 of the TFEU on these cartels was questionable, as none of the companies involved in the coordination measures had established their headquarters within the European Union. The CJEU nevertheless considered the relevant provision to be applicable. The first guiding principle of the decision therefore states:

¹⁹ CJEU, Judgement of 14 July 1972, *Imperial Chemical Industries Ltd. v. Commission*, 48/69, ECLI:EU:C:1972:70, at paras. 121 et seq.

²⁰ CJEU, Judgement of 14 July 1972, *Imperial Chemical Industries Ltd. v. Commission*, 48/69, ECLI:EU:C:1972:70, at paras. 121/123.

²¹ CJEU, Judgement of 27 September 1988, *Ahlström Osakeyhtiö*, C-89/85, ECLI:EU:C:1988:447, at paras. 14 et seq.

“1. Where producers established outside the Community sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market.

It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty.

The Community’s jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in Public International Law. Under the rules against agreements, decisions or concerted practices, the decisive factor is where the agreement, decision or concerted practice is implemented rather than where it is formed. It is immaterial whether or not the producers had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.”

In this decision, the CJEU merely formally upheld the *territoriality principle*. Rather, in the case at hand, it approached the *effects doctrine* – albeit with a problematic justification²² – by declaring the place of *implementation* of the cartel to be decisive for the application of European competition law.²³ In contrast, the Court expressly considered the intermediation of subsidiaries or other parties (agents, sub-agents or branches) to be irrelevant.²⁴ This is an important difference to the Dyestuff case from 1972.

It was questionable here whether there was a violation of the *principle of non-interference*, which is a principle that is based on international law. This prohibition of intervention states that whenever two States have competence to adopt and enforce rules and these rules have the effect of subjecting a person to conflicting orders as to the measures to be taken by him, each State is obliged to exercise its competence in a *moderate manner*. In the ruling, however, the CJEU negates the existence of such a conflict under international law. Guiding principle 2 states this succinctly:

“2. Where there is no contradiction between the conduct required of an undertaking from a non-member country operating in the common market by the Community competition rules and that required by the legislation of that non-member country, which authorizes export cartels but does not require them to be concluded, there is, in public international law, no conflict regarding the exercise of competing national jurisdictions which has to be resolved by applying a principle of non-intervention.”²⁵

²² Bechtold, R., Bosch, W., and Brinker, I., *EU-Kartellrecht*. 3rd edn., C.H. Beck: München 2014, at Einleitung mn. 17; Mestmäcker, E.-J., and Schweitzer, H., *Europäisches Wettbewerbsrecht*. 3rd edn., C.H. Beck: München 2014, at § 7 mn. 59.

²³ Cf. Mestmäcker, E.-J., and Schweitzer, H., *Europäisches Wettbewerbsrecht*. 3rd edn., C.H. Beck: München 2014, at § 7 mn. 61.

²⁴ CJEU, Judgement of 27 September 1988, *Ahlström Osakeyhtiö*, C-89/85, ECLI:EU:C:1988:447, at para. 17.

²⁵ CJEU, Judgement of 27 September 1988, *Ahlström Osakeyhtiö*, C-89/85, ECLI:EU:C:1988:447, at para. 20.

4.2.2.2.3 The *Intel* Case

The Intel case²⁶ concerned the application of the prohibition of abuse of a dominant position as governed by Article 102 of the TFEU. Specifically, the case concerned a contract between two companies, *Intel* (USA) and *Lenovo* (China), containing various restrictive agreements and discount schemes. It is true that this contract was not implemented within the European Union or the EEA. But it was nonetheless “*part of an overall strategy to ensure that no Lenovo notebook equipped with an AMD processor is commercially available, even in the EEA.*”²⁷

The CJEU ruled that the abusive conduct of a dominant company based in a third country towards a company based in another third country could be subject to the prohibition of abuse under European competition law if it had “qualified effects” in the European Union. In order to justify the Commission’s competence under International law, it is sufficient to prove either the qualified effects of the conduct or its implementation in the European Union. Their jurisdiction can be justified by the material, foreseeable and immediate consequences which Intel's conduct could have in the European Economic Area.²⁸

The CJEU is of the firm opinion that the criterion of “qualified effects” can be used to justify the application of European competition law if it is foreseeable that the conduct in question will have direct and substantial effects in the European Union.²⁹

Such “qualified effects” could also result from the fact that the conduct had been part of an overall strategy of the dominant undertaking which also included the European Union.³⁰ This strategy was present here because Intel’s competitor, the processor manufacturer AMD, was to be kept out of the affected product market in general and everywhere.

4.2.2.2.4 The *Gencor/Lonrho* Case

Let us now have a look at the relevant legal developments in the area of merger control. The former Court of First Instance (CFI – meanwhile the General Court – EGC) has explicitly stated its commitment to the effects doctrine in the *Gencor/Lonrho* case, which concerned the application of the ECMR to a merger between two South African companies whose main

²⁶ CJEU, Judgement of 6 September 2017, *Intel Corp. v. Commission*, C-413/14 P, ECLI:EU:C:2017:632, at paras. 42 et seq., 48 et seq., 54 et seq. In that case, the Commission had accused the US company Intel of hindering the development of AMD, the only significant competitor, through rebates and exclusivity agreements with its customers, which led the Commission to impose a record fine of EUR 1,06 billion in 2009.

²⁷ CJEU, Judgement of 6 September 2017, *Intel Corp. v. Commission*, C-413/14 P, ECLI:EU:C:2017:632, at para. 52.

²⁸ CJEU, Judgement of 6 September 2017, *Intel Corp. v. Commission*, C-413/14 P, ECLI:EU:C:2017:632, at para. 18.

²⁹ CJEU, Judgement of 6 September 2017, *Intel Corp. v. Commission*, C-413/14 P, ECLI:EU:C:2017:632, at para. 49.

³⁰ See also Berg, J. N., Die Genese des Auswirkungsprinzips in der Rechtsprechung des EuGH. In: *Wirtschaft und Wettbewerb* 68 (2018), pp. 557-561.

activity was platinum, rhodium and palladium mining.³¹ They were two of only three major mining companies in South Africa that were engaged in this kind of mining activity. After the merger, only two companies would have remained on the respective market. The companies concerned also exported significant quantities of their platinum and palladium products to the European Union. The EGC considered that the rules of the ECMR were applicable without this being contrary to public international law. From its view, the application of the regulation could be justified under international law, if it was foreseeable that a proposed concentration would have a direct and substantial effect in the European Union. The European Commission was therefore able to prohibit the merger between the two companies in South Africa, because they would have subsequently had too much market power in the European market for platinum and rhodium metals, which would have harmed competition in that market.

It is rather obvious that there was a conflict of competence between South Africa and the European Union (at government level as well as at the level of the authorities). Since such conflicts are to be resolved by International law, it was questionable whether its principles could be applied here. In its decision, the EGC commented on the principles of non-interference and proportionality, but ultimately³² left their scope open. Specifically, it made the following observations, citing the Wood Pulp judgement of the CJEU:

“103. *The applicant’s argument that, by virtue of a principle of non-interference, the Commission should have refrained from prohibiting the concentration in order to avoid a conflict of jurisdiction with the South African authorities must be rejected, without it being necessary to consider whether such a rule exists in international law. Suffice it to note that there was no conflict between the course of action required by the South African Government and that required by the Community given that, in their letter of 22 August 1995, the South African competition authorities simply concluded that the concentration agreement did not give rise to any competition policy concerns, without requiring that such an agreement be entered into (see, to that effect, Wood pulp, paragraph 20).*”³³

4.2.2.2.5 The General Electric/Honeywell Case

In the case of the merger of General Electric/Honeywell – two major US companies – even a 1991 agreement between the US Government and the European Community could not prevent different outcomes in the assessment of the merger, which subsequently led to the Commission's prohibition of the merger in 2001 on the grounds that it would create excessive market power.³⁴

³¹ EGC, Judgement of 25 March 1999, *Gencor v. Commission*, T-102/96, ECLI:EU:T:1999:65, at paras 89 et seq.

³² EGC, Judgement of 25 March 1999, *Gencor v. Commission*, T-102/96, ECLI:EU:T:1999:65, at paras. 102 et seq.

³³ EGC, Judgement of 25 March 1999, *Gencor v. Commission*, T-102/96, ECLI:EU:T:1999:65, at para. 103.

³⁴ Commission Decision 2004/134/EC of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (COMP/M.2220 – *General Electric/Honeywell*), OJ EC L 48 of 18

This decision was confirmed by the EGC in 2005.³⁵ Cooperation between the US and EU authorities was subsequently intensified through the so-called US-EU Best Practices.

On the basis of these premises, the fundamental validity of the effects doctrine in the application of the European competition rules and European merger control will be discussed below.

4.2.2.3 Regulatory Content and Limits of the Effects Doctrine

4.2.2.3.1 Overview

As explained above, the application of the European competition rules does not require that the infringements in question is committed by undertakings established in the European Union. On the contrary, the competition rules also intervene when EU non-nationals carry out activities outside the European Union which have an *effect* within the Union. The same applies to the ECMR, so that mergers between companies from non-EU countries must also be examined under the ECMR if they are likely to have an effect on competition in the internal market.³⁶ This principle is referred to as the effects doctrine which, pursuant to section 130, paragraph 2, of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), is also the basis of German competition law.

Under international law, the effects doctrine is justified by the fact that linking it to the place of implementation of an agreement would only lead to a patchy coverage of restrictions of competition.³⁷ The protection against restrictions of competition outside the European Union which have an effect on competition in the internal market is a legitimate concern and does not lead to a violation of the principle of non-interference under international law, as it does not affect foreign trade.

February 2004 at p. 1; cf. Rosenthal, M., and Thomas, S., *European Merger Control*. C.H. Beck: München 2010, at p. 13.

³⁵ EGC, Judgement of 14 December 2005, *General Electric v. Commission*, T-210/01, ECLI:EU:T:2005:456.

³⁶ Commission Decision 97/816/EC of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (IV/M.877 – *Boeing/McDonnell Douglas*), OJ EC L 336 of 8 December 1997, at p. 16; Commission Decision 2004/134/EC of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (COMP/M.2220 – *General Electric/Honeywell*), OJ EC L 48 of 18 February 2004 at p. 1; EGC, Judgement of 25 March 1999, *Gencor v. Commission*, T-102/96, ECLI:EU:T:1999:65.

³⁷ Bechtold, R., Bosch, W., and Brinker, I., *EU-Kartellrecht*. 3rd edn., C.H. Beck: München 2014, at Einleitung mn. 18.

4.2.2.3.1 Possible Restrictions of the Effects Doctrine

4.2.2.3.1.1 Principles of Public International Law

It is questionable whether the effects doctrine is guaranteed without any restrictions, which would certainly give rise to numerous conflicts of jurisdiction. International law certainly could play a limiting role here. The following principles that could eventually limit the “scope” of the effects doctrine under international law exist:

- the prohibition of abuse of rights,
- the principle of non-interference,
- the principle of balancing of interests, and
- the principle of proportionality.³⁸

However, none of these principles has ever had a practically limiting role for the jurisdiction of the European Union over companies from third countries. It cannot even be deduced with sufficient certainty from the case law cited above whether the CJEU accepts their validity at all. Rather, the Union Courts marginalize these principles, sometimes with a somewhat “threadbare” line of argument. According to the current legal status, no “resilient” limits can be derived from the prohibition of intervention under International law.

4.2.2.3.1.2 Restrictions Inherent in Competition Law Itself

Considering the regulatory system of European competition law, the results may be different. In the case of restrictions of competition initiated abroad in which only foreign companies are involved, the literature calls for the principle of limitation of the effects to the *direct effects* of the competition infringement in order to avoid an extension of the scope of domestic competition law which is undesirable under international law³⁹. In quantitative terms, the *materiality* of the market effect would be the limiting criterion.⁴⁰ The criterion of *appreciability* of a market effect, which is recognized in European competition law, is generally considered sufficient to limit the principle of effect under international law. The criterion of materiality results in a *de minimis limit* and thus in a *de minimis rule*⁴¹. In any event, a quantitative criterion as a limit to

³⁸ Bechtold, R., Bosch, W., and Brinker, I., *EU-Kartellrecht*. 3rd edn., C.H. Beck: München 2014, at Einleitung mn. 18.

³⁹ Fezer, K.-H., and Koos, S., Internationales Kartellprivatrecht. In: J. v. Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch. Internationales Wirtschaftsrecht*. Sellier and de Gruyter: München et al. 2015, at mn. 154.

⁴⁰ Fezer, K.-H., and Koos, S., Internationales Kartellprivatrecht. In: J. v. Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch. Internationales Wirtschaftsrecht*. Sellier and de Gruyter: München et al. 2015, at mn. 159.

⁴¹ Fezer, K.-H., and Koos, S., Internationales Kartellprivatrecht. In: J. v. Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch. Internationales Wirtschaftsrecht*. Sellier and de Gruyter: München et al. 2015, at mn. 159.

the principle of effect in competition law is useful, necessary and appropriate. However, due to the nature of the appreciability criterion under European competition law as a *de minimis* limit, no particularly strict requirements are to be set for its fulfilment.⁴² The intensity of the market effect is measured by reference to the competition policy objectives of the acting State.

The necessity of the *materiality* criterion is derived from a comparison of the regulatory interests of the effecting state and the initiating state. According to this principle, the lower the domestic effect in quantitative terms is, the lower the own regulatory interest will be, whereby the regulatory interest of other states can increase to such an extent that the risk of conflict increases⁴³. A regulatory interest is only legitimized in the case of serious threats to the domestic order, which are eliminated if the domestic effects are insignificant.⁴⁴

All this can be agreed upon, but the problem is that the *de minimis* thresholds in European competition law are generally set very low to ensure the effectiveness of its application. Any noticeable domestic effects are at least easy to construe in a globalized world economy. At the same time, *de minimis* thresholds are to a certain extent also an “instrument of power” of the Union institutions vis-à-vis the Member States of the European Union. For if the limits for the validity of European competition law are set consistently low with the aim of establishing the internal market, conflicting national laws will be pushed further and further back. There are numerous examples of this in the legal practice of the CJEU and the Commission.

In this context, it is important to note that according to German case law, namely that of the Berlin Court of Appeal (*Kammergericht*) on the effects doctrine, domestic effects do not have to have a particular quality in terms of appreciability or materiality as long as they are concrete and not just theoretically conceivable. Where domestic effects are established, the applicable competition law provision determines whether a *de minimis* threshold must be observed.⁴⁵

As explained above, the application of the “iridescent” appreciability criterion is to be supported in principle from a competition law perspective. This, of course, does not imply that this criterion should be the only restriction to the application of the effects doctrine. But as long as International law keeps “failing” as a limiting element, we will have to be satisfied for the time being with the limits inherent in competition law.

⁴² Fezer, K.-H., and Koos, S., Internationales Kartellprivatrecht. In: J. v. Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch. Internationales Wirtschaftsrecht*. Sellier and de Gruyter: München et al. 2015, at mn. 159.

⁴³ Meessen, K. M., *Völkerrechtliche Grundsätze des internationalen Kartellrechts*. Nomos: Baden-Baden 1975, at p. 158.

⁴⁴ Fezer, K.-H., and Koos, S., Internationales Kartellprivatrecht. In: J. v. Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch. Internationales Wirtschaftsrecht*. Sellier and de Gruyter: München et al. 2015, at mn. 160.

⁴⁵ Kammergericht Berlin, Decision of 1 July 1983, Kart 16/82, ECLI:DE:KG:1983:0701.KART16.82.0A, Guideline 4.

4.2.3 The Practical Significance of the Effects Doctrine in More Recent Cartel Cases

4.2.3.1 Horizontal Restrictions of Competition

Horizontal restrictions of competition by means of agreements, decisions and concerted practices, i.e. so-called *hardcore restrictions* such as price agreements between competitors or the sharing of markets or customers on a horizontal basis, are generally prohibited by competition law.⁴⁶ According to the case law of the European Court of Justice, this also applies to only so-called *gentlemen's agreements*. This may sometimes be the case where certain operators are based outside the European Union and do not sell goods on the European single market, but could do so because there are no insurmountable barriers to entry

To illustrate this by example: The Toshiba Corporation/Commission⁴⁷ case concerned an international cartel for so-called power transformers between European and Japanese manufacturers. Power transformers are certain technical components by which the voltage in an electric circuit can be reduced or increased. Such components are sold as separate accessories or as part of turnkey substations. The cartel agreement took the form of an oral agreement between European producers of power transformers and Japanese producers (including Toshiba). The *gentleman's agreement* was intended to respect the markets in the territory of each of these two groups of transformer manufacturers and to refrain from selling on these markets. The parties to the *gentlemen's agreement* had met once or twice per year for a period of four years. According to the Commission's assessment and the case law, these meetings served to confirm the *gentlemen's agreement* in each case.⁴⁸

The Commission and the Union Courts classified the *gentlemen's agreement* in that case as a restriction of competition by object as prohibited by Article 101 of the TFEU and Article 53

⁴⁶ CJEU, Judgement of 16 July 2015, ING Pensii – *Societate de Administrare a unui Fond de Pensii Administrat Privat SA/Consiliul Concurenței*, C-172/14, ECLI:EU:C:2015:484, Guideline: “Art. 101 para. 1 TFEU must be interpreted as meaning that customer-sharing agreements such as those concluded between private pension funds in the main proceedings constitute an agreement having an anti-competitive object, without the number of customers covered by those agreements being relevant for the purposes of assessing whether the condition of a restriction of competition in the internal market is fulfilled”; cf. Kuhn, T., Die Abgrenzung zwischen bezweckten und bewirkten Wettbewerbsbeschränkungen nach Art. 101 AEUV. In: *Zeitschrift für Wettbewerbsrecht* 12 (2014) pp. 143-168 at p. 148.

⁴⁷ CJEU, Judgement of 20 January 2016, *Toshiba Corporation v. Commission*, C-373/14 P, ECLI:EU:C:2016:26. This judgement confirms the EGC and the Commission, see EGC, Judgement of 21 May 2014, *Toshiba Corporation v. Commission*, T-519/09, ECLI:EU:T:2014:263; Commission Decision of 7 October 2009 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/39.129 – Power Transformers), OJ EU 2009 C 296 of 5 December 2009 at p. 21, at para. 5; see also Kling, M., Japanische Unternehmen vor dem EuGH? Die Verantwortlichkeit japanischer Unternehmen für Kartellverstöße nach Europäischem Kartellrecht. In: H. Menkaus and M. Narazaki (eds.), *Japanischer Vorkämpfer für die Rechtsordnung des 21. Jahrhunderts*. Festschrift für Koresuke Yamauchi. Duncker & Humblot: Berlin 2017, pp. 243-271.

⁴⁸ Commission Decision of 7 October 2009 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/39.129 – Power Transformers), OJ EU C 296 of 5 December 2009 at p. 21; cf. also CJEU, Judgement of 20 January 2016, *Toshiba Corporation v. Commission*, C-373/14 P, ECLI:EU:C:2016:26, at para. 13.

of the Agreement on the European Economic Area (EEA). There was potential competition between the two groups of producers – which is worthy of protection under cartel law – which was unlawfully restricted by the agreement. As the CJEU pointed out, there were no insurmountable barriers to entry into the EEA market for the Japanese producers. The *gentlemen's agreement* was therefore an agreement to divide markets and thus restrict competition by object.⁴⁹ It was therefore not necessary for the Commission to prove the occurrence of negative effects on competition.

Although none of the Japanese cartel members sold power transformers in the European Economic Area, the Japanese companies participating in the cartel were also subject to substantial fines (i.e. EUR 13,2 million in the case of Toshiba). This kind of sanctioning of international cartels in order to protect competition in the internal market is in line with the Commission's well established practice.⁵⁰

4.2.3.2 Vertical Restraints of Competition

4.2.3.2.1 Import Restrictions and Prohibitions

A further consequence of the application of the effects doctrine is the fact that contractual agreements concluded by undertakings established in a third country which concern exports from there to the European Union (i.e., export bans concerning the import of goods into the European Union) infringe Article 101, paragraph 1, of the TFEU if they are capable of affecting trade between Member States.⁵¹ This is in line with the Commission's practice and the CJEU's case law.⁵² Therefore, not only the subsidiaries of companies from third countries based in the

⁴⁹ Commission Decision of 7 October 2009 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/39.129 – Power Transformers), OJ EU C 296 of 5 December 2009 at p. 21; EGC, Judgement of 21 May 2014, *Toshiba Corporation v. Commission*, T-519/09, ECLI:EU:T:2014:263, at paras. 228 et seq.; CJEU, Judgement of 20 January 2016, *Toshiba Corporation v. Commission*, C-373/14 P, ECLI:EU:C:2016:26, at paras. 60 et seq.

⁵⁰ Cf. CJEU, Judgement of 29 June 2006, *Showa Denko v. Commission*, C-289/04 P, ECLI:EU:C:2006:431, Guideline 2; Commission Decision of 12 November 2008 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement (COMP/39.125 — Car glass), OJ EU C 173 of 25 July 2009 at p. 13: essentially confirmed by CJEU, Judgement of 27 March 2014, *Saint-Gobain Glass France SA and others v. Commission*, T-56/09, ECLI:EU:T:2014:160.

⁵¹ Bechtold, R., Bosch, W., and Brinker, I., *EU-Kartellrecht*. 3rd edn., C.H. Beck: München 2014, at Einleitung mn. 19; Mestmäcker, E.-J., and Schweitzer, H., *Europäisches Wettbewerbsrecht*. 3rd edn., C.H. Beck: München 2014, at § 7 mn. 87 et seq.

⁵² Décision 64/344 CEE de la Commission, du 1er juin 1964, relative à la demande d'attestation négative présentée conformément à l'article 2 du règlement n° 17 du Conseil (IV-A/12.868 – Bendix + Merten&Straat), OJ EC 92 of 10 June 1964 at p. 1426; Commission Decision 72/238/EWG of 9 June relating to a proceeding under Article 85 of the Treaty establishing the European Community (IV/26.813 – Raymond-Nagoya), OJ EC L 143 of 23 June 1972 at p. 39; Commission Decision 2003/675/EC of 30 October 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/35.57 – PO Video Games, COMP/35.706 – PO Nintendo Distribution and COMP/36.321 – Omega-Nintendo), OJ EC L 255 of 8 October 2003 at p. 33; CJEU, Judgement of 28 March 1984, *CRAM v. Commission and Rheinzink v. Commission*, 29/83 and 30/83, ECLI:EU:C:1984:130.

European Union are responsible under cartel law,⁵³ but also directly the parent companies based in third countries. The CJEU considers the latter to be admissible because Article 297, paragraph 2, sentence 3, of the TFEU does not require formal notification in order for the Commission decision to be effective, but allows notification to be sufficient.⁵⁴

According to the Commission's practice, whether such agreements appreciably restrict competition within the European Union must be assessed in the light of the Union's external tariff and the competitive conditions within the internal market.⁵⁵

4.2.3.2.2 Export Restrictions and Prohibitions

The question arises as to how the opposite case should be treated under European competition law. This refers to agreements by EU-based companies which restrict exports to non-European third countries (i.e. export restrictions). At first sight, the competition rules of the Treaty do not appear to be applicable at all in this case, since the restrictive agreement does not relate to the European internal market but to the relevant market in a non-European third country. However, this view sometimes falls short.

Article 101 of the TFEU applies to export-related restrictions of competition if the agreement has as its object or effect an appreciable restriction of competition within the internal European market and is also capable of affecting trade between Member States.⁵⁶ The CJEU – like the Commission – distinguishes⁵⁷ according to whether the regulation is aimed solely at opening up a third market (in this case it is unobjectionable from the point of view of European competition law) or whether it aims at or has the effect of preventing the re-importation (i.e., parallel imports) of goods from a third country into the Union (in this case Article 101, paragraph 1, of the TFEU and, if applicable, Article 53, paragraph 1, of the EEA intervene).⁵⁸

⁵³ Commission Decision 85/206/EEC of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/26.870 – Aluminum imports from eastern Europe), OJ EC L 92 of 30 March 1985 at pp. 1, 48.

⁵⁴ CJEU, Judgement of 14 July 1972, *ICI v. Commission*, 48/69, ECLI:EU:C:1972:70 85/206/EEC; CJEU, Judgement of 21 February 1972, *Continental Can*, 6/72, ECLI:EU:C:1973:22.

⁵⁵ Décision 64/344 CEE de la Commission, du 1er juin 1964, relative à la demande d'attestation négative présentée conformément à l'article 2 du règlement n° 17 du Conseil (IV-A/12.868 – Bendix + Merten&Straat), OJ EC 92 of 10 June 1964 at p. 1426; Mestmäcker, E.-J., and Schweitzer, H., *Europäisches Wettbewerbsrecht*. 3rd edn., C.H. Beck: München 2014, at § 7 para. 88.

⁵⁶ EGC, Judgement of 15 March 2000, *Cimenteries CBR and others v. Commission*, T-25/95 et al., ECLI:EU:T:2000:77, at para. 3785; cf. CJEU, Judgement of 1 February 1978, *Miller v. Commission*, 19/77, ECLI:EU:C:1978:19 (i.e. a decision concerning a ban on exports of sound recordings from Alsace-Lorraine to other countries).

⁵⁷ As regards the restrictive effect of an export restriction on competition in the common market, the Commission also examines whether the reimportation of the goods covered by the contract is prevented or hindered; in general, this examination must be made in the light of the structure of the market and the price differences between the foreign market and the domestic market; cf. Mestmäcker, E.-J., and Schweitzer, H., *Europäisches Wettbewerbsrecht*. 3rd edn., C.H. Beck: München 2014, at § 7 mn. 91 et seq.

⁵⁸ Cf., in addition to the Javico decision cited in the text, CJEU, Judgement of 25 November 1971, *Béguelin Import Co. v. S.A.G.L. Import Export*, 22/71, ECLI:EU:C:1971:113 and CJEU, Judgement of 20 June 1978, *Tepea v. Commission*, 28/77, ECLI:EU:C:1978:133 – (each decision concerning exclusive distribution agreements

An instructive practical example of the distinction made by the CJEU is the judgement of the CJEU in *Javico/Yves Saint Laurent Parfums*⁵⁹. This case concerned the opening up of markets in non-EU countries (in this case Russia, Ukraine and Slovenia) by a French manufacturer of cosmetic products and perfumes (YSLP), which had concluded several distribution agreements with a company established in Germany (Javico International) in 1992. Such market development in third countries is in principle permissible under cartel law, but only if it really serves to open up new markets and not a disguised prevention of parallel imports into the European Union.

4.3. Conclusion

Finally, I would like to draw a conclusion.

1. The effects doctrine has the consequence that anti-competitive measures of companies with a registered office outside the European Union can be qualified as infringements of the competition rules of the European Union if they are “appreciable” (Article 101 of the TFEU) or if they have “qualified effects” (Article 102 of the TFEU) on the relevant European market. The *de minimis* threshold of appreciability is usually to be set rather low. Therefore, the extraterritorial application of European competition law could potentially affect all of worldwide economic trade. The arm of the European Commission reaches, for example, as far as Japan or the USA.

2. Against this background, companies from outside Europe should not trust that only the cartel authority of their home country could hold them liable for infringements of competition law. This mistaken belief may be linked to the expectation that when export cartels are agreed upon by such companies, the domestic cartel authorities would not sanction them at all for reasons of economic policy, or that the authorities will only handle them with kid gloves. Such misconceptions may be widespread due to ignorance.

3. The European Commission and the CJEU will in any case defend competition in the European internal market “tooth and claw”. In doing so, they will encounter only weak limits in International law or in European competition law. That is why I would like to conclude by appealing to companies based in third countries: *Beware! The European Commission is watching you!*

concluded between an undertaking established in the European Community and an undertaking established in a third country).

⁵⁹ CJEU, Judgement of 28 April 1998, *Javico v. Yves Saint Laurent Parfums*, C-306/96, ECLI:EU:C:1998:173.

Case Law Studies

5 The Federal Constitutional Court of Germany on the Openness of National Law to International Treaty Law

Jeneka Manoharan

5.1 Introduction

This paper will deal with the correlation between international law and the national law of the Federal Republic of Germany. It aims to demonstrate how the German constitution, the Basic Law (*Grundgesetz*), incorporates international law. Both legal systems are in a constant state of change and are subject to various influences on a legal and political level. Against this background, the German Federal Constitutional Court (FCC) must repeatedly address the question of how international and national law correlate, which will be illustrated by three key judgements of the FCC.

But first, to approach the topic, we will have a look at the legal background. Whereas international law does not stipulate its effect on a national level,¹ the incorporation of international law into national law is solely governed by the German constitution itself.² It follows the principle of openness to international law (*Völkerrechtsfreundlichkeit*).³ The principle of openness to international law has constitutional rank.⁴ It emerges from an overall assessment of the constitutional provisions that address the relation between both legal systems. These provisions embody the constitutional decision in favour of international cooperation on the basis of respect for international law.⁵ On the one hand these provisions emphasise the importance and the position of the constitution towards international law, and on the other hand they regulate the rank between international law and national law.

First of all, the preamble of the constitution⁶ points out, that the aim of the constitution is to integrate Germany as a peaceful and equal partner within the system of international law

¹ Koenig, C., and Koenig, D., Art. 25. In: P. M. Huber and A. Voßkuhle (eds.), *v. Mangoldt/Klein/Starck Grundgesetz. Kommentar*. 7th edn., Vol. 2, C. H. Beck: München 2018, at mn. 3.

² See: Geiger, R., *Staatsrecht III*. 7th edn., C. H. Beck: München 2018, at p. 9.

³ Geiger, R., *Staatsrecht III*. 7th edn., C. H. Beck: München 2018, at p. 3.

⁴ Federal Constitutional Court, Decision of 15 December 2015, 2 BvL 1/12, ECLI:DE:BVerfG:2015:ls20151215.2bvl000112, BVerfGE 141, 1 (1), guiding principle no. 4.

⁵ Koenig, C., and Koenig, D., Art. 25. In: P. M. Huber and A. Voßkuhle (eds.), *v. Mangoldt/Klein/Starck Grundgesetz. Kommentar*. 7th edn., Vol. 2, C. H. Beck: München 2018, at mn. 12.; for further information see the contribution of Schmahl, S., *Das Verhältnis der deutschen Rechtsordnung zu Regeln des Völkerrechts*. In: *Juristische Schulung* 11 (2013) pp. 961-966 at p. 964; see also: Schweitzer, M., and Dederer, H.-G., *Staatsrecht III*. 11th edn., C. F. Müller: Heidelberg 2016, at p. 69.

⁶ Preamble of the Basic Law: "...inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law".

established by the international community.⁷ This is stressed further in Article 1, paragraph 2, of the Basic Law.⁸

The openness of the constitution in relation to international law becomes more concrete in Article 24, paragraph 1, of the Basic Law.⁹ According to this provision, the Federation may by a law, transfer sovereign rights to intergovernmental institutions.¹⁰ Intergovernmental institutions are bodies established between states through international treaties.¹¹ So each transfer of sovereign rights according to Article 24, paragraph 1, of the Basic Law leads to the opening of the domestic sphere to international institutions and therefore to international law.¹²

According to Article 25 of the Basic Law the general rules of international law are an integral part of federal law,¹³ they take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.¹⁴ Through Article 25 of the Basic Law general rules of international law, meaning customary international law¹⁵ and the general principles of law¹⁶ are incorporated into the German legal system.¹⁷ According to the jurisprudence of the International Court of Justice (ICJ), customary international law develops as a result of a consistent and constant practice of states and the common understanding that this conduct is lawful. Whereas general principles of law are legal rules, which are substantially similar in different national legal systems, e.g. the “rule of law”. The two categories combined under the

⁷ Dreier, H., Preamble. In: H. Dreier (ed.), *Grundgesetz. Kommentar*. 3rd edn., Vol. 1, Mohr Siebeck: Tübingen 2013, at mn. 43; Huber, P., Preamble. In: M. Sachs (ed.), *Grundgesetz. Kommentar*. 8th edn., C. H. Beck: München 2018, at mn. 46; Schmahl, S., Das Verhältnis der deutschen Rechtsordnung zu Regeln des Völkerrechts. In: *Juristische Schulung* 11 (2013) pp. 961-966 at p. 961.

⁸ Dreier, H., Preamble. In: H. Dreier (ed.), *Grundgesetz. Kommentar*. 3rd edn., Vol. 1, Mohr Siebeck: Tübingen 2013, at mn. 27.

⁹ Geiger, R., *Staatsrecht III*. 7th edn., C. H. Beck: München 2018, at pp. 172 et seq.

¹⁰ Wollenschläger, F., Art. 24. In: H. Dreier (ed.), *Grundgesetz. Kommentar*. 3rd edn., Vol. 2, Mohr Siebeck: Tübingen 2015, at mn. 18; Rojahn, O., Art. 24. In: P. Kunig (ed.), v. *Münch/Kunig Grundgesetz. Kommentar*. 6th edn., Vol. 2, C. H. Beck: München 2012, at mn. 13.

¹¹ Streinz, R., Art. 24. In: M. Sachs (ed.), *Grundgesetz. Kommentar*. 8th edn., C. H. Beck: München 2018, at mn. 19.

¹² Cf. Classen, C. D., Art. 24. In: P. M. Huber and A. Voßkuhle (eds.), v. *Mangoldt/Klein/Starck Grundgesetz. Kommentar*. 7th edn., Vol. 2, C. H. Beck: München 2018, at mn. 12; Calliess, C., *Staatsrecht III Bezüge zum Völker- und Europarecht*. C. H. Beck: München 2014, at pp. 117 et seq.; Sauer H., *Staatsrecht III Auswärtige Gewalt, Bezüge des Grundgesetzes zu Völker- und Europarecht*. 5th edn., C. H. Beck: München 2018, at p. 98.

¹³ Rojahn, O., Art. 24. In: P. Kunig (ed.), v. *Münch/Kunig Grundgesetz. Kommentar*. 6th edn., Vol. 2, C. H. Beck: München 2012, at mn. 25.

¹⁴ See Article 25 of the Basic Law; for further information regarding the history and development of Article 25 of the Basic Law see Geiger, R., *Staatsrecht III*. 7th edn., C. H. Beck: München 2018, at pp. 153 et seq; on the legal sources of international law in general: Sauer H., *Staatsrecht III. Auswärtige Gewalt, Bezüge des Grundgesetzes zu Völker- und Europarecht*. 5th edn., C. H. Beck: München 2018, at pp. 84 et seq.

¹⁵ Streinz, R., Art. 25. In: M. Sachs (ed.), *Grundgesetz. Kommentar*. 8th edn., C. H. Beck: München 2018, at mn. 32 et seq.; see also Herdegen M., *Völkerrecht*. 13th edn., C. H. Beck: München 2014, at pp. 141 et seq.

¹⁶ Streinz, R., Art. 25. In: M. Sachs (ed.), *Grundgesetz. Kommentar*. 8th edn., C. H. Beck: München 2018, at mn. 34 et seq.

¹⁷ Koenig, C., and Koenig, D., Art. 25. In: P. M. Huber and A. Voßkuhle (eds.), v. *Mangoldt/Klein/Starck Grundgesetz. Kommentar*. 7th edn., Vol. 2, C. H. Beck: München 2018, at mn. 3; Wollenschläger, F., Art. 25. In: H. Dreier (ed.), *Grundgesetz. Kommentar*. 3rd edn., Vol. 2, Mohr Siebeck: Tübingen 2015, at mn. 13; Geiger, R., *Staatsrecht III*. 7th edn., C. H. Beck: München 2018, at pp. 154 et seq.

term “general rules of international law” take precedence over ordinary federal law¹⁸ but rank below the German constitution.¹⁹ They therefore possess an intermediate rank.²⁰ Article 25 of the Basic Law has the function of a “national order giving effect to international law” (*nationaler Rechtsanwendungsbefehl*) to all general rules of international law. This means that the general rules of international law become part of the German legal system without an additional act of approval or any other intermediate act.²¹

On the other hand, Article 59, paragraph 2, of the Basic Law states that international treaties²² require an act of approval in order to be incorporated into German law. The act of approval is an ordinary federal law and a domestic reflection of the international treaty.²³ It has three functions: it is a democratic legitimation law²⁴, it has an order giving effect on the national level,²⁵ and it is an empowerment law for ratification of the international treaty.²⁶ International treaties generally share the rank of ordinary federal laws.²⁷ The requirement of parliamentary approval under Article 59, paragraph 2, sentence 1, of the Basic Law also fulfils further purposes. First, the act of approval manifests the distribution of decision-making powers in the area of foreign affairs.²⁸ It serves to enable the legislative branch to control the executive branch effectively and timely before a treaty becomes binding under international law.²⁹ Furthermore, it ensures the primacy of law (*Vorrang des Gesetzes*) and the requirement of a statutory provision (*Vorbehalt des Gesetzes*),³⁰ since Article 59, paragraph 2, sentence 1, of the Basic Law provides that stipulations of an international treaty may establish, modify or revoke rights

¹⁸ Koenig, C., and Koenig, D., Art. 25. In: P. M. Huber and A. Voßkuhle (eds.), *v. Mangoldt/Klein/Starck Grundgesetz. Kommentar*. 7th edn., Vol. 2, C. H. Beck: München 2018, at mn. 4.

¹⁹ See Geiger, R., *Staatsrecht III*. 7th edn., C. H. Beck: München 2018, at p. 154.

²⁰ Geiger, R., *Staatsrecht III*. 7th edn., C. H. Beck: München 2018, at p. 159; Sauer H., *Staatsrecht III Auswärtige Gewalt, Bezüge des Grundgesetzes zu Völker- und Europarecht*. 5th edn., C. H. Beck: München 2018, at p. 95.

²¹ Koenig, C., and Koenig, D., Art. 25. In: P. M. Huber and A. Voßkuhle (eds.), *v. Mangoldt/Klein/Starck Grundgesetz. Kommentar*. 7th edn., Vol. 2, C. H. Beck: München 2018, at mn. 2 et seq; cf. further the contribution of Horn, H.-D., *International and Constitutional Law Doctrines on the Correlation between National and International Law*. In this volume, Chapter 1, pp. 7-21.

²² For further information see Herdegen M., *Völkerrecht*. 13th edn., C. H. Beck: München 2014, at pp. 115 et seq.

²³ Rojahn, O., Art. 59. In: P. Kunig (ed.), *v. Münch/Kunig Grundgesetz. Kommentar*. 6th edn., Vol. 2, C. H. Beck: München 2012, at mn. 44; different view: Calliess, C., *Staatsrecht III Bezüge zum Völker- und Europarecht*, C. H. Beck: München 2014, at p. 111.

²⁴ Federal Constitutional Court, Judgement of 22 November 2001, 2 BvE 6/99, ECLI:DE:BVerfG:2001:es20011122.2bve000699, BVerfGE 104, 151 (194); Pieper, S. U., Art. 59. In: V. Epping and C. Hillgruber (eds.), *beck-online Grundgesetz. Kommentar*. 42th edn., C. H. Beck: München 2019, at mn. 39.

²⁵ Kempen, B., Art. 59. In: P. M. Huber and A. Voßkuhle (eds.), *v. Mangoldt/Klein/Starck Grundgesetz. Kommentar*. 7th edn., Vol. 2, C. H. Beck: München 2018, at mn. 60.

²⁶ Kempen, B., Art. 59. In: P. M. Huber and A. Voßkuhle (eds.), *v. Mangoldt/Klein/Starck Grundgesetz. Kommentar*. 7th edn., Vol. 2, C. H. Beck: München 2018, at mn. 81; Geiger, R. speaks of a double function, see himself, *Staatsrecht III*. 7th edn., C. H. Beck: München 2018, at p. 163.

²⁷ Geiger, R., *Staatsrecht III*. 7th edn., C. H. Beck: München 2018, at p. 168; Sauer H., *Staatsrecht III Auswärtige Gewalt, Bezüge des Grundgesetzes zu Völker- und Europarecht*. 5th edn., C. H. Beck: München 2018, at p. 90.

²⁸ Pieper, S. U., Art. 59. In: V. Epping and C. Hillgruber (eds.), *beck-online Grundgesetz. Kommentar*. 42th edn., C. H. Beck: München 2019, at mn. 39.

²⁹ Heun, W., Art. 59. In: H. Dreier (ed.), *Grundgesetz. Kommentar*. 3rd edn., Vol. 2, Mohr Siebeck: Tübingen 2015, at mn. 27; Rojahn, O., Art. 59. In: P. Kunig (ed.), *v. Münch/Kunig Grundgesetz. Kommentar*. 6th edn., Vol. 2, C. H. Beck: München 2012, at mn. 20 et seq.

³⁰ Kempen, B., Art. 59. In: P. M. Huber and A. Voßkuhle (eds.), *v. Mangoldt/Klein/Starck Grundgesetz. Kommentar*. 7th edn., Vol. 2, C. H. Beck: München 2018, at mn. 37.

and duties for individuals only if the treaty has been approved by the legislature. The requirement of approval is also designed to prevent important treaties from being concluded with foreign states if they cannot be fulfilled due to a lack of the required endorsement by the legislative power (*Zweck der Vollzugssicherung*).³¹

With this in mind, I would like to come back to the aforementioned three key jurisdictions of the FCC that dealt intensively with the relation and correlation of international law and German national law. First the so-called “Treaty Override” jurisdiction which dates from 2015, second the “NATO Strategy” case of 2001 and finally the judgement on so-called “Exclusion of right to vote for adults under full guardianship” of 2019.

5.2 Treaty Override

The Treaty Override jurisdiction concerns a judicial referral of the Federal Court of Finance (FCF) from 10 January 2012. The FCF was confronted with a case of two spouses who earned income from employment in both Turkey and Germany. In general, the “Agreement for the Avoidance of Double Taxation with respect to Taxes on Income and Capital” (*Abkommen zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern von Einkommen und vom Vermögen*) from 1985 between Turkey and Germany stipulates that the income earned in Turkey is only taxable in Turkey and is exempt from tax in Germany. Though a subsequent ordinary federal law by the German legislator – Section 50 d, paragraph 8, sentence 1, of the Income Tax Act (*Einkommensteuergesetz*) 2002 – requires proof that taxes were actually paid abroad in order to be exempted from tax in Germany. After the two spouses failed to provide proof, the tax office levied tax on their entire income. The couple objected to this and pointed out that Section 50 d, paragraph 8, sentence 1, of the Income Tax Act violated the double taxation agreement. More abstractly, a federal law was claimed to contradict an international treaty. Thus, the FCF raised the question to the Constitutional Court, whether the national legislator was bound by international treaties or not. By doing so, it focused on the principle of openness to international law.

In its jurisdiction, the FCC came to several fundamental conclusions. First of all, on the basis of Article 59, paragraph 2, sentence 1, of the Basic Law it is explained that international treaties and their act of approval have the rank of ordinary federal law.³² As a consequence subsequent (contradicting) federal statutes in accordance with the principle of *lex posterior derogate legi priori* can supersede them.³³ That means: “A later law repeals an earlier law”. Article 59,

³¹ Kempen, B., Art. 59. In: P. M. Huber and A. Voßkuhle (eds.), v. *Mangoldt/Klein/Starck Grundgesetz. Kommentar*. 7th edn., Vol. 2, C. H. Beck: München 2018, at mn. 37; Streinz, R., Art. 59. In: M. Sachs (ed.), *Grundgesetz. Kommentar*. 8th edn., C. H. Beck: München 2018, at mn. 21.

³² Federal Constitutional Court, Decision of 15 December 2015, 2 BvL 1/12, ECLI:DE:BVerfG:2015:ls20151215.2bvl000112, BVerfGE 141, 1 (1), guiding principle no. 2.

³³ Federal Constitutional Court, Decision of 15 December 2015, 2 BvL 1/12, ECLI:DE:BVerfG:2015:ls20151215.2bvl000112, BVerfGE 141, 1 (1), guiding principle no. 3.

paragraph 2, sentence 1, of the Basic Law does not limit the applicability of the principle of *lex posterior* in relation to international treaties.

What is the result of this principle in this particular case? The legislator was allowed to enact Section 50 d, paragraph 8, of the Income Tax Act although it contradicted the double taxation agreement between Germany and Turkey. More abstractly speaking, the legislator can enact a federal law which contradicts the act of approval and thus the international treaty behind the act.

This is in fact a violation of international law at the same time.³⁴ As the act of approval is an ordinary federal law, it has no protection against repeal. The reasons for this override can be found in the Basic Law itself. The principle of democracy in Article 20, paragraph 1 and 2, of the Basic Law and the principle of parliamentary discontinuity (*Grundsatz der parlamentarischen Diskontinuität*) imply that, in accordance with the will of the people expressed through elections, subsequent legislatures must be able to revise legislative acts undertaken by earlier legislatures.³⁵ It would be incompatible with the concept of parliamentary discontinuity if a parliament could bind subsequent legislatures during later parliamentary terms and limit their ability to rescind or correct past legislative decisions.

After the FCC had determined that Section 50 d, paragraph 8, of the Income Tax Act was indeed in violation of the international treaty between Germany and Turkey, it had to deal with the issue whether this violation of international law triggers an unconstitutionality of this provision.³⁶ As a result, the FCC is of the opinion that even the recourse to the principle of openness to international law and the rule of law cannot provide a basis for establishing the unconstitutionality of statutes that violate international law.³⁷

According to this, the principle of openness to international law does not entail an unreserved constitutional duty to comply with all international treaties. Furthermore, if a treaty override were in contradiction to the principle of the rule of law and thus be unconstitutional, international treaties would take precedence over ordinary federal law, which, however, would contradict the concept of the Basic Law according to Article 25, paragraph 2, and Article 59, paragraph 2, sentence 1, of the Basic Law.³⁸

³⁴ Schwenke, M. deals with the question of the relation between “Treaty Override” and the democratic principle: see himself, *Treaty Override im Lichte des Demokratieprinzips. Offenes und verdecktes Treaty Override: Was ist geklärt, was offen?* In: *Deutsches Steuerrecht* 44 (2018) pp. 2310-2314 at p. 2311.

³⁵ Federal Constitutional Court, Decision of 15 December 2015, 2 BvL 1/12, ECLI:DE:BVerfG:2015:ls20151215.2bvl000112, BVerfGE 141, 1 (1), guiding principle no. 3.

³⁶ On the question of the constitutionality of a Treaty Override in Switzerland in comparison with German case law: Weigel, J., and Goerlich, M., *Treaty Override verfassungsgemäß? Der Beschluss des BVerfG vom 15.1.2015 im Lichte des Urteils des schweizerischen Bundesgerichts vom 26.11.2015*. In: *Internationales Steuerrecht* 18 (2017) pp. 772-774.

³⁷ Federal Constitutional Court, Decision of 15 December 2015, 2 BvL 1/12, ECLI:DE:BVerfG:2015:ls20151215.2bvl000112, BVerfGE 141, 1 (1, 33), guiding principle no. 4 and at para. 80.

³⁸ Federal Constitutional Court, Decision of 15 December 2015, 2 BvL 1/12, ECLI:DE:BVerfG:2015:ls20151215.2bvl000112, BVerfGE 141, 1 (33), at para. 80.

Even though international law does not preclude domestic effectiveness of legal acts that violate international law, this does not mean that the resulting violation is insignificant.³⁹ If a state violates its obligations under an international treaty, the other contracting state or states can respond to the breach of treaty in a number of ways.⁴⁰

5.3 NATO Strategy

In the year 2001 the FCC dealt with a legal question concerning the North Atlantic Treaty Organization (NATO), which is, according to the case-law of the FCC a system of mutual collective security pursuant to Article 24, paragraph 2, of the Basic Law.⁴¹ The NATO is not only a defence alliance,⁴² but also a military-political organisation of 29 European and North American Member States with the goal of security and global stability.⁴³ The NATO is based on the North Atlantic Treaty, which is an international treaty. At the Washington Summit in 1999 the Heads of State and Government adopted a new NATO strategic concept.⁴⁴ The question arose as to whether the elaboration of the new strategy falls within the scope of the North Atlantic Treaty or not. A parliamentary group of the German Parliament, the *Bundestag*, considered that the new strategy included an amendment to the North Atlantic Treaty.⁴⁵ As a result, they demanded a new approval of the *Bundestag* in the form of an act of approval.⁴⁶ At the same time, the opposing opinion argued that the new strategy was not a treaty amendment and that it falls within the scope of the North Atlantic Treaty, thus an act of approval was redundant.⁴⁷

³⁹ Federal Constitutional Court, Decision of 15 December 2015, 2 BvL 1/12, ECLI:DE:BVerfG:2015:ls2015121 5.2bvl000112, BVerfGE 141, 1 (25), at para. 63.

⁴⁰ Federal Constitutional Court, Decision of 15 December 2015, 2 BvL 1/12, ECLI:DE:BVerfG:2015:ls2015121 5.2bvl000112, BVerfGE 141, 1 (25), at para. 63.

⁴¹ Federal Constitutional Court, Judgement of 12 July 1994, 2 BvE 3/92 et al., BVerfGE 90, 286 (347 et seq.), at para. 234; Judgment of 22 November 2001, 2 BvE 6/99, ECLI:DE:BVerfG:2001:es20011122.2bve000699, BVerfGE 104, 151 (209), at para. 152; Judgment of 3 July 2007, 2 BvE 2/07, ECLI:DE:BVerfG:2007:es200707 03.2bve000207, BVerfGE 118, 244 (261), at paras. 47 et seq.; Streinz, R., Art. 24. In: M. Sachs (ed.), *Grundgesetz. Kommentar*. 8th edn., C. H. Beck: München 2018, at mn. 62; Rojahn, O., Art. 24. In: P. Kunig (ed.), v. *Münch/Kunig Grundgesetz. Kommentar*. 6th edn., Vol. 2, C. H. Beck: München 2012, at mn. 53.

⁴² Federal Constitutional Court, Judgement of 22 November 2001, 2 BvE 6/99, ECLI:DE:BVerfG:2001:es200111 22.2bve000699, BVerfGE 104, 151 (173), at para. 71.

⁴³ Federal Constitutional Court, Judgement of 22 November 2001, 2 BvE 6/99, ECLI:DE:BVerfG:2001:es200111 22.2bve000699, BVerfGE 104, 151 (160), at paras. 35 et seq.

⁴⁴ Further information: Sauer, H., Die NATO und das Verfassungsrecht: neues Konzept – alte Fragen. In: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 62 (2002) pp. 317-346 at pp. 318-320.

⁴⁵ Federal Constitutional Court, Judgement of 22 November 2001, 2 BvE 6/99, ECLI:DE:BVerfG:2001:es200111 22.2bve000699, BVerfGE 104, 151 (169); detailed background: Sauer, H., Die NATO und das Verfassungsrecht: neues Konzept – alte Fragen. In: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 62 (2002) pp. 317-346.

⁴⁶ Federal Constitutional Court, Judgement of 22 November 2001, 2 BvE 6/99, ECLI:DE:BVerfG:2001:es200111 22.2bve000699, BVerfGE 104, 151 (169), at para. 64.

⁴⁷ Federal Constitutional Court, Judgement of 22 November 2001, 2 BvE 6/99, ECLI:DE:BVerfG:2001:es200111 22.2bve000699, BVerfGE 104, 151 (202), at paras. 139 et seq.

In this case, the arising question of how far an international organisation may extend its competences without having to obtain the consent of the parliament again, had to be examined more closely. In its ruling, the FCC came to the conclusion that the new strategy was neither an explicit nor an implied amendment to the NATO treaty. It was just a further development of the treaty.⁴⁸ From this point of view, there was no need for renewed approval by the parliament under Article 59, paragraph 2, of the Basic Law.⁴⁹

However, the further development of a system of mutual collective security may not exceed the authorisation given under the act of approval and the constitutional scope of Article 24, paragraph 2, of the Basic Law.⁵⁰ It can therefore be concluded from this decision that, in principle, international organisations shall apply within the framework of their original authorisation. However, according to the interpretation of the FCC, these organisations can, to a certain extent, develop their own dynamics. It allows an extension beyond the given authorisation without the need for prior domestic consent.⁵¹

Here, reference can be made to the so-called “implied powers doctrine”. According to this doctrine, competences of international organisations laid down in the founding treaties must be interpreted in such a way that they also contain the unwritten competences, provided that without the unwritten competences, the written competences could not be applied meaningfully. Thus, the doctrine opened the way to implied competences, so that international organisations based on international treaties are able to carry out their tasks adequately. The decision on the NATO strategy goes in the same direction, but goes even further, because it does not merely concern an extension of given competences, but rather an expansion of the previously not given range of tasks.

5.4 Exclusion of Right to Vote (for Adults under Full Guardianship)

Finally, in a recent ruling the FCC decided that Section 13, paragraph 2, of the Federal Electoral Act (*Bundeswahlgesetz*) was unconstitutional.⁵² The statute regulates the exclusion of voting rights for persons under full guardianship, which means that to these persons a supervisor has been appointed in all matters not only by temporary injunction.

Complaints were not only raised concerning fundamental rights, but also with regard to a violation of international law. Next to the evaluation of the violation of the European

⁴⁸ Federal Constitutional Court, Judgement of 22 November 2001, 2 BvE 6/99, ECLI:DE:BVerfG:2001:es20011122.2bve000699, BVerfGE 104, 151 (199), at para. 133.

⁴⁹ Federal Constitutional Court, Judgement of 22 November 2001, 2 BvE 6/99, ECLI:DE:BVerfG:2001:es20011122.2bve000699, BVerfGE 104, 151 (198), at paras. 131 et seq.

⁵⁰ Federal Constitutional Court, Judgement of 22 November 2001, 2 BvE 6/99, ECLI:DE:BVerfG:2001:es20011122.2bve000699, BVerfGE 104, 151, guiding principle no. 3.

⁵¹ For a comprehensive discussion of the judgement cf. Sauer, H., Die NATO und das Verfassungsrecht: neues Konzept – alte Fragen. In: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2 (2002) pp. 317-346.

⁵² Federal Constitutional Court, Decision of 29 January 2019, 2 BvC 62/14, ECLI:DE:BVerfG:2019:cs20190129.2bvc006214, BVerfGE 151, 1.

Convention on Human Rights (ECHR), the FCC also examined Article 25 lit. b, of the International Covenant on Civil and Political Rights (ICCPR), and Article 29 lit. a, of the Convention on the Rights of Persons with Disabilities (CRPD). The federal legislature approved these provisions under Article 59, paragraph 2, of the Basic Law, so as already explained, they have the rank of a federal law.

After the FCC takes constitutional violations into account, it then reviews the statute for a possible violation of obligations under the aforementioned international law.⁵³ Here, it comes to the conclusion that the Basic Law must at all times be interpreted in a manner compatible with international law.

However, the provisions of international law that have now been reviewed do not go beyond the constitutional requirements. Although they only have the rank of a federal law, the above-mentioned international treaties serve significance as an aid to interpretation in determining the content and scope of the fundamental rights and constitutional principles of the Basic Law. Their consideration is an expression of the Basic Law's openness to international law, so that the Basic Law is to be interpreted, as far as possible, in such a way that no conflict arises with obligations of the Federal Republic of Germany under international law. The possibility of an interpretation that is open to international law ends where it no longer appears justifiable according to the recognised methods of interpreting the law and the interpretation of the constitution. However, if this is not the case, the German courts are obliged to give priority to an interpretation in accordance with the Convention or the Treaty.

With regard to the ECHR, the use of international law also applies to the judgments of the European Court of Human Rights (ECtHR), even if they do not concern the same subject matter in dispute.⁵⁴ The use of the case-law of the ECtHR as an aid to interpretation at the level of constitutional law makes it possible to ensure that the guarantees of the ECHR are fully applicable in the Federal Republic of Germany.⁵⁵

What emerges from this judgment is that although international treaties are only federal law under national law, they nevertheless occupy such an important position that its applicability approximates to the general rules in terms of Article 25 of the Basic Law.

⁵³ Federal Constitutional Court, Decision of 29 January 2019, 2 BvC 62/14, ECLI:DE:BVerfG:2019:cs20190129. 2bvc006214, BVerfGE 151, 1 (26-37), at paras. 60-82.

⁵⁴ Federal Constitutional Court, Decision of 29 January 2019, 2 BvC 62/14, ECLI:DE:BVerfG:2019:cs20190129. 2bvc006214, BVerfGE 151, 1 (28), at para. 64.

⁵⁵ Federal Constitutional Court, Decision of 29 January 2019, 2 BvC 62/14, ECLI:DE:BVerfG:2019:cs20190129. 2bvc006214, BVerfGE 151, 1 (28), at para. 64.

6 The Russian Federation and the Concept of Monism in the Development of the Case Law of the Constitutional Court of the Russian Federation

Vadim Vaulin

The correlation between international and national law is still one of the key problems in contemporary international legal theory. However, the classical “monism-dualism” dichotomy is criticized in our present reality. The fact that legislative regulation in “particular states can’t cover the full diversity of international law practice, reflect the current external and internal political priorities and doesn’t take in account reciprocity” is a premise to search for flexible solutions to the highlighted problem.¹ Therefore national legal orders are determined to customize the general approach to establishing borders in relation between international and national law. There also exist more radical assessments about using the general approach to solve this problem: it has been suggested that “monism and dualism should cease to exist as doctrinal and theoretical concepts for discussing the relation between national and international law; maybe they can be useful for comparison, or for more open and more indecisive political attitude to international law”.² Either way “contemporary practice doesn’t show any general agreement between states about international law's supremacy in national legal orders”.³

Until recently, the Russian Federation could be described as monist state because Article 15, paragraph 4, of the Russian Constitution states that universally recognized principles and rules of international law and international treaties to which Russian Federation is a party constitute an integral part of its legal system, and consolidates supremacy of international law over national legislation. On the other hand, it is established in Article 15, paragraph 1, of the Constitution that laws and other legal statutes enacted in the Russian Federation may not be at variance with the Russian Constitution. In a formal sense it is unclear whether international treaties should be considered as a “law or other legal statute” within the meaning Article 15, paragraph 1, (then the Constitution will be supreme) or we need to consider the Constitution as law within the meaning of Article 15, paragraph 4 (then international treaties will be supreme).⁴

In the past this question was answered clearly in favour of international treaty supremacy and the Russian Federation was classified as monist state. However, to better understand the Russian Federation’s contemporary relation to the place of international law in the hierarchical

¹ Ispolinov, A. S., Issues of relationship of international and domestic law in the judgments of the Constitutional Court of the Russian Federation. In: *Russian Juridical Journal* 2017, No. 1, at p. 75; see also the contribution of Horn, H.-D., International and Constitutional Law Doctrines on the Correlation between National and International Law. In this volume, Chapter 1, pp. 7-21.

² Von Bogdandy, A., Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law. In: *International Journal of Constitutional Law* 6 (2008) pp. 397-413 at p. 400.

³ Ispolinov, A. S., Issues of relationship of international and domestic law in the judgements of the Constitutional Court of the Russian Federation. In: *Russian Juridical Journal* 2017, No. 1, at p. 74.

⁴ Budylin, S. L., Convention or Constitution? International Law and Limits of State Sovereignty. In: *Zakon [Law]* 2013, No. 12, at p. 65.

structure of national law we need to overlook some basic provisions that were formulated by the Supreme Court of the Russian Federation.

In our case it is interesting to look into two Supreme Court's rulings that clarify the use of international law in the national jurisdiction. According to paragraph 5 to the decision of the Plenum of the Supreme Court "About some questions of applying the Russian Constitution by courts in the administration of justice"⁵ "courts need to understand that universally recognized principles and rules of international law and international treaties to which Russian Federation is a party constitute an integral part of its legal system". This provision duplicates Article 15, paragraph 4, of the Constitution and doesn't provide any new information, but afterwards the Supreme Court developed this provision and stated "that the courts are prohibited from applying rules that govern legal relationships if the international treaty of which the Russian Federation is a party and if that treaty is enacted by the federal law that binds the Russian Federation contains different provisions unlike the national law". This developed provision refers to the Federal Act "About Russian Federation's international treaties" that develops Article 15, paragraph 4, of the Constitution.

We can note that by this provision the Supreme Court confirmed the legal mechanism that allows to check international treaties for compliance with the national legal system. The same position was confirmed in another Supreme Court's ruling "About the usage of universally recognized principles and rules of international law and international treaties to which Russian Federation is a party by general courts".⁶ Paragraph 3 of the ruling clarifies that the provisions of international treaties to which Russian Federation is a party about obligations for participant states to make changes in the national law require to enact relevant legal acts in the national legal system. The Supreme Court also points out that the Russian Federation's acceptance of these obligations must be expressed in form of a federal law. The Supreme Court also states that international treaties that were accepted without the form of federal law are supreme to bylaws (sub-decree acts).

We need to note that this overview doesn't clearly answer the question about the place of international law in the national legal system of the Russian Federation. But we can try to answer this question by analysing the activity of the Constitutional Court of Russian Federation that can check the compliance of international treaties which are not yet in force with the Constitution within the meaning of Article 125, paragraph 2, littera d, of the Constitution. Therefore, the Constitutional Court is competent to formulate legal provisions about the relation of international and national law. In this sense we can overlook some of the Constitutional Court's rulings which contain some arguments about the problem that we consider. In our case we can analyse rulings about the compliance of Marrakesh Protocol to the General Agreement

⁵ Ruling of the Plenum of the Supreme Court of the Russian Federation "About some questions of applying the Russian Constitution by courts in the administration of justice", 30 October 1995, No. 8.

⁶ Ruling of the Plenum of the Supreme Court of the Russian Federation "About the usage of universally recognized principles and rules of international law and international treaties to which Russian Federation is a party by general courts", 10 October 2003, No. 5.

on Tariffs and Trade (GATT) of 1994 (hereinafter the ruling No. 17-P)⁷ and the compliance of the international treaty between the Russian Federation and the Republic of Crimea (hereinafter the ruling No. 6-P)⁸.

After analysing ruling No. 17-P from 2012 we can note that the Constitutional Court justifies the need for the ratification procedure because Russia's national legal system is built on the provisions of the Constitution of the Russian Federation. The Constitutional Court also states that the national legal system also provides a mechanism to check the compliance of the federal laws that were enacted within the ratification procedure of a specific international treaty. The goal of this compliance check within the procedure of constitutional control is to determine to what extent the international treaty ensures respect for rights and freedoms and whether it violates any foundations of the constitutional order. The Constitutional Court states that "because the national legal system is based on the supremacy of the Constitution, provisions of an international treaty that are contrary to the provisions of the Constitution can't be applied; otherwise, it would be contrary to the constitutional principles of people's authority and sovereignty of the Russian Federation and also contrary to the requirements of paragraph 1 of article 15 of the Constitution".

This position was confirmed in the ruling No. 6-P of 2014: "An international treaty which is not yet in force can be ratified if the Constitutional Court will recognize its compliance to the Constitution and the ratification procedure is an indispensable condition for an international treaty to attain legal force". The Constitutional Court also reminds that only it is competent to check international treaty's compliance (conformity) with the Constitution and recognize its compliance if there is no contradiction.

Therefore, we can confirm that ratification procedure provided by the national legislation is a mechanism that allows to apply the Constitution as a basis for answering the question of the place of international treaties in the hierarchy of the national legal system. The decision of implementing a specific international treaty in the national legal system is based on whether the treaty is compliant to the provisions of the Constitution.

We can add that the confirmation of the Russian Federation's new course to a more customized general approach to the relation of international and national law can be found in the latest Constitutional Court's rulings; for example, in the ruling No. 21-P from 2015⁹ that included similar arguments. In this ruling the Constitutional Court clarifies that "because of the provisions of the Constitution that provide Russian Federation's sovereignty, the supremacy of the Constitution and the restriction to implement those international treaties that can limit rights and freedoms or violate any foundations of the constitutional order or those treaties that obligate

⁷ Constitutional Court of the Russian Federation, Judgement of 9 July 2012, No. 17-P. URL: <http://www.ksrf.ru/en/Decision/Judgments/Documents/2012%20July%209%2017-P.pdf>.

⁸ Constitutional Court of the Russian Federation, Judgement of 19 March 2014, No. 6-P. URL: <http://www.ksrf.ru/en/Decision/Judgments/Documents/Resume19032014.pdf>.

⁹ Constitutional Court of the Russian Federation, Judgement of 14 July 2015, No. 21-P. URL: <http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-%D0%9F.pdf>.

to change national legislation don't abolish the supremacy of the Constitution for the Russian Federation; and therefore international treaties can be applied with taking the supremacy of the Constitution into account”.

The Constitutional Court also formulates a provision that allows the Russian Federation to be excused from complying with its obligations that are linked to the participation in an international treaty on an exceptional basis, if principles and rules of the Constitution are violated from the constitutional point of view and when this decision is the only way to avoid these violations.

The Constitutional Court confirms that the Russian Federation is obligated to ensure supremacy of the Constitution and in every occasion, when a conflict in this sphere occurs, Russia needs to favour the provisions of the Constitution even if the state is bound with an international treaty.

The analysis presented helps to understand the tendency of the Russian Federation's withdrawal from the strict monism concept. The basic regulations of the Supreme Court's rulings were customized by the Constitutional Court that was able to formulate some arguments about the Constitution's supremacy thanks to specific political and legal reasons.

But it is also crucial to understand that the answer to the relation between international and national law in Russian Federation isn't definitive: The Constitutional Court didn't argue about the supremacy of universally recognized principles and rules of international law. Thus, we can point out since the Constitutional Court doesn't answer the question about the compliance of universally recognized principles and rules of international law with the Constitution we can accept that Article 15, paragraph 4, of the Constitution states supremacy for them.

From our point of view this provides confirmation that the strict “monism-dualism” dichotomy is irrelevant nowadays and that there is a global tendency of customizing the general approach to the relation between international and national law.

7 The Scope of International Organisation Law within the Legal Framework of the European Union according to the Case Law of the CJEU

Leonhard Graf

First, I will outline the relationship between the Charter of the United Nations (UN Charter) and the European Union (EU) legal order from the view of the Court of Justice of the European Union (CJEU) as presented in the Kadi cases. Then I will discuss the applicability of the law of the World Trade Organization (WTO) in the EU on the basis of the Nakajima and Fediol decisions of the CJEU.

7.1 Relationship between the EU Law and the Law of the United Nations

7.1.1 Background of the *Kadi* Cases

In 1990, the United Nations Security Council (UNSC) adopted the Resolution 1267 against Afghanistan, which attempted to force the Taliban to allow the prosecution of Osama Bin Laden. The Council of the EU then implemented the resolution by adopting Common Position 1999/727/CFSP and Council Regulation EC 337/2000, according to which Taliban funds were frozen within the EU.¹ Next, UNSC Resolution 1333 provided for the establishment of a list of persons and organisations/entities associated with the Taliban. This resolution was also implemented into the EU by Council Common Position 2001/154/CFSP and Regulation EC 467/2001. As a result, the financial resources of the listed individuals or organisations suspected of supporting Osama Bin Laden or the Taliban, have been frozen.² In 2001, Regulation (EC) 467/2001 was adopted, repealing Regulation (EC) 337/2000 and banning the export of certain goods and services to Afghanistan and further extending the freeze of funds and other financial resources in respect of the Taliban.³ Yassin Abdullah Kadi, a Saudi Arabian businessman, was added to the list by later Regulation EC 2062/2001.

It should be noted that EU regulations are directly applicable within the legal sphere of Member States and therefore do not need any additional transformation act of national law. Therefore, when Mr. Kadi was placed on the EU sanction list, his accounts and funds within the EU were frozen.⁴ And I would like to point out that Articles 3 and 4 of the UN Charter only provide the possibility of states joining the UN, thus the EU itself is not a member of the UN.⁵

¹ Feinäugle, C., Kadi Case. In: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*. Vol. VI, Oxford University Press: New York 2012, pp. 557-563 at p. 557.

² *Ibid.*, at p. 557.

³ CJEU, Judgement of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, at para. 18.

⁴ Kokott, J., and Sobotta, C., The Kadi Case – Constitutional Core Values and International Law – Finding the Balance? In: *The European Journal of International Law* 23 (2012) pp. 1015-1024 at p.1016.

⁵ Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 401.

7.1.2 *Kadi I*

Mr. Kadi requested the annulment of the regulation adding him to the list on the basis of the breach of fundamental rights.⁶ His appeal included the question whether the implementing act of the Council of the EU would be at all reviewable by a European court, since it is the mere implementation of an UNSC Resolution.⁷ In this respect, this case is of relevance when assessing the relationship between UN law and EU law from the perspective of the CJEU.

7.1.2.1 General Court (Court of First Instance)

The former Court of First Instance (CFI) – which is meanwhile called the General Court (EGC) – ruled that it was unable to review the Regulations EC 467/2001 and EC 2062/2001 on the basis of European law and that it had no authority to call its lawfulness – even indirectly – into question.⁸ The judgement was based on the following crucial argument: The obligations of EU Member States under the UN Charter claim to take precedence over all other obligations under international law and therefore also over the obligations under the EU Treaty.⁹ The EGC justified this decision by referring to Article 103 of the UN Charter, which states that the UN Charter and all actions associated with it, such as UN resolutions and the obligation to implement them, take precedence over other international treaties.¹⁰ Herewith, the EGC also referred to Article 351 and Article 347 of the Treaty on the Functioning of the European Union (TFEU), former Articles 307 and 297 of the Treaty of the European Community.¹¹ According to its wording, Article 351 TFEU gives priority to the obligations arising from treaties concluded before the founding of the European Community in 1958. Article 347 TFEU allows Member States to carry out obligations they accepted for the purpose of maintaining peace and international security.

Furthermore, the EGC states that the EU itself is not directly bound to the UN Charter, but only, like the Member States, the EU is bound to the UN Charter by virtue of the European Community Treaty.¹² In this respect, the EGC hold that the EU should not violate the

⁶ Cuyvers, A., The Kadi II Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States. In: *European Constitutional Law Review* 7 (2011) pp. 481-510 at p. 483.

⁷ Von Bogdandy, A., and Smrkolj, M., European Community and Union Law and International Law. In: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*. Vol. III, Oxford University Press: New York 2012, pp. 828-839 at p. 836.

⁸ EGC, Judgement of 21 September 2005, *Kadi v. Council*, T-315/01, ECLI:EU:T:2005:332, at para. 221; see also Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 402.

⁹ Cuyvers, A., The Kadi II Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States. In: *European Constitutional Law Review* 7 (2011) pp. 481-510 at p. 484.

¹⁰ Lenaerts, K., The Kadi Saga and the Rule of Law within the EU. In: *SMU Law Review* 67 (2014) pp. 707-715 at p. 709; EGC, Judgement of 21 September 2005, *Kadi v. Council*, T-315/01, ECLI:EU:T:2005:332, at para. 183.

¹¹ EGC, Judgement of 21 September 2005, *Kadi v. Council*, T-315/01, ECLI:EU:T:2005:332, at para. 196; Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 402.

¹² EGC, Judgement of 21 September 2005, *Kadi v. Council*, T-315/01, ECLI:EU:T:2005:332, at para. 192.

obligations of the Member States towards the UN Charter. Additionally, the EGC did not see the possibility of judicially reviewing the EU regulation, which was to implement the UN resolution on the basis of EU law, since the EU had no autonomous discretion when it adopted the regulation.¹³ In this respect, a hypothetical review of the regulation in the light of Community law would have also been a review of the UNSC resolution, something that the EGC decided was not possible, due to the relationship between the EU legal order and the UN legal order.¹⁴ Therefore, the EGC ruled that it had no jurisdiction to examine the regulation and its compatibility with the law of the EU respectively. It would only have the authority to review the UNSC Resolution in relation to a violation of *ius cogens*, since *ius cogens* binds all subjects of international law, including the UN.¹⁵ However, the Court did not find any violation of *ius cogens*.¹⁶

Mr. Kadi appealed against the EGC's decision to the European Court of Justice (ECJ) – nowadays the Court of Justice of the European Union (CJEU), where his case was taken under consideration along with the Al Barakaat International Foundation case.

7.1.2.2 Court of Justice of the European Union (European Court of Justice)

The CJEU decided to set aside the EGC's decision.¹⁷ The Court found that the EGC was wrong in considering that it had no legal authority to review the EU regulation for compatibility with EU law.¹⁸ First and foremost, since the EU is based on the rule of law, all acts of Member States or institutions of the EU are reviewable for their conformity with the EU Treaty.¹⁹ The autonomy of the EU legal system cannot be influenced in any way by an international agreement.²⁰ In contrast to the EGC, the Court found that it was not the resolution of the UNSC itself that was reviewable, but only the European act which intended to implement the international act.²¹ Moreover, it was not for the European jurisdiction to review an international agreement in relation to *ius cogens*.²² The fundamental relationship between the international legal order and the Union legal order did not exclude the juridical review of the regulation.²³

¹³ Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 403.

¹⁴ EGC, Judgement of 21 September 2005, *Kadi v. Council*, T-315/01, ECLI:EU:T:2005:332, at para. 5.

¹⁵ *Ibid.*, at para. 231.

¹⁶ *Ibid.*, at para. 8.

¹⁷ CJEU, Judgement of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, at para. 380.

¹⁸ Lenaerts, K., The Kadi Saga and the Rule of Law within the EU. In: *SMU Law Review* 67 (2014) pp. 707-715 at p. 710.

¹⁹ Feinäugle, C., Kadi Case. In: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*. Vol. VI, Oxford University Press: New York 2012, pp. 557-563 at p. 560.

²⁰ Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 408.

²¹ Kokott, J., and Sobotta, C., The Kadi Case – Constitutional Core Values and International Law – Finding the Balance? In: *The European Journal of International Law* 23 (2012) pp. 1015-1024 at p. 1016.

²² Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 409.

²³ *Ibid.*, at p. 409.

Furthermore, the CJEU emphasised that the European Commission must respect international law by implementing measures according to Chapter VII of the UN Charter. Thus, while implementing those measures, not only the wording of the resolution should be accounted for, but also its meaning must be respected.²⁴ However, this does not exclude the verifiability of the implementing act, since the UN Charter allows its Member States to choose between different models as far as the implementation is concerned.²⁵ In this respect, it is not about a decision without any discretion, but rather a separate act of the EU, which must be reviewable.²⁶

Additionally, the immunity of the implementing act from judicial review could also not be based on the EC Treaty. Within the legal order of the EU nothing outranks the fundamental rights that are defined in the legal order of the Community.²⁷ While the EGC referred to the principles laid down in Article 351 and Article 347 TFEU as justification for the precedence of international law, the CJEU stated that although these Articles would partly permit deviations from European primary law, they would under no circumstances allow a deviation from the fundamental freedoms that form and define the foundations of the EU.²⁸

Also contrary to what the EGC argued, judicial control could not be based on the UN Charter. Article 216, paragraph 2, of the TFEU has to be understood in the sense that it may allow an international agreement to have primacy over secondary law, but not over primary law. Interestingly, the CJEU hardly mentioned Article 103 of the UN Charter in its judgment.²⁹

Finally, the court considered the re-examination procedure of the UNSC. Although this procedure has recently been significantly improved, it could not exclude the verification of acts of the EU within the internal order of the Community, because at the time of the judgment it could not offer the same level of status and legal protection. The CJEU decided that it “must [...] ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures, which, like the regulation at issue, are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.”³⁰

²⁴ Cuyvers, A., The Kadi II Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States. In: *European Constitutional Law Review* 7 (2011) pp. 481-510 at p. 485.

²⁵ Feinäugle, C., Kadi Case. In: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*. Vol. VI, Oxford University Press: New York 2012, pp. 557-563 at p. 560.

²⁶ Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 409.

²⁷ Cuyvers, A., The Kadi II Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States. In: *European Constitutional Law Review* 7 (2011) pp. 481-510 at p. 485.

²⁸ CJEU, Judgement of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, at para. 303.

²⁹ Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 416.

³⁰ CJEU, Judgement of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, C-402/05 P and C-415/05 P, ECLI: ECLI:EU:C:2008:461, at para. 5.

In the end, the Court ruled that the fundamental rights of Mr. Kadi and Mr. Al Barakaat were violated and therefore it annulled the regulation that listed them on the sanction list. However, it was decided that the effect of the regulation would stay in affect for another three months.³¹

7.1.3 *Kadi II*

The main question concerning the Kadi II case is the standard of review, which the CJEU has to apply while reviewing acts of the EU implementations of UN sanctions.³²

Shortly after the decision of the CJEU in Kadi I, the European Commission decided to relist Mr. Kadi on the sanction list. Mr. Kadi then requested further information and, above all, evidence from the European Commission on the basis of why he was listed. However, the European Commission insisted that it was not obliged to disclose this information under the Kadi I judgement.³³ Mr. Kadi filed an action for annulment of his relisting.

7.1.3.1 General Court

The EGC upheld Mr. Kadi's claim and referred to the standard of review by the Kadi I jurisdiction, which is directed to a full review.³⁴ It should be noted, however, that the EGC first gave a detailed statement of reasons against the Kadi I judgement and questioned the applicability of the review standard in the event that the UN provides similar protection as the EU does.³⁵

7.1.3.2 Court of Justice of the European Union

The decision was then appealed by the European Commission, the Council of the European Union and the United Kingdom. They argued that the scope of the controls were too extensive. The main argument behind this was that, unlike the CJEU in the Kadi I judgement, they found a lack of discretion in the implementation of UNSC decisions.³⁶ Like the CJEU in the Kadi I

³¹ Cuyvers, A., The Kadi II Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States. In: *European Constitutional Law Review* 7 (2011) pp. 481-510 at p. 486.

³² Tzanakopoulos, A., Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ. In: *European Journal of International Law: Talk!*. Available at: <https://www.ejiltalk.org/kadi-showdown/> (Access: 25.02.2020).

³³ Tzanakopoulos, A., Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ. In: *European Journal of International Law: Talk!*. Available at: <https://www.ejiltalk.org/kadi-showdown/> (Access: 25.02.2020).

³⁴ EGC, Judgement of 30 September 2010, *Yassin Abdullah Kadi v. European Commission*, T-85/09, ECLI:EU:T:2010:418; Cuyvers, A., The Kadi II Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States. In: *European Constitutional Law Review* 7 (2011) pp. 481-510 at p. 490.

³⁵ EGC, Judgement of 30 September 2010, *Yassin Abdullah Kadi v. European Commission*, T-85/09, ECLI:EU:T:2010:418, at paras. 113-125; Cuyvers, A., The Kadi II Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States. In: *European Constitutional Law Review* 7 (2011) pp. 481-510 at p. 489.

³⁶ Tzanakopoulos, A., Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ. In: *European Journal of International Law: Talk!*. Available at: <https://www.ejiltalk.org/kadi-showdown/> (Access: 25.02.2020).

case, the applicants argued that they had no choice of model when implementing a UN Security Council measure and therefore a full review of its implementation would mean either abandoning their obligation under the UN Charter or disobedience to the CJEU.³⁷ However, the CJEU again, ruled in favour of Mr. Kadi that all acts of the EU should in principle be fully reviewable under the fundamental rights of the EU.³⁸

The emphasis on the autonomy of the EU legal order and the full juridical reviewability of all acts of the Members States and institutions of the EU, suggests that the CJEU considers the relationship between the UN legal order and the EU legal order to be strictly separate and in this respect pursues a dualist approach.

7.2 The Relationship between EU Law and WTO Law

7.2.1 Background

The general issue of the two cases of *Fediol*³⁹ and *Nakajima*⁴⁰ concerns whether international treaties have direct effect in the European legal order or whether they can be applied when reviewing the legality of Union acts. The term “direct effect”, in this context, asks if litigants can rely on international law agreements.⁴¹ In order to determine whether an international agreement has direct effect, the CJEU evaluates whether the agreement is directly binding on the Union and whether it confers rights on individual citizens, which they can invoke before a court.⁴² While examining the aforementioned, the CJEU often bases its decisions on the objective and purpose of the agreement.

The CJEU had to decide the first time if the General Agreement on Tariffs and Trade (GATT) has direct effect on the European legal order in the well-known *International Fruit Company* case.⁴³ In this case, the Court declined the direct effect of the GATT. While the GATT would have binding effects on the EU, it could not transfer subjective rights to the individual to rely on them.⁴⁴ The Court argued, that the GATT is based on the principle of negotiation and

³⁷ Tzanakopoulos, A., *Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ*. In: *European Journal of International Law: Talk!*. Available at: <https://www.ejiltalk.org/kadi-showdown/> (Access: 25.02.2020).

³⁸ CJEU, Judgement of 18 July 2013, *European Commission et al. v. Yassin Abdullah Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518; Cuyvers, A., *The Kadi II Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States*. In: *European Constitutional Law Review* 7 (2011) pp. 481-510 at p. 490.

³⁹ CJEU, Judgement of 22 June 1989, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, C-70/87, ECLI:EU:C:1989:254.

⁴⁰ CJEU, Judgement of 7 May 1991, *Nakajima All Precision Co. Ltd v. Council*, C-69/89, ECLI:EU:C:1991:186.

⁴¹ Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 329.

⁴² Ruiz Fabri, H., *Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?* In: *European Journal of International Law* 25 (2014) pp. 151-173 at p. 158.

⁴³ CJEU, Judgement of 12 December 1972, *Internationale Fruit Company NV et al. v. Produktschap voor Groenten en Fruit*, C-21/7, ECLI:EU:C:1972:115, at para. 21.

⁴⁴ Ruiz Fabri, H., *Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?* In: *European Journal of International Law* 25 (2014) pp. 151-173 at p. 158.

is characterised by the flexibility of its provisions and is therefore not suitable for transferring rights to individuals.⁴⁵

The establishment of the WTO in 1994 did not change this view of the CJEU. In the Portugal decision, the CJEU stated that the WTO commitments were still negotiable and that there was a lack of reciprocity towards the other WTO members regarding direct effect.⁴⁶ If the WTO agreement had a direct effect, the EU would obstruct the possibility of the use of its rights under Art. 22 of the Dispute Settlement Understanding (DSU).⁴⁷

While therefore WTO agreements do not have a direct effect, WTO rules can nevertheless have an effect within the legal order of the EU via the so-called principle of implementation, which were established by jurisdiction in the Fediol and Nakajima cases.

7.2.2 Fediol

Regulation 2641/84 permitted producers to complain to the European Commission about illegal trade practices of other WTO Member States.⁴⁸ The EEC Seed Crushers' and Oil Processors' Federation (Fediol) complained about the violations of GATT provisions by Argentina.⁴⁹ The Commission, however, decided not to take any actions. As a result, Fediol sued for annulment of the decision under Article 263 of the TFEU. Ultimately, the CJEU repeated that the GATT has no direct effect. However, in the Fediol case, the action was considered permissible on the grounds that the regulation itself refers directly to the GATT.⁵⁰ It was thus argued that, while the GATT itself had no direct effect, it could be transformed into the European legal order by an act of the EU.⁵¹

7.2.3 Nakajima

In the Nakajima decision, the European anti-dumping regulations were not in compliance with the anti-dumping measures found within the GATT Anti-Dumping Code.⁵² Here the CJEU again, found that the GATT had no direct effect and therefore individuals cannot directly evoke

⁴⁵ CJEU, Judgement of 12 December 1972, *International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit*, C-21/7, ECLI:EU:C:1972:115, at para. 21.

⁴⁶ CJEU, Judgement of 23 November 1999, *Portuguese Republic v. Council*, C-149/96, ECLI:EU:C:1999:574, at paras. 34-46.

⁴⁷ Von Bogdandy, A., and Smrkolj, M., European Community and Union Law and International Law. In: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*. Vol. III, Oxford University Press: New York 2012, pp. 828-839 at p. 834.

⁴⁸ Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 358.

⁴⁹ Errico, J., The WTO in the EU: Unwinding the Knot. In: *Cornell International Law Journal* 44 (2011) pp. 179-208 at p. 190.

⁵⁰ CJEU, Judgement of 22 June 1989, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, C-70/87, ECLI:EU:C:1989:254, at para. 21.

⁵¹ Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 358.

⁵² CJEU, Judgement of 7 May 1991, *Nakajima All Precision Co. Ltd v. Council*, C-69/89, ECLI:EU:C:1991:186, at paras. 1-10.

rights from it. However, the anti-dumping regulation was adopted explicitly by the EU to comply with the WTO obligation.⁵³ The regulation could therefore be examined for its compliance with the GATT Anti-Dumping Code.⁵⁴

The Fediol and Nakajima decisions can be generalised to the principle of implementation. The CJEU will review a legal act of the EU relating to WTO agreements, if the EU intended to implement an obligation under the WTO agreement or if the legal act in question directly refers to the WTO agreement.⁵⁵

⁵³ Ibid., at paras. 27-32.

⁵⁴ Errico, J., The WTO in the EU: Unwinding the Knot. In: *Cornell International Law Journal* 44 (2011) pp. 179-208 at p. 191.

⁵⁵ Eeckhout, P., *EU External Relations Law*. Oxford University Press: Oxford 2011, at p. 357.

8 Consideration of the ECHR in German and European Jurisprudence.

The Interplay of ECtHR, FCC, and CJEU

Kostja Peters

8.1 Introduction

The application of the European Convention on Human Rights (ECHR) in Germany and Europe is influenced by the existence of three different courts, all of which have the protection of fundamental rights as their shared objective: the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU) and the German Federal Constitutional Court (FCC). The following contribution will deal with the issue of how these “rival” courts interact with each other when interpreting the ECHR. For this purpose, a brief overview of the current handling of the ECHR in Germany and Europe will be given by looking at some of the fundamental decisions of these courts concerning the interpretation of the ECHR.

8.2 The Application of the ECHR in Germany

First, a view will be taken on how the ECHR is applied in Germany by describing some of the guidelines set up by the FCC in the so-called Görgülü-case¹. These guidelines outline the fundamental relationship between German law and the ECHR. In the further course it is then shown how these criteria are applied in a concrete case, taking as example the FCC case Caroline von Monaco².

8.2.1 The Federal Constitutional Court Case of Görgülü

In the Görgülü-case³, the complainant was the biological father of an illegitimate child adopted by foster parents. After the ordinary courts denied him the right of custody and contact and imposed on him a prohibition of contact for one year, the father turned to the ECtHR. The Court considered this to be a violation of his right to respect for private and family life under Article 8 of the ECHR.⁴ It justified its decision, among other things, with the insufficient

¹ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307.

² Federal Constitutional Court, Decision of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07, and 1 BvR 1626/07, ECLI:DE:BVerfG:2008:rs20080226.1bvr160207, BVerfGE 120, 180.

³ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307; see also Meyer-Ladewig, J., and Petzold, H., Die Bindung deutscher Gerichte an Urteile des EGMR – Neues aus Straßburg und Karlsruhe. In: *Neue Juristische Wochenschrift* 58 (2005) pp. 15-20; Sachs, M., Verfassungsrecht – Bezüge zum Völkerrecht. In: *Juristische Schulung* 45 (2005) pp. 164-167, both are reviewing this decision.

⁴ ECtHR, Judgement of 26 February 2014, *Görgülü v. Germany*, 74969/01.

examination of the state's obligation of family reunification by the national courts and with the disproportionate nature of the prohibition of contact for one year.⁵ Despite this ruling, the competent national Higher Regional Court continued to deny the father the right of custody and contact. The judges argued that a judgement of the ECtHR only binds the Federal Republic of Germany as a subject of international law, but not its courts. As a result, the complainant turned to the FCC claiming a violation of his fundamental right of protection of the family under Article 6, paragraph 1, of the Basic Law (*Grundgesetz*).⁶ The Court then had to determine whether and to what extent German courts were bound by the ECHR and ECtHR judgements.

First of all, the Court stressed that the ECHR is an international treaty which, by its implementation through a transformation law (pursuant to Article 59, paragraph 2, of the Basic Law [*Grundgesetz*]), has the rank of a simple federal law in Germany.⁷ In this respect, it is ranked below the constitution and a violation of the ECHR cannot be challenged directly at the Federal Constitutional Court.⁸ In some cases, however, this could lead to a conflict between Germany's obligations under international law and the application of national law.⁹ The Court emphasised that the international law-friendliness of the German constitution must be respected. Hence, the responsible state authorities must use the ECHR as an aid to interpreting the fundamental rights under constitutional law. However, the effects of the principle of openness to international law do not go beyond the framework of the democratic and constitutional system of the Basic Law (*Grundgesetz*), which means that the "last word" lies with the German constitution. Moreover, the ECHR cannot be used as an interpretation tool to restrict or reduce the level of protection offered by German fundamental rights (such a narrowing interpretation would also run counter the spirit of the ECHR).¹⁰

The FCC then turned to the question which legal effects decisions taken by the ECtHR have on the application and interpretation of German law. First of all, it found that, in general, decisions of the ECtHR refer only to the persons, time and subject matter of the proceedings brought before the ECtHR.¹¹ The affected state party is obliged to restore the Convention status

⁵ ECtHR, Judgement of 26 February 2014, *Görgülü v. Germany*, 74969/01, at paras. 46 and 50.

⁶ On the facts of the case see Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (308-313), at paras. 2-19.

⁷ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (316), at para. 31; cf. also Cammareri, R., Die Bedeutung der EMRK und der Urteile des EGMR für die nationalen Gerichte. In: *Juristische Schulung* 56 (2016) pp. 791-794 at p. 791.

⁸ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (317), at para. 32.

⁹ Ludwigs, M., and Sikora, P., Grundrechtsschutz im Spannungsfeld von Grundgesetz, EMRK und Grundrechtecharta. In: *Juristische Schulung* 57 (2017) pp. 385-393 at p. 387.

¹⁰ Cf. Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (317-318), at paras. 32-34.

¹¹ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (320), at para. 39.

as far as possible or to put an end to the continuing violation of the Convention. Thereby, the affected state party enjoys discretion of how to implement the human rights standard.¹²

In addition, the Court stated that all German state authorities, in principle, are bound by decisions of the ECtHR.¹³ These decisions are manifestations of the interpretation and development status of the ECHR; and as the ECHR has the rank of a federal law, it must be – due to the binding nature of law and statute – considered when state authorities, namely national courts apply national law.¹⁴ However, a schematic implementation of ECtHR judgements is not required. On the contrary, only awareness and consideration of the relevant case law in the decision-making process is needed.¹⁵ The national court may even diverge from the case-law of the ECtHR in cases where a violation of the Convention has already been established by the ECtHR and where this violation continues to exist. In this case, however, the courts must clearly consider the decision of the ECtHR and justify their divergence in a comprehensible manner.¹⁶ In particular, the effects on the national legal system must be considered and the ECtHR decision must be implemented in and brought into line with the national legal system as far as possible.¹⁷ Though, where there is scope for interpretation and consideration, priority must be given to an interpretation in accordance with the Convention.¹⁸ But if decisions of German courts are already final and absolute there is no obligation to eliminate court decisions which violate the Convention. If there is no legal possibility of retrial neither the ECHR nor the Basic Law (*Grundgesetz*) contain any provision which would allow to eliminate the legal force of judicial decisions.¹⁹

With regard to its own scope of review, the FCC stated, that it is called upon to prevent a violation of international law due to incorrect application of the ECHR by German courts. In

¹² Cf. Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (320-322), at paras. 40-44; also on this issue Ludwigs, M., and Sikora, P., Grundrechtsschutz im Spannungsfeld von Grundgesetz, EMRK und Grundrechtecharta. In: *Juristische Schulung* 57 (2017) pp. 385-393 at p. 387; Cammareri, R., Die Bedeutung der EMRK und der Urteile des EGMR für die nationalen Gerichte. In: *Juristische Schulung* 56 (2016) pp. 791-794 at pp. 791 and 792.

¹³ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (322-323), at paras. 45-46; in detail Cammareri, R., Die Bedeutung der EMRK und der Urteile des EGMR für die nationalen Gerichte. In: *Juristische Schulung* 56 (2016) pp. 791-794 at pp. 792-794.

¹⁴ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (323, 325-326), at paras. 47, 53.

¹⁵ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (329), at para. 62.

¹⁶ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (324), at para. 50.

¹⁷ Cf. also Cammareri, R., Die Bedeutung der EMRK und der Urteile des EGMR für die nationalen Gerichte. In: *Juristische Schulung* 56 (2016) pp. 791-794 at pp. 793 and 794.

¹⁸ Cf. Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (327, 329), at paras. 57, 62.

¹⁹ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (325-327), at paras. 52-56; cf. also Cammareri, R., Die Bedeutung der EMRK und der Urteile des EGMR für die nationalen Gerichte. In: *Juristische Schulung* 56 (2016) pp. 791-794 at p. 793.

this respect, it is possible to indirectly let the Federal Constitutional Court review the application and interpretation of international treaties (in particular the ECHR) by complaining about a violation of the equivalent national fundamental right in connection with the rule of law principle.²⁰

8.2.2 The Federal Constitutional Court Case of *Caroline v. Monaco*

How exactly German courts may implement the jurisprudence of the ECtHR in their decisions can nicely be seen in the FCC case of *Caroline v. Monaco*²¹. In this case, the complainant *Caroline v. Monaco* challenged the publication of photos in the yellow press. Previously, she had been only partially successful before the national courts and the FCC, whereupon she turned to the ECtHR. The ECtHR identified a violation of her right to respect of private life under Article 8 of the ECHR.²² Subsequently, the competent German Federal Court of Justice (*Bundesgerichtshof*) ruled in the final instance that the publishing of two of the three objected pictures violated her general right of privacy under Article 2, paragraph 1, in conjunction with Article 1, paragraph 1, of the Basic Law (*Grundgesetz*). Both, the publisher, who complained about a violation of its fundamental right of freedom of the press under Article 5, paragraph 1, of the Basic Law (*Grundgesetz*), and the complainant, i.e., *Caroline v. Monaco* appealed against this decision to the Federal Constitutional Court. Thereby, the complainant also considered the publication of the third photo to be a violation of her general personality rights and complained in particular about a disregard for the case-law of the ECtHR on Article 8 of the ECHR.

However, the FCC rejected both complaints. First, it balanced the publisher's right of freedom of the press under Article 5, paragraph 1, of the Basic Law (*Grundgesetz*) and the general right of personality of *Caroline v. Monaco* under Article 2, paragraph 1, in conjunction with Article 1, paragraph 1, of the Basic Law (*Grundgesetz*). The Court again clarified that the ECHR's guarantees must be taken into account when interpreting these fundamental rights, although they have the rank of a federal law.²³ As such Article 8 of the ECHR serves as a limitation of the right of freedom of the press (Article 5, paragraph 1, of the Basic Law [*Grundgesetz*]) within the meaning of Article 5, paragraph 2, of the Basic Law (*Grundgesetz*).²⁴ In addition, the Constitutional Court also stated that the freedom of opinion guaranteed in

²⁰ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (328-330), at paras. 60-63.

²¹ Federal Constitutional Court, Decision of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07 and 1 BvR 1626/07, ECLI:DE:BVerfG:2008:rs20080226.1bvr160207, BVerfGE 120, 180; in detail Hoffmann-Riem, W., *Die Caroline II-Entscheidung des BVerfG – Ein Zwischenschritt bei der Konkretisierung des Kooperationsverhältnisses zwischen den verschiedenen betroffenen Gerichten*. In: *Neue Juristische Wochenschrift* 62 (2009) pp. 20-29.

²² ECtHR, Judgement of 24 June 2004, *Hannover v. Germany*, 59320/00.

²³ Federal Constitutional Court, Decision of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07 and 1 BvR 1626/07, ECLI:DE:BVerfG:2008:rs20080226.1bvr160207, BVerfGE 120, 180 (199-201), at paras. 49, 52.

²⁴ Federal Constitutional Court, Decision of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07 and 1 BvR 1626/07, ECLI:DE:BVerfG:2008:rs20080226.1bvr160207, BVerfGE 120, 180 (200-201), at paras. 52, 53.

Article 10 of the ECHR is a restriction of the right of personality under Article 2, paragraph 1, in conjunction with Article 1, paragraph 1, of the Basic Law (*Grundgesetz*).²⁵

With regard to the concrete implementation of these measures, it must be kept in mind, however, that the competent non-constitutional courts have their own scope of interpretation when assessing the ECHR and ECtHR case-law.²⁶ Taking this into account, the FCC finally came to the conclusion that there largely had been no disregard or insufficient consideration of the relevant ECHR jurisprudence by the German Federal Court of Justice except the third photo of *Caroline v. Monaco* mentioned above.²⁷ In fact, the FCC pointed out, that the German Federal Court of Justice had mostly considered the relevant case-law of the ECtHR for the interpretation of Articles 5 and 8 of the ECHR. For example, it had referred to the particular importance of the freedom of the press, guaranteed in Article 10, paragraph 1, of the ECHR, with regard to reports which contribute to questions of public interest.²⁸ It had also used the distinction established by the ECtHR between politicians, other persons in public life and the ordinary private person and classified the complainant as another person in public life in accordance with the case-law of the ECtHR.²⁹ Finally, the FCC once again emphasised that the competent ordinary court may as well come to a different conclusion than the ECtHR in its assessment of the relevant case law of the ECtHR; this alone is not a sufficient reason for the Constitutional Court to correct a decision of the ordinary courts.³⁰

8.2.3 Conclusion

In summary it can be said that the decision of the FCC in the *Görgülü*-case was of particular importance. It significantly enhanced the relevance of the ECHR for the application and interpretation of national law in Germany.³¹ Before this decision, ECtHR judgements were

²⁵ Federal Constitutional Court, Decision of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07 and 1 BvR 1626/07, ECLI:DE:BVerfG:2008:rs20080226.1bvr160207, BVerfGE 120, 180 (202), at paras. 56, 57.

²⁶ Federal Constitutional Court, Decision of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07 and 1 BvR 1626/07, ECLI:DE:BVerfG:2008:rs20080226.1bvr160207, BVerfGE 120, 180 (208), at para. 71.

²⁷ Federal Constitutional Court, Decision of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07 and 1 BvR 1626/07, ECLI:DE:BVerfG:2008:rs20080226.1bvr160207, BVerfGE 120, 180 (218-223), at paras. 97-107.

²⁸ Federal Constitutional Court, Decision of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07 and 1 BvR 1626/07, ECLI:DE:BVerfG:2008:rs20080226.1bvr160207, BVerfGE 120, 180 (219-220), at paras. 100 and 101; thereto Hoffmann-Riem, W., *Die Caroline II-Entscheidung des BVerfG – Ein Zwischenschritt bei der Konkretisierung des Kooperationsverhältnisses zwischen den verschiedenen betroffenen Gerichten*. In: *Neue Juristische Wochenschrift* 62 (2009) pp. 20-29 at pp. 25, 26.

²⁹ Cf. Federal Constitutional Court, Decision of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07 and 1 BvR 1626/07, ECLI:DE:BVerfG:2008:rs20080226.1bvr160207, BVerfGE 120, 180 (218-219), at para. 99; thereto Hoffmann-Riem, W., *Die Caroline II-Entscheidung des BVerfG – Ein Zwischenschritt bei der Konkretisierung des Kooperationsverhältnisses zwischen den verschiedenen betroffenen Gerichten*. In: *Neue Juristische Wochenschrift* 62 (2009) pp. 20-29 at p. 25.

³⁰ Federal Constitutional Court, Decision of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07 and 1 BvR 1626/07, ECLI:DE:BVerfG:2008:rs20080226.1bvr160207, BVerfGE 120, 180 (210, 220), at paras. 76, 101.

³¹ C.f. Haug, T., *Die Pflicht deutscher Gerichte zur Berücksichtigung der Rechtsprechung des EGMR*. In: *Neue Juristische Wochenschrift* 71 (2018) pp. 2674-2677 at p. 2674, who also stresses the importance of the judgement of the FCC on preventive detention (Federal Constitutional Court, Judgement of 4 May 2011, 2 BvR 2365/09, ECLI:DE:BVerfG:2011:rs20110504.2bvr236509, BVerfGE 128, 326).

rather neglected. After the unmistakable instruction of the FCC to the Higher Regional Court, this practice had to change radically.³² One example of German courts taking greater account of the ECtHR jurisprudence is the case of *Caroline v. Monaco*, in which the FCC seeks to reconcile the ECHR and German law.³³ In the meantime, the ECHR and the decisions of the ECtHR have become an integral part of national jurisprudence as a result of several other important decisions of the FCC.³⁴ German courts are obliged to sufficiently appreciate the ECtHR case law and may only deviate from it in well-founded circumstances. Citizens are also free to challenge possible violations of their rights guaranteed in the ECHR by state authorities indirectly before the FCC.³⁵

8.3 The Interaction between EU Law and the ECHR

At the European level, too, the question arises as to how the relationship between the ECHR and the European Union law, and in particular the Charter of Fundamental Rights (CFR), is designed. Although the EU also has its own legal personality, it has – in contrast to Germany – never joined the ECHR. An interim attempt by the EU to join the ECHR according to Article 6, paragraph 2, of the Treaty on European Union (TEU), failed due to a legal opinion from the CJEU that found the draft of the Accession Agreement negotiated between the EU and the Council of Europe to be incompatible with EU primary law.³⁶ Although the EU itself is not a member of the ECHR, all of the EU Member States are. This gives rise to difficult questions.

³² Likewise Meyer-Ladewig, J., and Petzold, H., Die Bindung deutscher Gerichte an Urteile des EGMR – Neues aus Straßburg und Karlsruhe. In: *Neue Juristische Wochenschrift* 58 (2005) pp. 15-20 at p. 20; Sachs, M., BVerfG: Verfassungsrecht – Bezüge zum Völkerrecht. In: *Juristische Schulung* 45 (2005) pp. 164-167 at p. 167; for a critical analysis on the (non-)compliance of German courts with ECtHR jurisprudence see Sauer, H., Principled Resistance to and Principled Compliance with ECtHR Judgements in Germany. In: Breuer, M. (ed.), *Principled Resistance to ECtHR Judgements – A New Paradigm?* Springer: Berlin 2019, pp. 55-87.

³³ Cf. Hoffmann-Riem, W., Die *Caroline II*-Entscheidung des BVerfG – Ein Zwischenschritt bei der Konkretisierung des Kooperationsverhältnisses zwischen den verschiedenen betroffenen Gerichten. In: *Neue Juristische Wochenschrift* 62 (2009) pp. 20-29 at p. 29.

³⁴ E.g. Federal Constitutional Court, Judgement of 12 June 2018, 2 BvR 1738/12, ECLI:DE:BVerfG:2018:rs20180612.2bvr173812, BVerfGE 148, 296; in detail Haug, T., Die Pflicht deutscher Gerichte zur Berücksichtigung der Rechtsprechung des EGMR. In: *Neue Juristische Wochenschrift* 71 (2018) pp. 674-677.

³⁵ Cf. Cammareri, R., Die Bedeutung der EMRK und der Urteile des EGMR für nationale Gerichte. In: *Juristische Schulung* 56 (2016) pp. 791-794 at p. 794.

³⁶ Cf. on this subject Kingreen, T., Artikel 6 EUV. In: C. Calliess and M. Ruffert (eds.), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar*. 5. edn., C. H. Beck: München 2016, at mn. 31 and 32.

8.3.1 Interpretation of the CFR in the Light of the ECHR

At first, the question arises as to whether and, if so, how the CJEU must take the ECHR into account in the interpretation of the CFR.³⁷ It should be noted that – in contrast to the compatibility of German national law with the ECHR – there is no single precedent case of the CJEU regulating this relationship. Rather, the CJEU always emphasises the importance and the applicability of the ECHR and ECtHR jurisprudence in the interpretation of the CFR. Of fundamental relevance for the relationship between these legal regimes is Article 52, paragraph 3, of the CFR. It states that the fundamental rights contained in the CFR should have “the same meaning and scope” as the guarantees contained in the ECHR. The purpose is therefore to establish a coherence between the guarantees contained in the ECHR and in the CFR and to prevent any deviation below the ECHR level.³⁸ In this respect, Article 52, paragraph 3, of the CFR also refers to the jurisprudence of the ECtHR, whereby this jurisprudence can be used for interpreting the fundamental rights which are contained in the CFR.³⁹ In addition, Article 6, paragraph 3, of the TEU establishes the fundamental rights guaranteed by the ECHR as part of EU law in the form of general principles. Together with Article 52, paragraph 3, of the CFR, Article 6, paragraph 3, of the TEU thus forms the basis for the use of the ECHR and the case-law of the ECtHR for the interpretation of the fundamental rights contained in the CFR.⁴⁰ Nevertheless, it should be remembered that the ECHR and its interpretation by the ECtHR just remain a pure source of legal knowledge for interpreting the CFR. In particular, the ECHR is not a formal source of EU law due to the lack of EU membership to the ECHR.⁴¹

An often-referred example of the CJEU’s consideration of the ECHR is the CJEU case of *Roquette Frères*⁴². In this case the CJEU expressly emphasized the special importance of the ECHR for the interpretation of the Charter of Fundamental Rights and adapted its own case-law to the case-law of the ECtHR.⁴³ In particular, the CJEU had previously ruled in the *Hoechst* case⁴⁴ that business premises are not covered by the protection of Article 7 of the CFR (respect for private and family life, in particular respect for home). However, since the ECtHR has taken

³⁷ In detail Kargopoulos, A.-I., ECHR and the CJEU – Competing, Overlapping or Supplementary Competences? In: *eu crim* (2015) pp. 96-100.

³⁸ Terhechte, J. P., Artikel 52 GRC – Tragweite und Auslegung der Rechte und Grundsätze. In: H. von der Groebe, J. Schwarze and A. Hatje (eds.), *Europäisches Unionsrecht*. 7th edn., Nomos: Baden-Baden 2015, at mn. 15.

³⁹ Jarass, H. D., *Charta der Grundrechte der EU*. 3rd edn., C. H. Beck: München 2016, at Artikel 52 GRC mn. 65.

⁴⁰ Grabenwarter, C., and Pabel, K., *Europäische Menschenrechtskonvention*. C. H. Beck: München 2016, at § 4, mn. 13; Kingreen, T., Artikel 6 EUV. In: C. Calliess and M. Ruffert (eds.), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar*. 5th edn., C. H. Beck: München 2016, at mn. 7.

⁴¹ Schwerdtfeger, A., Artikel 52 GRCh – Tragweite und Auslegung der Rechte und Grundsätze. In: J. Meyer and S. Hölscheidt (eds.), *Charta der Grundrechte der Europäischen Union*. 5th edn., Nomos: Baden-Baden 2019, at mn. 62 and 63.

⁴² CJEU, Judgement of 22 October 2002, *Roquette Frères*, C-94/00, ECLI:EU:C:2002:603.

⁴³ Cf. Ludwigs, M., and Sikora, P., Grundrechtsschutz im Spannungsfeld von Grundgesetz, EMRK und Grundrechtecharta. In: *Juristische Schulung* 57 (2017) pp. 385-393 at p. 392.

⁴⁴ CJEU, Judgement of 21 September 1989, *Hoechst v. Commission*, C-46/97, ECLI:EU:C:1989:337.

the opposite view in the case of *Niemietz*⁴⁵ regarding the corresponding Article 8 of the ECHR, the CJEU has adapted this view in its judgement in the case of *Roquette Frères*. Referring to the case-law of the ECtHR in the *Niemietz*-case, the CJEU stressed that, under certain circumstances, the protection of the home may also be extended to business premises.⁴⁶

Another example in which the CJEU dealt with the relationship between EU fundamental rights and the ECHR and referred to the jurisprudence of the ECtHR as an interpretative aid is the *McB.*-case⁴⁷. In this case, the CJEU stressed again the importance of the ECHR for the interpretation of the CFR. It concluded from Article 52, paragraph 3, of the CFR that the rights contained therein, insofar as they correspond to the rights guaranteed by the ECHR, have the same meaning and scope as those which are granted to them in the ECHR. Thereupon, it argues that the right to respect for private and family life protected by Article 7 of the CFR corresponds to Article 8, paragraph 1, of the ECHR and therefore the relevant jurisdiction of the ECtHR has to be used in the interpretation of Article 7 of the CFR.⁴⁸ According to these general determinations, the CJEU then referred to the concrete case law of the ECtHR and used it for the interpretation of Article 7 of the CFR. The Court stated that the ECtHR had already ruled in a comparable case that the automatic attribution of custody to the mother does not violate Article 8 of the ECHR as long as the father is given the opportunity to apply for custody before a competent national court.

In another case, the ECtHR had decided that national legal provisions which do not give the biological father any possibility of being granted custody constitute an unjustified discrimination and therefore violate Article 14 in conjunction with Article 8 of the ECHR. The CJEU concluded from this that, in the scope of application of the relevant European regulation,⁴⁹ the father must be given the opportunity to apply for custody in front of a court, before the child is transferred from the mother to another Member State.⁵⁰

8.3.2 Applicability of the ECHR in the Application of EU Law by National Authorities

Beyond that, the question arises if national authorities are also bound by the ECHR when applying EU law. According to the ECtHR, an absolute obligation to take account of the ECHR only exists if the Member States have an area for autonomous action.⁵¹ In his *Bosphorus-*

⁴⁵ ECtHR, Judgement of 16 December 1992, *Niemietz v. Germany*, 13710/88, at para. 33.

⁴⁶ Cf. e.g. Ludwigs, M., Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR. In: *Europäische Grundrechte Zeitschrift* 41 (2014) pp. 273-285 at p. 277.

⁴⁷ CJEU, Judgement of 5 October 2010, *McB.*, C-400/10, ECLI:EU:C:2010:582.

⁴⁸ CJEU, Judgement of 5 October 2010, *McB.*, C-400/10, ECLI:EU:C:2010:582, at para. 53.

⁴⁹ Council Regulation 2201/2003/EC of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ EU L 338 of 23 December 2003 at p. 1.

⁵⁰ CJEU, Judgement of 5 October 2010, *McB.*, C-400/10, ECLI:EU:C:2010:582, at paras. 54-56.

⁵¹ Cf. Ludwigs, M., Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR. In: *Europäische Grundrechte Zeitschrift* 41 (2014) pp. 273-285 at p. 278 with further references to the jurisprudence of the ECtHR.

judgement⁵² the ECtHR had to decide whether the ECHR applies to state acts in implementation of a EU regulation with having no room for manoeuvre. As a matter of principle, the ECtHR assumes⁵³ that the EU offers an equivalent level of protection of fundamental rights as the ECHR does and that therefore a state that merely implements legally binding obligations arising from its EU membership does not violate the ECHR.⁵⁴ In order to avoid an “escape into EU law”, however, this assumption can be rebutted, “if in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient” in EU law.⁵⁵ Notably, it seems that these principles are not applicable if the case has not been submitted to the CJEU for a preliminary ruling, even though such a ruling was requested in the national proceedings. In this event, the ECtHR arguably carries out a comprehensive review based on ECHR standards.⁵⁶

Subsequently, in its *Åkerberg Fransson*-judgement⁵⁷ the CJEU had to answer *inter alia* the question whether the non-application of EU regulations that violate the ECHR can be limited to obvious violations.⁵⁸ At first, the CJEU stressed again that, although the ECHR constitutes general principles of the Union law according to Article 6, paragraph 3, of the TEU, it is not formally implemented in EU law. Therefore, EU law does not regulate the relationship between national law and the ECHR. Accordingly, the ECHR cannot be invoked as part of higher-ranking EU law in the event of a conflict between national law and the ECHR. Hence, EU law also does not determine the consequences that a national court must draw from a conflict between its own national law and the ECHR.⁵⁹

8.4 Résumé

As a final résumé it can be stated that both in the application and interpretation of German law and in the consideration of European Union law, the ECHR and its concretisation by the ECtHR are playing an important role in assessing the extent and meaning of German and European Union fundamental rights.⁶⁰ The FCC and the CJEU are taking into account the case

⁵² ECtHR, Judgement of 30 June 2005, *Bosphorus v. Ireland*, 45036/98.

⁵³ Ludwigs, M., and Sikora, P., Grundrechtsschutz im Spannungsfeld von Grundgesetz, EMRK und Grundrechtecharta. In: *Juristische Schulung* 57 (2017) pp. 385-393 at pp. 391 and 392.

⁵⁴ ECtHR, Judgement of 30 June 2005, *Bosphorus v. Ireland*, 45036/98, at para. 156.

⁵⁵ ECtHR, Judgement of 30 June 2005, *Bosphorus v. Ireland*, 45036/98, at para. 156.

⁵⁶ Ludwigs, M., Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR. In: *Europäische Grundrechte Zeitschrift* 41 (2014) pp. 273-285 at p. 278 with reference to ECtHR, Judgement of 6 December 2012, *Michaud v. France*, 12323/11, at paras. 114-116.

⁵⁷ CJEU, Judgement of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:280.

⁵⁸ Cf. CJEU, Judgement of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:280, at para. 43.

⁵⁹ CJEU, Judgement of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:280, at para. 44.

⁶⁰ Concurring Ludwigs, M., Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR. In: *Europäische Grundrechte Zeitschrift* 41 (2014) pp. 273-285 at p. 279; Ludwigs, M., and Sikora, P., Grundrechtsschutz im Spannungsfeld von Grundgesetz, EMRK und Grundrechtecharta. In: *Juristische Schulung* 57 (2017) pp. 385-393 at p. 392; critical in regard to the effectiveness of fundamental rights protection at the European level Kargopoulos, A.-I., ECHR and the CJEU – Competing, Overlapping or Supplementary Competences? In: *eucrim* (2015) pp. 96-100 at pp. 98 and 99.

law of the ECtHR. In particular they usually adapt their own case law to the divergent case law of the ECtHR. Examples of such an adaptation of ECtHR jurisprudence are, for example, the above described FCC case of *Caroline v. Monaco* and the CJEU case of *Roquette Frères*. At the same time, the ECtHR also considers the case-law of the FCC and CJEU when interpreting the ECHR.⁶¹ Furthermore, the ECHR is in some way part of the German and European legal system. In German law, it ranks on the level of simple federal law and has to be considered in the interpretation of fundamental rights.⁶² On a European level it finds its way into EU law at least via Article 6, paragraph 3, of the TEU and Article 52, paragraph 3, of the CFR as a source of legal knowledge for interpreting the fundamental rights guaranteed in the CFR.⁶³

However, it must also be noted that all courts this article has looked at are characterized by an urge for self-assertion. This is expressed in particular, by presumptions of reservations of control and priority.⁶⁴ For example, the CJEU states that the ECtHR should not be able to question CJEU findings in relation to the scope of competence of EU law, which could also include the interpretation of fundamental rights.⁶⁵ Besides that, such presumptions are also expressed in the fundamental principles established by the FCC. In particular, the FCC still leaves room for a discrepancy from the ECHR due to national specifics of the constitution.

Despite these self-assertion tendencies it can certainly be stated that the cooperation of the various courts on ECHR issues is characterized by conflict avoidance and cooperation. This is already evident from the practice of the CJEU and the FCC of considering ECtHR rulings in the interpretation of German or European Union fundamental rights respectively. In addition, the presumption rule established by the ECHR in its *Bosphorus-judgement* is a sign of acceptance of the jurisdiction of other “human rights courts”.⁶⁶ This is also reflected in the self-restraint exercised by the CJEU in its *Åkerberg Fransson-judgement* with regard to the relationship between national law and the ECHR.

⁶¹ E.g. ECtHR, Judgement of 17 September 2009, *Scoppola v. Italy*, 10249/03, at para. 105; consenting Ekardt F., and Lessmann, V., EuGH, EGMR und BVerfG – Die dritte Gewalt im transnationalen Mehrebenensystem. In: *Kritische Justiz* 39 (2006) pp. 381-397 at p. 389.

⁶² Cf. above under point 8.2.3.

⁶³ Cf. above under point 8.3.1.

⁶⁴ Ludwigs, M., Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR. In: *Europäische Grundrechte Zeitschrift* 41 (2014) pp. 273-285 at p. 279.

⁶⁵ Cf. Kargopoulos, A.-I., ECHR and the CJEU – Competing, Overlapping or Supplementary Competences? In: *eucri* (2015) pp. 96-100 at p 96.

⁶⁶ Cf. Ludwigs, M., Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR. In: *Europäische Grundrechte Zeitschrift* 41 (2014) pp. 273-285 at p. 278.

9 The Relation between National Law and ECHR in Regard to the Issues of Agent Provocateur and Preventive Detention in Germany

Alexander Benz

9.1 Introduction

The following article uses two examples to provide an overview of how Germany has dealt with standards set by the European Court of Human Rights (ECtHR). The first part of the paper will examine the issue of covert investigations in more detail, while the second part will provide a brief overview of the discussion about preventive detention. Although the issues involved are very different, it becomes clear in the end how the requirements of the ECtHR are implemented (or disregarded).

9.2 Agent Provocateur

9.2.1 Background and History of the ECtHR Jurisprudence

An Agent Provocateur is an undercover investigator or a person under the guidance of the investigating authorities, who is smuggled into the criminal scene under a legend in order to induce suspected persons to commit criminal offences.¹ This is done in order to be able to arrest such individuals at a later date on solid evidence. With regard to a conviction on the basis of evidence obtained in this way, the ECtHR repeatedly had to deal with the question of whether the rights of the persons concerned under Article 6 of the European Charter on Human Rights (ECHR; the right to a fair trial) were violated. The Court recognizes the necessity of this type of investigation, but makes strict demands on its legality.² These have been consolidated in its established case law since the judgement in the *Castro v. Portugal* case (1998).³ The judgement of the *Bannikova v. Russia* case (2010) explicitly demonstrated the two-step test used by the Court as a basis for assessing the legality of a provocation against the rule of law.⁴ The first step is to examine whether there were objective grounds for suspecting that the perpetrator was involved in criminal activities or was inclined to act prior to the provocation.⁵ Here, the specific

¹ Fischer, T., *Strafgesetzbuch mit Nebengesetzen Kommentar*. 66th edn., C. H. Beck: München 2019, at § 46 mn. 66.

² Esser, R., Implementation of Judgements of the ECtHR in the Area of Criminal Law and Criminal Procedure Law from a German Perspective. In: *Journal of Siberian Federal University. Humanities & Social Sciences* 10 (2017) pp. 875-892 at pp. 876 et seq.

³ ECtHR, Judgement of 9 June 1998, *Castro v. Portugal*, 44/1997/828/1034, at paras. 34-39.

⁴ ECtHR, Judgement of 4 November 2010, *Bannikova v. Russia*, 18757/06, at paras. 37-50.

⁵ ECtHR, Judgement of 4 November 2010, *Bannikova v. Russia*, 18757/06, at paras. 37-46; Esser, R., Lockspitzel und V-Leute in der Rechtsprechung des EGMR: Strafrechtliche Ermittlungen jenseits der StPO – außerhalb des Gesetzes? In: 35. *Strafverteidigertag* Berlin 2011, pp. 197-212 at p. 201.

circumstances of the individual case must be taken into account. In a second step, the ECtHR examines whether and, if so, how pressure was exerted on the perpetrator to commit the offence.⁶ If there is an offence provocation contrary to the rule of law, this can lead to a procedural obstacle and the injured party must be compensated for the violation of Article 6 of the ECHR. The contracting States shall then find appropriate solutions in criminal proceedings as to how this violation can be addressed.⁷ In the *Furcht v. Germany* case (2014)⁸, national jurisprudence was for the first time directly confronted with the question of whether the solution previously used in Germany satisfies the requirements for such compensation.

9.2.2 Implementation in Germany

9.2.2.1 “Strafzumessungslösung”

Thus far, German criminal courts have applied the so-called “Strafzumessungslösung” (which translates literally to: penalty assessment solution) in cases of any kind of provocation. In such proceedings, the offender is granted a penalty reduction within the sentence and thus after his guilt has been established.⁹ This solution for the implementation of sufficient compensation within the meaning of Article 6 of the ECHR, however, has been criticized by German scholars at the latest since the decision of *Castro v. Portugal* (1998).¹⁰

9.2.2.2 *Furcht v. Germany* and its Impact on German Jurisprudence

9.2.2.2.1 *Furcht v. Germany*, ECtHR, Judgement of 23 October 2014

In the *Furcht v. Germany* case (2014), an offender induced by an Agent Provocateur to commit a narcotic offence brought an action before the ECtHR against this practice of sentencing and complained of a violation of his right to a fair trial under Article 6 of the ECHR.¹¹ The Court decided that the “*Strafzumessungslösung*” was in fact not sufficient to compensate for the violation of human rights. In the fact that an innocent, unsuspecting person was made a tool of criminal policy by state authorities themselves instigating him to commit a criminal offence the Court saw a major violation – especially as this conviction was then used to deter others. In

⁶ ECtHR, Judgement of 4 November 2010, *Bannikova v. Russia*, 18757/06, at paras. 47-50; Esser, R., Lockspitzel und V-Leute in der Rechtsprechung des EGMR: Strafrechtliche Ermittlungen jenseits der StPO – außerhalb des Gesetzes? In: 35. *Strafverteidigertag*. Berlin 2011, pp. 197-212 at p. 201.

⁷ ECtHR, Judgement of 4 November 2010, *Bannikova v. Russia*, 18757/06, at paras. 51-65.

⁸ ECtHR, Judgement of 23 October 2014, *Furcht v. Germany*, 54648/09.

⁹ Fischer, T., *Strafgesetzbuch mit Nebengesetzen Kommentar*. 66th edn., C. H. Beck: München 2019, at § 46 mn. 68.

¹⁰ Roxin, C., Zu den Auswirkungen der staatlich veranlaßten Verleitung einer nicht tatgeneigten Person auf die Strafverfolgung. In: *JuristenZeitung* 55 (2000) pp. 363-371 at p. 369; with further references, Fischer, T., *Strafgesetzbuch mit Nebengesetzen Kommentar*. 66th edn., C. H. Beck: München 2019, at § 46 mn. 69.

¹¹ ECtHR, Judgement of 23 October 2014, *Furcht v. Germany*, 54648/09, at para 32.

conclusion, the ECtHR called for a ban on the use of the knowledge gained from provocation or for a “similar reaction”.

9.2.2.2.2 Federal Constitutional Court (FCC), Decision of 18 December 2014

As a result of this judgement, national courts in Germany had to deal with how the requirements of the ECtHR were to be implemented. In a decision of December 2014 of the FCC on a conviction in an Agent Provocateur scenario, the Court argued that the threshold to a crime provocation contrary to the rule of law was not crossed. On the side lines, it also dealt with the verdict against Furcht. It noted that the acceptance of a procedural obstacle proposed by the ECtHR (which would have the termination of the proceedings as consequence) was still not the only way to compensate for such cases. However, in extreme exceptions, the proposed solution of the ECtHR should be considered by German courts in the future.¹² Nonetheless, this could only be done in the course of an interpretation of Article 20, paragraph 3, of the German Basic Law (*Grundgesetz*) in conformity with international law.¹³

9.2.2.2.3. Federal Court of Justice (FCJ), Decision of 19 May 2015

Afterwards in a decision of May 2015, the First Senate of the FCJ rejected a procedural obstacle in another comparable case and adhered to the “Strafzumessungslösung”. A further implementation of the ECtHR jurisprudence was – according to the Court – not necessary, since the compensation called for per Article 6 of the ECHR (which in principle was not disputed) had already been carefully constructed in a differentiated manner in previous decisions. The Senate thus adopted a very restrictive interpretation approach, denied the existence of an extreme exceptional case and allowed the proceedings to continue.¹⁴

9.2.2.2.4 FCJ, Judgement of 10 June 2015

In a ruling of June 2015, the Second Senate of the FCJ opposed this view and, in another case, adopted an absolute prohibition on the exploitation of evidence with regard to the statements of the undercover investigators and, as a result, an obstacle to proceedings. It did so even though the intensity of the underlying case was not “more extreme” than that of the aforementioned decisions, so far as evident from the grounds of the judgement.¹⁵ Thus, the Second Senate assumed that the compensation demanded by the ECtHR could only be

¹² Federal Constitutional Court, Decision of 18 December 2014, 2 BvR 209/14, ECLI:DE:BVerfG:2014:rk20141218.2bvr020914, at para. 53.

¹³ Federal Constitutional Court, Decision of 18 December 2014, 2 BvR 209/14, ECLI:DE:BVerfG:2014:rk20141218.2bvr020914, at para. 41.

¹⁴ Federal Court of Justice, Decision of 19 May 2015, 1 StR 128/15, BGHSt 60, 238 (241, 242), at paras. 15-17.

¹⁵ Federal Court of Justice, Judgement of 10 June 2015, 2 StR 97/14, BGHSt 60, 276 (299), at para. 58.

guaranteed by the assumption of an obstacle to proceedings. It thus rejected the previous case law of the other Senates because of an interim “overhaul” by the ECtHR, without bringing about a clarification by the Grand Senate for Criminal Matters of the FCJ, since in its view all senates were equally obliged to implement the ECtHR rulings.¹⁶

9.2.2.2.5 Subsequent Federal Jurisprudence

In the subsequent case law, three decisions are worth mentioning. In a decision of the Fourth Senate of the FCJ of January 2016, the Second Senate was not followed in another comparable case, but the line of the First Senate was adhered to. Again, the Senate did not make a decision on the merits of the case, as the threshold to the violation of the rule of law was not considered to have been crossed.¹⁷ In December 2017, the First Senate again dealt with the question of a provocation contrary to the rule of law, whereby this time it explicitly also considered an obstacle to the procedure as a potential compensation possibility, but also did not comment on it due to the fact that necessary threshold had not been exceeded.¹⁸ Also, in a judgement of the Fifth Senate of July 2018, the submitted case was referred back to the Regional Court for the investigation of new facts, without the Senate dealing more closely with the solution of the ECtHR.¹⁹

9.2.3 Conclusion

The events surrounding the *Furcht v. Germany* case (2014) have shown how the requirements of the ECtHR on an interpretation of the Basic Law (*Grundgesetz*) that has to be friendly to international law can influence national case law. The decision of the FCC of December 2014 does not represent a fundamental rejection of the case law of the ECtHR. The Second Senate of the FCJ also shows how a solution compatible with Article 6 of the ECHR can look like in cases of provocation contrary to the rule of law. It is noteworthy, however, that the First, Fourth and now apparently also the Fifth Senate in their case law by rejecting the “quantum leap” necessary for the violation of the rule of law in Agent Provocateur cases no longer deal with a possible procedural obstacle. In the long run, this tendency could be seen as a factual undermining of the ECtHR requirements.

¹⁶ Federal Court of Justice, Judgement of 10 June 2015, 2 StR 97/14, BGHSt 60, 276 (300), at paras. 62-65; Haak, J., *Die Wirkung und Umsetzung von Urteilen des Europäischen Gerichtshofs für Menschenrechte*. Lit: Berlin 2018, at pp. 131 et seq.

¹⁷ Federal Court of Justice, Decision of 19 January 2016, 4 StR 252/15, ECLI:DE:BGH:2016:190116B4STR252.15.0, at paras. 2-6; Esser, R., Implementation of Judgements of the ECtHR in the Area of Criminal Law and Criminal Procedure Law from a German Perspective. In: *Journal of Siberian Federal University. Humanities & Social Sciences* 10 (2017) pp. 875-892 at p. 882.

¹⁸ Federal Court of Justice, Judgement of 7 December 2017, 1 StR 320/17, ECLI:DE:BGH:2017:071217U1STR320.17.0, at para. 19.

¹⁹ Federal Court of Justice, Judgement of 4 July 2018, 5 StR 650/17, ECLI:DE:BGH:2018:040718U5STR650.17.0, at paras. 28 et seq.

9.3 Preventive Detention

9.3.1 Nature of Preventive Detention

In Germany, preventive detention (*Sicherungsverwahrung*) means that a criminal is not released after serving his sentence, but transferred to an appropriate institution for further detention. The guilt appropriate to the sentence has thus actually been served, but the offender remains detained. This is done to protect the general public from him or her. Accordingly, from a German perspective, preventive detention is a prophylactic measure.²⁰ In detail, it is a so-called measure for protection and correction, which is regulated according to Section 61, No. 3, and Section 66 of the German Penal Code (*Strafgesetzbuch*). The preventive detention of adult offenders can be ordered by the court either already in the judgement, reserved there or only subsequently pronounced. In the case of juvenile offenders, however, preventive detention in accordance with the Juvenile Courts Act (*Jugendgerichtsgesetz*) can only be ordered subsequently. This article will refrain from presenting further details on that specific point.

9.3.2 Chronology of Major Developments

The history of preventive detention as a measure of protection and correction in Germany begins around 1933, when the possibility of its indefinite imposition on habitual offenders was first enshrined in law.²¹ In post-war history, its length was initially limited to 10 years. Starting in the 1990s, a tendency towards a renewed intensification can be observed. After the legislative body had already given up the maximum period of ten years for initial placement in preventive detention in 1998 and ordered that these new rules also apply to prisoners who had been placed in preventive detention prior to the law's entry into force, the FCC declared this procedure lawful in February 2004.²² It rejected the constitutional complaint of Mr. M., who requested to be released from preventive detention after the maximum ten-year period (which was in force at the time he was originally convicted) had expired, as unfounded. In its reasoning, the Court also discussed the nature of preventive detention in more detail and concluded that the abolition of the maximum period of detention for "old cases" did not violate the absolute prohibition of retroactivity under Article 103, paragraph 2, of the Basic Law (*Grundgesetz*).²³ The Court

²⁰ Fischer, T., *Strafgesetzbuch mit Nebengesetzen Kommentar*. 66th edn., C. H. Beck: München 2019, at Vor § 61 mn. 1.

²¹ Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung, 24.11.1933, Reichgesetzblatt I 1933 at p. 995; Zimmermann, T., Das neue Recht der Sicherungsverwahrung (ohne JGG). In: *Onlinezeitschrift für Höchstgerichtliche Rechtsprechung zum Strafrecht* 14 (2013) pp. 164-178 at p. 164; Stisser, D. T., *Die Sicherungsverwahrung – de lege lata et de lege ferenda*. Nomos: Baden-Baden 2019, at p. 25.

²² Federal Constitutional Court, Judgement of 5 February 2004, 2 BvR 2029/01, ECLI:DE:BVerfG:2004:rs20040205.2bvr202901, BVerfGE 109, 133.

²³ Federal Constitutional Court, Judgement of 5 February 2004, 2 BvR 2029/01, ECLI:DE:BVerfG:2004:rs20040205.2bvr202901, BVerfGE 109, 133 (167), at paras. 127 et seq.

stressed that preventive detention is not precisely a punishment, which is a form retribution for incurred guilt, but is rather used for individual prevention.

Subsequently, there were further legal adjustments and an expansion of preventive detention in Germany.²⁴ In December 2009²⁵, the ECtHR made its first ruling on the subject. In the *M. v. Germany* case (2009), it declared the subsequent abolition of the 10-year period incompatible with Article 5, paragraph 1, sentence 2, littera a, (right to liberty and security) and Article 7, paragraph 1, sentence 2, (no punishment without law) of the ECHR. With regard to Article 5, paragraph 1, sentence 2, littera a, of the ECHR, the Court saw the violation in the lack of causal connection between the conviction and subsequent extension of the detention. As far as Article 7, paragraph 1, sentence 2, of the ECHR was concerned, there was a violation of the *nullum crimen* principle.²⁶ The ECtHR did not consider itself bound by the interpretation of German courts and assumed that preventive detention was indeed a punishment in the sense of Article 7 of the ECHR.²⁷

9.3.3 FCC, Judgement of 4 May 2011

Shortly thereafter, the FCC made an unexpected U-turn in its case law on preventive detention. In May 2011, it declared all the provisions of the German Criminal Code (*Strafgesetzbuch*) and the Juvenile Courts Act (*Jugendgerichtsgesetz*) on preventive detention to be incompatible with the Basic Law (*Grundgesetz*) and called on the legislature to amend them within two years.²⁸ On the one hand, the Federal Constitutional Court spoke of an obligation to distance preventive detention from normal detention and set out concrete requirements.²⁹ On the other hand, it again dealt with Article 103, paragraph 2, of the Basic Law (*Grundgesetz*) and its relationship to Article 7 of the ECHR. The interpretation of the term “penalty” under Article 103, paragraph 2, of the Basic Law (*Grundgesetz*) was not similar to the one adopted by the ECtHR with regard to Article 7, paragraph 1, of the ECHR.³⁰ Just as the ECtHR interprets the Convention autonomously, the Constitutional Court saw itself not bound by the interpretation of the European Court either. Nevertheless, the European Court’s findings

²⁴ Zimmermann, T., Das neue Recht der Sicherungsverwahrung (ohne JGG). In: Onlinezeitschrift für Höchststrichterliche Rechtsprechung zum Strafrecht 14 (2013) pp. 164-178 at p. 165; Stisser, D. T., Die Sicherungsverwahrung – de lege lata et de lege ferenda. Nomos: Baden-Baden 2019, at pp. 35 et seq.

²⁵ ECtHR, Judgement of 17 December 2009, *M. v. Germany*, 19359/04.

²⁶ Nullum crimen, nulla poena sine lege.

²⁷ ECtHR, Judgement of 17 December 2009, *M. v. Germany*, 19359/04. In a further judgement (ECtHR, Judgement of 13 January 2011, *Haidn v. Germany*, 6587/04), the Court also criticized the subsequent Preventive Detention as incompatible with Article 5, paragraph 1, sentence 2, litterae a, c and e, of the ECHR, as it lacks a sufficient causal connection between the conviction and the deprivation of liberty.

²⁸ Federal Constitutional Court, Judgement of 4 May 2011, 2 BvR 2365/09, ECLI:DE:BVerfG:2011:rs20110504.2bvr236509, BVerfGE 128, 326.

²⁹ Federal Constitutional Court, Judgement of 4 May 2011, 2 BvR 2365/09, ECLI:DE:BVerfG:2011:rs20110504.2bvr236509, BVerfGE 128, 326 (373, 379), at paras. 101 and 111 et seq.

³⁰ Federal Constitutional Court, Judgement of 4 May 2011, 2 BvR 2365/09, ECLI:DE:BVerfG:2011:rs20110504.2bvr236509, BVerfGE 128, 326 (393), at para 142; Stisser, D. T., *Die Sicherungsverwahrung – de lege lata et de lege ferenda*. Nomos: Baden-Baden 2019, at p. 88.

were taken into consideration in so far as the degree of protection of legitimate expectations approximated that of absolute protection.³¹ Due to the conditions of enforcement and the lack of a time limit, the persons concerned de facto perceived the measure as a penalty after all. This had to be taken into account in a necessary interpretation of Article 2, paragraph 2, sentence 2, (right to personal freedom) in conjunction with Article 20, paragraph 3, (rule of law) of the Basic Law (*Grundgesetz*). With this solution, the FCC found a compromise between its previous case law and that of the ECtHR. It maintained its interpretation of the concept of “penalty” and the distinction to preventive detention.³² The absolute prohibition of retroactivity of Article 103, paragraph 2, of the Basic Law (*Grundgesetz*) as a form of the principle of legality was thus still not applied in preventive detention.³³ However, the FCC recognized the decisions of the ECtHR by taking them into account when assessing the weight of the protection of confidence involved.

9.3.4 Further Events and Conclusion

Subsequently, the preventive detention was comprehensively reorganized by Parliament. The catalogue of criminal offences giving rise to preventive detention was drastically reduced. In addition, it is now intended to distinguish itself much more from normal detention, which is to be achieved not only by spatial separation but also, for example, by extended rules of contact and an improved range of therapies. In more recent rulings, such as in the *Bergmann v. Germany* case (2016)³⁴ or *Ilseher v. Germany* case (2017)³⁵, the ECtHR continues to adhere to its view that preventive detention is a penalty, but considers the new German regulation from 2013 to be compatible with the ECHR, as the mainly therapeutic benefit of the new Therapy Accommodation Act (*Therapieunterbringungsgesetz*), which has been created for old cases for example, is now clearly visible.³⁶ The judgement of the FCC and the subsequent reaction of the legislature have thus created a legal solution which now seems to be compatible with the requirements of the ECHR.

³¹ Stisser, D. T., *Die Sicherungsverwahrung – de lege lata et de lege ferenda*. Nomos: Baden-Baden 2019, at p. 89.

³² Stisser, D. T., *Die Sicherungsverwahrung – de lege lata et de lege ferenda*. Nomos: Baden-Baden 2019, at pp. 88 et seq.

³³ Feest, J., Grundsatzurteil zur Sicherungsverwahrung: Karlsruhe sucht Konsens mit Straßburg. *Legal Tribune Online* 04.05.2011, https://www.lto.de/persistent/a_id/3193/ (last accessed 29.02.2020); Stisser, D. T., *Die Sicherungsverwahrung – de lege lata et de lege ferenda*. Nomos: Baden-Baden 2019, at p. 88.

³⁴ ECtHR, Judgement of 7 January 2016, *Bergmann v. Germany*, 23279/14.

³⁵ ECtHR, Judgement of 4 December 2018, *Ilseher v. Germany*, 10211/12 and 27505/14.

³⁶ ECtHR, Judgement of 4 December 2018, *Ilseher v. Germany*, 10211/12 and 27505/14, at paras. 221 et seq.

9.4 Résumé

The case of preventive detention has shown how the ECtHR's requirements have ultimately even led to a change in national regulations in Germany through the jurisdiction of the Federal Court of Justice. These now appear to comply with the European case law to the greatest extent possible. This article is not intended to deal with the criticism that these new regulations have also attracted. In comparison, the current status of the implementation of requirements for undercover investigations is much less clear. As already explained above, it was initially assumed that in this area, too, the guidelines of the Court would find their way into case law. However, the current ruling practice of the higher instances does not contain for a real discourse on these guidelines. It remains to be seen how long this evasive behaviour will continue. So far, the old "Strafzumessungslösung" is probably not yet completely dismissed.

10 The Russian Constitutional Court and the Problematic Aspects of the Compliance of Russian Law with Article 6 and Article 13 of the ECHR

Alexandra Voronina and Alexander Leshchenko

On 30 March 1998 the Russian Federation ratified the European Convention on Human Rights (ECHR). Thereafter, this Convention has become an integral part of the domestic legal system, and the European Court of Human Rights (ECtHR) has begun to act as a subsidiary interstate judicial body in specific cases if all constitutionally established domestic remedies have been exhausted.

In enforcing the conditions of the Convention, the ECtHR makes pilot judgements on the so-called “repetitive cases”, which derive from a common dysfunction at the national level. In accordance with Rule 61 § 3 of the Rules of Court, the operative part of the decision indicates the nature of the systemic problem and states the measures to be taken by the appropriate state.

10.1 *Burdov v. Russia*

The first pilot judgement to the Russian Federation was delivered in the case of *Burdov v. Russia* (no. 2). The matter was that the applicant as the liquidator of the consequences of the Chernobyl disaster who suffered from an excessive dose of radiation had the right to social benefits. Despite, the national courts satisfied his complaints about the payment of social benefits, most of the decisions were unenforced for a long time. As a result, in 2000, Anatoliy Tikhonovich Burdov lodged his first application with the ECtHR by reason of the non-enforcement of domestic judicial decisions.

By deciding on this application, the European Court found a violation of Article 6, paragraph 1, of the European Convention on Human Rights and Article 1 of the Protocol No. 1 to the Convention in connection with the failure to execute the Court’s decisions in favour of the applicant.¹

After nine years, the European Court in its second judgement for the same applicant, found that in addition to the existing violations, there was a violation of Article 13 of the Convention because of the domestic effective remedies “in the event of violations of the Convention on account of prolonged non-enforcement of judicial decisions delivered against the State or its entities”² were absent.

¹ European Court of Human Rights, Judgement of 7 Mai 2002, *Burdov v. Russia*, 59498/00, at paras. 33-38, 39-42.

² European Court of Human Rights, Judgement of 15 January 2009, *Burdov v. Russia (No. 2)*, 33509/04, at para. 117.

Due to the fact that the underlying cause of the case was a structural problem, the measures to which were not taken by the respondent State, the Court applied a pilot judgement procedure. As a result, the Court ordered the Russian Federation to introduce “an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgements in line with the Convention principles as established in the Court’s case-law”.³

A year after the judgement of the ECtHR came into force, authorities of the Russian Federation adopted such remedy. It was the Compensation Act.⁴ The Compensation Act established the right to compensation for violations of reasonable time limits for judicial proceedings or the right to enforce a judicial act within a reasonable time.

After the entry into force of this Act, persons whose rights were violated began to appeal to the courts of general jurisdiction, referring to the norms of the new legislation. So, the judicial practice in this category of cases gradually began to formalise. At the same time, settlement agreements were concluded with the applicants who filed complaints with the ECtHR in connection with the non-enforcement of court’s decisions, as the state acknowledged violations of a reasonable time and paid proportional compensation.⁵ As for the applications that were lodged after the entry into force the Compensation Act they were declared inadmissible as it was more reasonable to resort to the new domestic remedy introduced by the Compensation Act.⁶ Thus, the Compensation Act was recognized as a new remedy which satisfied the basic criteria for the effectiveness of a compensatory remedy.

It should be noted that the Act was really effective; in just a year the share of applications of non-enforcement of court decisions more than halved and continued to decline.⁷ And it seemed that this structural problem was solved. However, Resolution of the Plenum of the Supreme Court of the Russian Federation and Plenum of the Supreme Arbitration Court of the Russian Federation “On Certain Issues Arising from the Consideration of Cases for Awarding Compensation for Violation of the Right to a Judicial Procedure within a Reasonable Time or the Right to Execute a Judicial Act within a Reasonable Time” was adopted. The Resolution expounded how to consider the applications to courts of general jurisdiction and to arbitration courts for awarding compensation, in particular, clarified that the Act applied only to monetary obligations of budgetary (treasury) institutions. Thus, compensation for obligations in kind was derived from the operation of the Act. This circumstance showed that structural problems were not solved and the Act could not be admitted as an effective domestic remedy.

³ Ibid., operative part no. 6.

⁴ Federal Law of “On Compensation for Infringement of the right to the Judicial Proceedings Conduct within Reasonable Time or Right to the Judicial Act enforcement within Reasonable Time” (FL No. 68 of 30 April 2010).

⁵ Kovler, A., Gerasimov and others v. Russia – A new pilot judgment of the European Court of Human Rights. In: *Mezhdynarodnoe pravosudie [International Justice]* 11 (2014), No. 3, pp. 3-10.

⁶ European Court of Human Rights, Judgement of 23 September 2008, *Nagovitsyn and Nalgiyev v. Russia* (dec.), 27451/09 and 60650/09.

⁷ Kovler, A. Gerasimov and others v. Russia – A new pilot judgment of the European Court of Human Rights. In: *Mezhdynarodnoe pravosudie [International Justice]* 11 (2014), No. 3, pp. 3-10.

Subsequently, in cases, which provided the compensation in kind, in particular the cases of *Ilyushkin and Others v. Russia*,⁸ the Court took unequivocal position that the new legislation did not solve the existing problem in full measure. As a result, those who won litigations are deprived of the opportunity to protect their right to timely execution of court's decisions at the national level, and filing a complaint with the ECtHR remained the only effective remedy.

10.2 *Gerasimov and Others v. Russia*

In the light of the emerging legal problem, it was only a matter of time before a new pilot judgement was issued. After more than 150 decisions in the ordinary procedure, it was the pilot judgement *Gerasimov and others v. the Russian Federation* of 1 July 2014 on the execution of obligations in kind. State bodies evaded the implementation of decisions of national courts on such obligations as repair of the foundation of the house, providing new housing instead of demolished, providing the car with manual control to the police officer who became in the course of execution of official duties a disabled person, etc., thereby again violating requirements of Article 13 (right to an effective remedy), Article 6 (right to a fair trial) of the European Convention of Human Rights and Article 1 of the Protocol No. 1 to the Convention (some applicants tried judicially to compensate the harm caused by untimely execution of judgements, referring to the norms of the Federal Law No. 68, but their claims were denied), which was subsequently later decided unanimously by the ECtHR.

According to the Court “the Government opted at a later stage for radically restricting the scope of the draft Compensation Act to judgments awarding monetary payments against the State. [...] As a result, the effective domestic remedy set up by the Compensation Act is not available to the applicants in the present cases”.⁹

In conclusion, the ECtHR expressed itself as follows with regard to General measures against the Respondent state: the Court holds

- “that the respondent State in cooperation with the Committee of Ministers must set up, within one year from the date on which the judgement becomes final in accordance with Article 44 § 2 of the Convention, an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgements imposing obligations in kind on the State's authorities in line with the Convention principles as established in the Court's case-law;
- that the respondent State must grant redress, within two years from the date on which the judgement becomes final, to all victims of delayed enforcement of judgements imposing obligations in kind on the State authorities who lodged their applications with

⁸ European Court of Human Rights, Judgement of 17 April 2012, *Ilyushkin and Others v. Russia*, 5734/08 et al.

⁹ European Court of Human Rights, Judgement of 1 July 2014, *Gerasimov and Others v. Russia*, 29920/05 et al., at para. 161.

the Court before the delivery of the present judgement and whose applications were or will be communicated to the Government...;

- that pending the adoption of the above measures, the Court will adjourn, for a maximum period of two years from the date on which the judgement becomes final, the proceedings in all cases concerning the non-enforcement or delayed enforcement of domestic judgements imposing obligations in kind on the State authorities, without prejudice to the Court's power at any moment to declare inadmissible any such case or to strike it out of its list following a friendly settlement between the parties or the resolution of the matter by other means...".¹⁰

In fulfilling the requirement of the ECtHR in this pilot judgement the Federal Law No. 450 of 12 December 2016 was adopted, amending the No. 68-Federal Law "On compensation..." in terms of awarding compensation for violation of right to enforcement within a reasonable time of the judicial act, providing for the execution of government obligations in kind. As described by the ECtHR in its decision of 30 January 2018 in the case of *Shtolts and Others versus Russia*¹¹ the law changed the Compensation Act and meets the criteria, set forth in the Gerasimov's pilot judgement, and provides applicants with a potentially effective remedy. Thus, it was finally put an end to a legal Saga that lasted more than 15 years, as evidenced by the practice of the ECtHR in the case *Konstantinova and Others against Russia* from 5 February 2019.¹²

¹⁰ Ibid., operative part No. 12-14.

¹¹ European Court of Human Rights, Judgement of 30 January 2018, *Shtolts and Others v. Russia*, 77056/14.

¹² European Court of Human Rights, Judgement of 5 February 2019, *Konstantinova and Others v. Russia*, 60708/13.

11 Scope of National Duties to Cooperate with International Tribunals and the International Criminal Court

Tobias Römer

11.1 Introduction

The following article deals with the scope of states' obligations to cooperate with international criminal tribunals and the International Criminal Court (ICC) as well as various national handlings of corresponding legal problems. Three cases shall serve as an illustration. In the Tadic case, the German legislator amended its law in order to comply with binding orders of an international tribunal. The case of South Africa reveals a dilemma when the executive branch faces conflicting obligations under international law. Finally, a German case is presented in which the competent court interpreted a national criminal norm in the light of international law.

11.2 Request for a Deferral of National Proceedings: *Prosecutor v. Tadic*

11.2.1 Legal Background

In 1993, the United Nations (UN) Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY)¹ through Resolutions 808 and 827 under Chapter VII of the UN Charter.² It was as a response to the serious violation of international humanitarian law during the Yugoslavian conflict.³ Resolutions under Chapter VII of the UN Charter are binding to all UN Member States.⁴ However, the tribunal suffered from a lack of police power, so it depended on the cooperation of the states.⁵ Consequently, the Security Council annexed the Statute of the ICTY (ICTY Statute) to Resolution 827 and decided "that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions

¹ Full name: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

² UN Doc. S/Res/808 (22 February 1993) at No. 1; UN Doc. S/Res/827 (25 May 1993) at No. 4.

³ UN Doc. S/Res/827 (25 May 1993) at No. 2.

⁴ Scholz, S., *Die Zulieferung an den Jugoslawien-Strafgerichtshof*. Shaker: Aachen 1998, at p. 94; Shaw, M.-N., *International Law*. 8th edn., Cambridge University Press: Cambridge 2017, at p. 927.

⁵ Ambos, K., *Treatise on International Criminal Law. Volume III: International Criminal Procedure*. Oxford University Press: Oxford 2016, at p. 605; De Meester, K., *The Investigation Phase in International Criminal Procedure*. Intersentia: Cambridge 2015, at p. 562.

of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute".⁶

According to Article 29, paragraph 1, of the ICTY Statute, all states shall cooperate with the tribunal. Article 8, paragraph 2, of the ICTY Statute states that the tribunal has primacy over national courts' jurisdiction and that it may, at any stage of the procedure, formally request a national court to defer to the competence of the tribunal.⁷ States cannot invoke national law (or the non-existence of a respective law) to evade an order or request.⁸ As far as Germany was concerned, its legal system did not provide a rule allowing to stop national proceedings and to transfer a person to the ICTY.⁹ When the tribunal's first request then concerned the deferral of the case of Dusko Tadic, Germany almost violated its duty to comply. Tadic was supposed of having committed crimes against international humanitarian law during the conflict in the former Yugoslavia.¹⁰ He had already been in German custody and a national trial was just about to start.¹¹ However, the German legislator remarkably fast passed a law on cooperation with the ICTY including a legal basis for a deferral.¹² On that basis Tadic was transferred to the ICTY, became its first defendant and Germany escaped a violation of international law.¹³ Nevertheless, there were constitutional issues with the cooperation law.

11.2.2 Right to the Lawful Judge

First, Article 101, paragraph 1, sentence 2, of the Basic Law (*Grundgesetz*) provides that no one may be deprived of his lawful judge. Sentence 1 expressly prescribes the inadmissibility of exceptional courts. According to Article 101, paragraph 2, of the Basic Law (*Grundgesetz*), courts for special matters can only be established by law. As a consequence, a law allowing the transfer of a person to a court not fulfilling the requirements of Article 101 of the Basic Law (*Grundgesetz*) would be unconstitutional. Otherwise, the public authority would participate in an infringement of the citizen's rights. In the case of a tribunal based on a resolution of the Security Council, it may be questioned whether it is an exceptional court or a court for special

⁶ UN Doc. S/Res/827 (25 May 1993) at No. 4.

⁷ Brown, B.-S., Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals. In: *Yale Journal of International Law* 23 (1998) pp. 383-436 at p. 395.

⁸ ICTY, Judgement of 18 July 1997, *Prosecutor v. Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14, at para. 54; Stroh, D., State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and Rwanda. In: *Max Planck Yearbook of United Nations Law* 5 (2001) pp. 249-283 at p. 266.

⁹ Safferling, C.-M., *Internationales Strafrecht. Strafanwendungsrecht. Völkerstrafrecht. Europäisches Strafrecht*. Springer: Berlin, Heidelberg 2011, at pp. 59-60.

¹⁰ For more details, ICTY, Second Amended Indictment of 14 December 1995, *Prosecutor v. Tadic*, IT-94-1.

¹¹ Ritscher, C., Die Ermittlungstätigkeit des Generalbundesanwalts zum Völkerstrafrecht: Herausforderungen und Chancen. In: C.-M. Safferling and S. Kirsch (eds.), *Völkerstrafrechtspolitik*. Springer: Berlin, Heidelberg 2014, pp. 223-235 at p. 224; Safferling, C.-M., *Internationales Strafrecht. Strafanwendungsrecht. Völkerstrafrecht. Europäisches Strafrecht*. Springer: Berlin, Heidelberg 2011, at pp. 59-60.

¹² Cooperation Law with the ICTY (*Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien vom 10. April 1995*), BGBl I at p. 485.

¹³ For a brief overview of the procedural history, ICTY, Case Information Sheet, *Prosecutor v. Tadic*, IT-94-1.

matters that has to be established by law.¹⁴ An exceptional court can be defined as a court that, in derogation from the statutory jurisdiction, is specially established and called upon to decide individual concrete or individually determined cases.¹⁵ The prohibition does not concern a court created by abstract-generic rules for all cases with the same subject matter.¹⁶ Additionally it only encompasses establishments in arbitrary deviation from statutory jurisdiction.¹⁷ Because the ICTY dealt with a large number of different cases relating to the commission of the most serious crimes against international law in the Yugoslavian conflict, the tribunal is generally not considered an exceptional court.¹⁸

The question remains whether the ICTY is a court established by law. It was raised by Tadic's defence before the ICTY when it challenged the tribunal's establishment by claiming an infringement of Article 14, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR). The competent chamber acknowledged the general principle of law, that a tribunal has to be established by law.¹⁹ In the view of the judges, "it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments".²⁰ They concluded that the ICTY Statute as well as the Rules of Procedure and Evidence adopted pursuant to the Statute fulfil these requirements.²¹ Nevertheless, this interpretation might not necessarily reflect the word "law" in Article 101 of the Basic Law (*Grundgesetz*). The rule is generally understood to mean that a parliamentary law is required to establish a court.²² As the international system has no parliamentary legislature,²³ a Security

¹⁴ Basak, D., *Die Zuständigkeitsregeln internationaler Strafgerichte und Art. 101 GG*. Peter Lang: Frankfurt am Main 2005, at p. 159; Hollweg, C., Das neue Internationale Tribunal der UNO und der Jugoslawienkonflikt. In: *JuristenZeitung* 48 (1993), pp. 980-989 at pp. 983-984.

¹⁵ Federal Constitutional Court, Judgement of 17 December 1953, 1 BvR 335/51, BVerfGE 3, 213 (223); Federal Constitutional Court, Decision of 10 June 1958, 2 BvF 1/56, BVerfGE 8, 174 (182); Federal Constitutional Court, Decision of 17 November 1959, 1 BvR 88/56, 59/57, 212/59, BVerfGE 10, 200 (212).

¹⁶ Schulze-Fielitz, H., Artikel 101 [Recht auf den gesetzlichen Richter]. In: H. Dreier (ed.), *Grundgesetz. Kommentar. Band III*. 3rd. edn., Mohr Siebeck: Tübingen 2018, at mn. 32; Degenhart, C., Artikel 101 [Ausnahmegerichte]. In: M. Sachs (ed.), *Grundgesetz. Kommentar*. 8th edn., C. H. Beck: München 2018, at mn. 24.

¹⁷ Federal Constitutional Court, Decision of 9 May 1962, 2 BvL 13/60, BVerfGE 14, 56 (72); Basak, D., *Die Zuständigkeitsregeln internationaler Strafgerichte und Art. 101 GG*. Peter Lang: Frankfurt am Main 2005, at pp. 157-158; for a different view cf. Degenhart, C., Art. 101 [Ausnahmegerichte]. In: M. Sachs (ed.), *Grundgesetz. Kommentar*. 8th edn., C. H. Beck: München 2018, at mn. 23.

¹⁸ Basak, D., *Die Zuständigkeitsregeln internationaler Strafgerichte und Art. 101 GG*. Peter Lang: Frankfurt am Main 2005, at p. 156; Scholz, S., *Die Zulieferung an den Jugoslawien-Strafgerichtshof*. Shaker: Aachen 1998, at pp. 88-89.

¹⁹ ICTY, Decision of 2 October 1995, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, at para. 42.

²⁰ ICTY, Decision of 2 October 1995, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, at para. 45.

²¹ ICTY, Decision of 2 October 1995, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, at para. 46.

²² Schulze-Fielitz, H., Artikel 101 [Recht auf den gesetzlichen Richter]. In: H. Dreier (ed.), *Grundgesetz. Kommentar. Band III*. 3rd. edn., Mohr Siebeck: Tübingen 2018, at mn. 20.

²³ ICTY, Decision of 2 October 1995, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, at para. 41; cf. also ICTY, Judgement of 18 July 1997, *Prosecutor v. Blaskic*,

Council resolution strictly speaking never meets this criterion.²⁴ Indeed, according to academic literature, Article 101 of the Basic Law (*Grundgesetz*) does not, in the case of a court established outside the application of the Basic Law, require a formal law if it concerned lawfully passed and binding legal acts of the UN.²⁵ However, constitutional concerns never completely dispelled.

11.2.3 Constitutional Ban on Extradition of German Nationals

The second legal problem with the cooperation law concerns the constitutional ban on extradition of German nationals to other states under Article 16, paragraph 2, of the Basic Law (*Grundgesetz*) as amended up to the year 2000. Although not explicitly mentioned, the ban included extradition or surrender of German nationals not only to other states, but also to international criminal tribunals since their competencies lie outside German authority.²⁶ That may be controversial.²⁷ At least the government at the time shared this legal opinion.²⁸ In addition, the wording of Article 16, paragraph 2, of the Basic Law (*Grundgesetz*) was unambiguous and excluded an interpretation in the light of international norms – as it is common practice in Germany.²⁹ In the end, the legislator solved the problem by adding the following words to the ban under Article 16, paragraph 2, of the Basic Law (*Grundgesetz*): “The law may provide otherwise for extraditions to a Member State of the European Union or to an international court, provided that the rule of law is observed.”³⁰

Nevertheless, since the law amending the constitution did not enter into force until 29 November 2000, Germany would not have been able to fulfil its duties under international law as far as the transfer of German nationals was concerned by that date. In the case of Tadic, the

Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14, at para. 54.

²⁴ Basak, D., *Die Zuständigkeitsregeln internationaler Strafgerichte und Art. 101 GG*. Peter Lang: Frankfurt am Main 2005, at p. 160.

²⁵ Basak, D., *Die Zuständigkeitsregeln internationaler Strafgerichte und Art. 101 GG*. Peter Lang: Frankfurt am Main 2005, at p. 161; Hollweg, C., Das neue Internationale Tribunal der UNO und der Jugoslawienkonflikt. In: *JuristenZeitung* 48 (1993), pp. 980-989 at p. 984; Scholz, S., *Die Zulieferung an den Jugoslawien-Strafgerichtshof*. Shaker: Aachen 1998, at pp. 90-91.

²⁶ Schmalenbach, K., Die Auslieferung mutmaßlicher deutscher Kriegsverbrecher an das Jugoslawientribunal in Den Haag. In: *Archiv des öffentlichen Rechts* 36 (1998) pp. 285-304 at pp. 303-304; Scholz, S., *Die Zulieferung an den Jugoslawien-Strafgerichtshof*. Shaker: Aachen 1998, at p. 162.

²⁷ Cf. Schöbener, B., and Bausback, W., Verfassungs- und völkerrechtliche Grenzen der „Überstellung“ mutmaßlicher Kriegsverbrecher an den Jugoslawien-Strafgerichtshof. In: *Die Öffentliche Verwaltung* 15 (1996), pp. 621-629 at p. 622.

²⁸ Bundestag-Drucksache No. 14/2668 at p. 4.

²⁹ Federal Constitutional Court, Decision of 14 October 2004, 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, BVerfGE 111, 307 (318), at para. 33; Herdegen, M., *Völkerrecht*. 16th edn., C. H. Beck: München 2017, at p. 185; Schöbener, B., and Bausback, W., Verfassungs- und völkerrechtliche Grenzen der „Überstellung“ mutmaßlicher Kriegsverbrecher an den Jugoslawien-Strafgerichtshof. In: *Die Öffentliche Verwaltung* 15 (1996), pp. 621-629 at pp. 623-624.

³⁰ German original: „Durch Gesetz kann eine abweichende Regelung für Auslieferungen an einen Mitgliedstaat der Europäischen Union oder an einen internationalen Gerichtshof getroffen werden, soweit rechtsstaatliche Grundsätze gewahrt sind.“

problem did not arise because he did not have German nationality. However, because also German citizens were taking part in the conflict in former Yugoslavia,³¹ it was not purely theoretical. Considering the high level of commitment in the negotiations on the establishment of the International Criminal Court at the same time,³² such kind of violation of international duties would have been all the more negative for Germany.³³

11.3 Decision on Non-Compliance: *Prosecutor v. Al-Bashir*

11.3.1 Legal Background

The Statute of the ICC (Rome Statute) provides a rule on full cooperation duties (Article 86 of the Rome Statute).³⁴ Article 89 of the Rome Statute obliges states parties to execute the court's pending orders for the arrest and surrender of a person.³⁵ Nevertheless, conflicts may arise between the obligation to cooperate and other obligations under international law, especially towards third states.³⁶ The issue became particularly apparent in the case of the recently overthrown president of Sudan, Umar Al-Bashir. Since 2002, there is an armed conflict in Darfur, a region in Sudan. Acting under Chapter VII of the UN Charter, the Security Council referred the situation to the ICC and asked the court to investigate and prosecute those responsible for crimes under the Rome Statute.³⁷ Sudan is not a Member State of the Rome Statute.³⁸ However, a referral of the Security Council under Chapter VII of the UN Charter allows the court also to investigate in situations on the territory of a state not party to the Rome Statute.³⁹ Although the ICC repeatedly ordered the arrest of Al-Bashir against various Member States when he was on their territory, these states did not comply.⁴⁰ One exemplary case concerns South Africa. The court ruled in 2017 that the country had violated its cooperation

³¹ Stock, J., Polizeiliche Ermittlungstätigkeit im Ausland zur Verfolgung von Völkerstraftaten. In: C.-M. Safferling and S. Kirsch (eds.), *Völkerstrafrechtspolitik*. Springer: Berlin, Heidelberg 2014, pp. 211-222 at p. 215.

³² Werle, G., Deutschland und das Völkerstrafrecht: Zeitgeschichtliche Perspektiven. In: F. Jeßberger and J. Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*. Nomos: Baden-Baden 2013, pp. 23-33 at p. 32.

³³ Zimmermann, A., The Creation of a Permanent International Criminal Court. In: *Max Planck Yearbook of United Nations Law* 2 (1998), pp. 169-237 at p. 224.

³⁴ Ambos, K., *Treatise on International Criminal Law. Volume III: International Criminal Procedure*. Oxford University Press: Oxford 2016, at p. 602; Ciampi, A., The Obligation to Cooperate. In: A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary. Volume II*. Oxford University Press: Oxford 2002, pp. 1607-1683 at p. 1625.

³⁵ De Meester, K., *The Investigation Phase in International Criminal Procedure*. Intersentia: Cambridge 2015, at p. 581; O'Keefe, R., *International Criminal Law*. Oxford University Press: Oxford 2015, at p. 564.

³⁶ Ciampi, A., The Obligation to Cooperate. In: A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary. Volume II*. Oxford University Press: Oxford 2002, pp. 1607-1683 at p. 1632.

³⁷ UN Doc. S/Res/1593 (31 March 2005) at No. 1.

³⁸ A detailed list of ratifications can be found on the website of the ICC: see [here](#) (last access 31 January 2020).

³⁹ Schabas, W., and Pecorella, G., Article 13. Exercise of Jurisdiction. In: O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court. A Commentary*. 3rd edn., C. H. Beck, Hart, Nomos: München, Oxford, Baden-Baden 2016, at mn. 16.

⁴⁰ A detailed list can be found on the website of the ICC: see [here](#) (last access 31 January 2020).

duties when it had not arrested Al-Bashir at an African Union summit in 2015.⁴¹

11.3.2 Immunity of Non-Member State Nationals before the ICC

Al-Bashir was acting president of Sudan and a sitting head of state enjoys, in principle, immunity under international law from the exercise of criminal jurisdiction by other states.⁴² Article 98, paragraph 1, of the Rome Statute prevents the ICC from requests that would force a Member State to act against obligations under international law including the respect of immunity of nationals of Non-Member States.⁴³ On the other hand, Article 27, paragraph 2, of the Rome Statute states that “immunities [...] shall not bar the Court from exercising its jurisdiction”. States that have joined the Rome Statute and accepted Article 27 therefore abrogate immunity to that extent.⁴⁴ In the first instance this rule concerns South Africa, but not Sudan. The case law of the ICC has not recognized a rule under customary international law granting a person immunity towards an international court.⁴⁵ However, even if that was correct, it does not necessarily mean that national authorities, upon an order of an international court, may arrest a head of state in accordance with international law.⁴⁶ In the light of Article 98, paragraph 1, of the Rome Statute, such order appears questionable if the addressed Member State was under obligation to respect the immunity.⁴⁷

The ICC dealt with the matter by referring to the wording of the resolution by which the Security Council referred the situation to the ICC: “Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.”⁴⁸ The judges interpreted the full cooperation duties set out in the resolution as equivalent to those of a Member State of the Rome Statute. In their

⁴¹ ICC, Decision of 6 July 2017, *Prosecutor v. Al-Bashir*, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09-302, at para. 123.

⁴² International Court of Justice, Judgement of 14 February 2002, *Democratic Republic of the Congo v. Belgium*, Case Concerning the Arrest Warrant of 11 April, ICJ-Reports 2002 at para. 51; Pedretti, R., *Immunity of Heads of State and State Officials for international Crimes*. Brill Nijhoff: Leiden 2015, at p. 7.

⁴³ Ciampi, A., The Obligation to Cooperate. In: A. Cassese, P. Gaeta and J. Jones, J. (eds.), *The Rome Statute of the International Criminal Court: A Commentary. Volume II*. Oxford University Press: Oxford 2002, pp. 1607-1683 at pp. 1631-1632.

⁴⁴ Kaul, H.-P., Das Völkerstrafgesetzbuch aus Sicht der Internationalen Strafjustiz. In: F. Jeßberger and J. Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*. Nomos: Baden-Baden 2013, pp. 223-230 at p. 227; Pedretti, R., *Immunity of Heads of State and State Officials for international Crimes*. Brill Nijhoff: Leiden 2015, at p. 247.

⁴⁵ ICC, Decision of 13 December 2011, *Prosecutor v. Al-Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-tENG, at para. 36; ICC, Judgement of 6 May 2019, *Prosecutor v. Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397, at para. 113.

⁴⁶ Akande, D., The Immunity of Heads of States of Nonparties in the early Years of the ICC. In: *American Journal of International Law Unbound* 112 (2018), pp. 172-176 at p. 175.

⁴⁷ De Meester, K., *The Investigation Phase in International Criminal Procedure*. Intersentia: Cambridge 2015, at pp. 574-575; Pedretti, R., *Immunity of Heads of State and State Officials for international Crimes*. Brill Nijhoff: Leiden 2015, at p. 275.

⁴⁸ UN Doc. S/Res/1593 (31 March 2005) at No. 2.

words, “for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of States Parties to the Statute”.⁴⁹ In consequence, Article 27, paragraph 2, of the Rome Statute was applicable for Sudan.⁵⁰ Thus, the chamber did not follow South Africa’s argument that Sudan should have waived the immunity before South Africa could act upon the arrest order.⁵¹ In addition, the judges stated that Article 98, paragraph 1, of the Rome Statute only addresses the court without giving a state the right to refuse orders, even if they may potentially be unlawful.⁵² Following that, in any scenario South Africa was under legal duty to arrest Al-Bashir. Had South Africa indeed been obliged to respect the immunity, the state would have had no way of fulfilling it.⁵³ In principle, such a dilemma could affect all Member States of the Rome Statute.

11.4 Desecration of Dead Bodies

11.4.1 Legal Background

According to the principle of complementarity under the Rome Statute, national states have the primary responsibility to prosecute crimes under international law.⁵⁴ A case is generally inadmissible before the ICC if national investigations or prosecutions are carried out.⁵⁵ Nonetheless, it is commonly understood that states are not legally obliged to implement the ICC’s core crimes into their national legal system in order to comply with their responsibility.⁵⁶ However, the ICC may exercise jurisdiction over a case if the primarily responsible state is unwilling

⁴⁹ ICC, Decision of 6 July 2017, *Prosecutor v. Al-Bashir*, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09-302, at para. 88.

⁵⁰ ICC, Decision of 6 July 2017, *Prosecutor v. Al-Bashir*, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09-302, at para. 107.

⁵¹ ICC, Decision of 6 July 2017, *Prosecutor v. Al-Bashir*, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09-302, at para. 32.

⁵² ICC, Decision of 6 July 2017, *Prosecutor v. Al-Bashir*, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09-302, at para. 106.

⁵³ For a similar criticism, cf. De Meester, K., *The Investigation Phase in International Criminal Procedure*. Intersentia: Cambridge 2015, at pp. 573-575.

⁵⁴ ICC, Decision of 26 October 2011, *Prosecutor v. Mbarushimana*, Decision on the “Defence Challenge to the Jurisdiction of the Court”, ICC-01/04-01/10-451, at para. 21; Rackwitz, K., Das Zusammenspiel von nationaler und internationaler Strafverfolgung aus Sicht des Internationalen Strafgerichtshofs. In: C.-M. Safferling and S. Kirsch (eds.), *Völkerstrafrechtspolitik*. Springer: Berlin, Heidelberg 2014, pp. 269-277 at pp. 270-271; Schabas, W.-A., and El Zeidy, M., Article 17. Issues of Admissibility. In: O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court. A Commentary*. 3rd edn., C. H. Beck, Hart, Nomos: München, Oxford, Baden-Baden 2016, at mn. 4.

⁵⁵ Schabas, W.-A., and El Zeidy, M., Article 17. Issues of Admissibility. In: O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court. A Commentary*. 3rd edn., C. H. Beck, Hart, Nomos: München, Oxford, Baden-Baden 2016, at mn. 4.

⁵⁶ Benzing, M., The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity. In: *Max Planck Yearbook of United Nations Law* 7

or unable (e.g. due to a lack of law) to conduct the proceedings.⁵⁷ To prevent this from happening, the German legislator enacted the national Code of Crimes against International Law (*Völkerstrafgesetzbuch*), which in its main parts reflects the crimes of the Rome Statute.⁵⁸

In a recent case, the German court of first instance was faced with the following facts:⁵⁹ The accused travelled to Syria to join one of the rebel groups and fight against the Assad government. At some point members of the group attacked a checkpoint of the Syrian army and captured at least two soldiers. Later they killed the two people, beheaded them and impaled their heads on iron bars, which they positioned in front of a school. In the view of the court, it could not be proven that the defendant himself took part in the killings. However, the judges found that he posed in front of the impaled and badly deformed heads for pictures that he later posted on Facebook. Because of this conduct, the perpetrator was convicted pursuant to § 8, paragraph 1, No. 9, of the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*). That rule states: “Whoever in connection with an international armed conflict or with an armed conflict not of an international character [...] treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner will be [...] punished”.⁶⁰

11.4.2 Principle of Legality

According to the constitutional principle of legality, the interpretation of a criminal provision may not go beyond the limits of its wording.⁶¹ In the case at hand, it seems questionable whether impaled heads fall within the meaning of the word “person” because German criminal law usually uses the term to describe a living person.⁶² Furthermore, there is criticism that the German legislator did not want to go beyond customary international law with the Code of

(2003) pp. 591-632 at p. 596; Dittmann, T., and Heinitz, J., *Das Bundesministerium der Justiz und das Völkerstrafrecht*. In: C.-M. Safferling and S. Kirsch (eds.), *Völkerstrafrechtspolitik*. Springer: Berlin, Heidelberg 2014, pp. 191-197 at p. 196; Werle, G., *Völkerstrafgesetzbuch (VStGB) – Einleitung*. In: W. Joecks and K. Mießbach (eds.), *Münchener Kommentar zum Strafgesetzbuch – Band 8. Nebenstrafrecht III*. 3rd edn., C. H. Beck: München 2018, at mn. 25.

⁵⁷ Benzing, M., *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity*. In: *Max Planck Yearbook of United Nations Law* 7 (2003) pp. 591-632 at p. 602-603; Safferling, C.-M., *International Criminal Procedure*. Oxford University Press: Oxford 2012, at p. 99; Werle, G., and Jeßberger, F., *Völkerstrafrecht*. 4th edn., Mohr Siebeck: Tübingen 2016, at mn. 290; Stegmüller, I., *The Pre-Investigation Stage of the ICC*. Duncker & Humblot: Berlin 2011, at p. 284.

⁵⁸ Bundestag-Drucksache No. 14/8524 at pp. 11-12.

⁵⁹ Cf. Higher Regional Court Frankfurt, Judgement of 12 July 2016, 5-3 StE 2/16-4-1/16.

⁶⁰ German original: „Wer im Zusammenhang mit einem internationalen oder nichtinternationalen bewaffneten Konflikt [...] eine nach dem humanitären Völkerrecht zu schützende Person in schwerwiegender Weise entwürdigend oder erniedrigend behandelt, wird [...] bestraft.“

⁶¹ Wessels, J., Beulke, W., and Satzger, H., *Strafrecht Allgemeiner Teil. Die Straftat und ihr Aufbau*. 49th edn., C. F. Müller: Heidelberg 2018, at mn. 72.

⁶² Ambos, K., *Leichenschändung als Kriegsverbrechen – Syrienkonflikt*. In: *Neue Juristische Wochenschrift* 70 (2017) p. 3672; Bock, S., and Bülte, N., *Die Strafbarkeit von Leichenschändungen nach dem VStGB und die Herausforderung einer völkerrechtskonformen Auslegung*. In: *Höchstrichterliche Rechtsprechung zum Strafrecht* 19 (2018) pp. 100-103 at p. 101.

Crimes against International Law (*Völkerstrafgesetzbuch*), whereas customary law probably does not cover the punishment of the conduct in question.⁶³

Nevertheless, the German Federal Court of Justice confirmed the broad interpretation of the law in the light of the Rome Statute and it subsumed corpses under the term “person” in § 8, paragraph 1, No. 9, of the Code of Crimes against International Law (*Völkerstrafgesetzbuch*).⁶⁴ In their argumentation, the judges initially referred to the will of the legislator, according to which Germany should always be in a position to prosecute the crimes falling under the jurisdiction of the ICC.⁶⁵ § 8, paragraph 1, No. 9 of the Code of Crimes against International Law (*Völkerstrafgesetzbuch*) is guided by Article 8, paragraph 2, littera b, No. xxi, and littera c, No. ii, of the Rome Statute.⁶⁶ Thus, it should be interpreted similarly.⁶⁷ In this respect, the Elements of Crimes became relevant, which according to Article 9, paragraph 1, of the Rome Statute, serve as an assisting guideline for interpreting the crimes of the Statute.⁶⁸ In a footnote to the respective Elements, they state: “For this crime, ‘persons’ can include dead persons.”⁶⁹ Additionally, the judges of the Federal Court of Justice assumed that the criminal liability for desecration of dead bodies in armed conflict was indeed part of customary international law.⁷⁰ In sum, they concluded that the term “person” in § 8, paragraph 1, No. 9, of the Code of Crimes against International Law (*Völkerstrafgesetzbuch*) encompasses dead persons.⁷¹

However, the judgement has also been criticised for other aspects.⁷² For example, it is questionable to what extent a footnote in an interpretation aid such as the Elements of Crimes

⁶³ Berster, L., Leichenschändung als Kriegsverbrechen. In: *Zeitschrift für Internationale Strafrechtsdogmatik* 12 (2017) pp. 264-273 at p. 268.

⁶⁴ Federal Court of Justice, Judgement of 27 July 2017, 3 StR 57/17, ECLI:DE:BGH:2017:270717U3STR57.17.0, BGHSt 62, 272 (277-282), at paras. 21-34.

⁶⁵ Bundestag-Drucksache No. 14/8524 at p. 12; Dittmann, T., and Heinitz, J., Das Bundesministerium der Justiz und das Völkerstrafrecht. In: C.-M. Safferling and S. Kirsch (eds.), *Völkerstrafrechtspolitik*. Springer: Berlin, Heidelberg 2014, pp. 191-197 at p. 192.

⁶⁶ Bundestag-Drucksache No. 14/8524 at p. 28.

⁶⁷ Federal Court of Justice, Judgement of 27 July 2017, 3 StR 57/17, ECLI:DE:BGH:2017:270717U3STR57.17.0, BGHSt 62, 272 (279), at para. 24; Werle, G., and Jeßberger, F., *Völkerstrafrecht*. 4th edn., Mohr Siebeck: Tübingen 2016, at mn. 1236.

⁶⁸ Gadirov, E., and Clark, R., Article 9. Elements of Crimes. In: O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court. A Commentary*. 3rd edn., C. H. Beck, Hart, Nomos: München, Oxford, Baden-Baden 2016, at mn. 31; Stegmiller, I., *The Pre-Investigation Stage of the ICC*. Duncker & Humblot: Berlin 2011, at p. 31.

⁶⁹ Note 49 to Article 8, paragraph 2, littera b, No. xxi, of the Rome Statute, and note 57 to Article 8, paragraph 2, littera c, No. ii, of the Rome Statute of the Elements of Crimes of the Rome Statute.

⁷⁰ Federal Court of Justice, Judgement of 27 July 2017, 3 StR 57/17, ECLI:DE:BGH:2017:270717U3STR57.17.0, BGHSt 62, 272 (279-282) at paras. 26-33; also cf. Werle, G., and Jeßberger, F., *Völkerstrafrecht*. 4th edn., Mohr Siebeck: Tübingen 2016, at mn. 1490.

⁷¹ Federal Court of Justice, Judgement of 27 July 2017, 3 StR 57/17, ECLI:DE:BGH:2017:270717U3STR57.17.0, BGHSt 62, 272 (277), at para. 19.

⁷² Cf. Ambos, K., Leichenschändung als Kriegsverbrechen – Syrienkonflikt. In: *Neue Juristische Wochenschrift* 70 (2017) p. 3672; Berster, L., Leichenschändung als Kriegsverbrechen. In: *Zeitschrift für Internationale Strafrechtsdogmatik* 12 (2017) pp. 264-273; Bock, S., and Bülte, N., Die Strafbarkeit von Leichenschändungen nach dem VStGB und die Herausforderung einer völkerrechtskonformen Auslegung. In: *Höchstrichterliche Rechtsprechung zum Strafrecht* 19 (2018) pp. 100-103.

leads to a legally binding interpretation.⁷³ However, this issue may not be discussed here. At least, the interpretation of the Code of Crimes against International Law (*Völkerstrafgesetzbuch*) in the light of the Rome Statute reveals the extent to which German jurisdiction understands its obligation to align the national law to the law of the ICC, even if there are constitutional concerns and there is only an international obligation more of political nature, rather than being a strict legal duty.

11. 5 Resumé

The cases described show that states' duties of cooperation in international criminal law can lead to complex consequences. They may collide with constitutional law or, as in the case of Al-Bashir, possibly with other norms of international law. The way these situations are handled varies significantly from one state to another. South Africa, on the one hand, refused to comply with an order of the ICC. On the other hand, German case law interprets national law in the light of the Rome Statute, regardless of constitutional concerns. The German legislator even amended its constitution in order to comply with – only potential – orders of an international tribunal. Of course, these are extreme examples. Nevertheless, they reveal varying degrees of understanding of the scope of cooperation obligations.

⁷³ Ambos, K., Leichenschändung als Kriegsverbrechen – Syrienkonflikt. In: *Neue Juristische Wochenschrift* 70 (2017) p. 3672; Berster, L., Leichenschändung als Kriegsverbrechen. In: *Zeitschrift für Internationale Strafrechtsdogmatik* 12 (2017) pp. 264-273 at pp. 266-267.

12 Russia and the International Criminal Court: Problems of the Implementation of the Rome Statute

Elizaveta Zheleznova and Maria Gerasimenko

The following paper gives a brief overview of the problems of the implementation of the Rome Statute of the International Criminal Court (ICC) in Russia. The ICC is now at the heart of the international criminal justice system.¹ In 1998, its Statute was adopted at a diplomatic conference held in Rome and therewith an international criminal authority with seat in The Hague was established. It is tasked with the investigation and prosecution of the international core crimes. The Rome Statute entered into force in 2002. In 2000, Russia signed it, but has not yet ratified it.² It should be noted that upon ratification it would be necessary to amend national law. The necessary changes would in many respects conflict with fundamental principles of Russian criminal law. Among these contradictions, the following can be distinguished:³

12.1 Non-Compliance with the Constitution of the Russian Federation

Article 14 of the Rome Statute empowers State Parties to refer to the Prosecutor situations that fall under the jurisdiction of the ICC. However, the article does not determine the competent body and the procedure for the transfer of materials. Article 11 of the Constitution of the Russian Federation⁴ contains a closed list of bodies that may exercise state power in the Russian Federation, and Article 118 of the Constitution establishes the institutional and procedural system for administering justice. The ratification of the Rome Statute would therefore require that the ICC is included in the list of state judicial bodies.

Article 27 of the Rome Statute on the irrelevance of official capacity cancels the special procedure for the removal of the president from office for committing a serious crime as enshrined in Article 93 of the Constitution of the Russian Federation. Also, Article 20 of the Rome Statute on the *ne bis in idem* principle contradicts Article 50, paragraph 1, of the Constitution of the Russian Federation fixing the provision on the prohibition of re-conviction for the same crime. This is because the Rome Statute establishes two exceptions from the *ne bis in idem* rule: if the national proceedings have not been conducted independently and impartially, therefore thwarting the prosecution, or they served to protect a person from criminal

¹ Glotova, S. V., The Russian Federation and the International Criminal Court: Some Problems of Implementation of the Rome Statute. 2007, see [here](#), pp. 72-78 at p. 72.

² Skuratova, A. Y., The Russian Federation and the Rome Statute of International Criminal Court. 2016, see [here](#), pp. 1-18 at p. 2.

³ Lazutin, L. A., The Rome Statute of the International Criminal Court and the Constitution of the Russian Federation: The Edge of Non-Conformity. 2018, see [here](#), at pp. 5-9.

⁴ English Translation available at <http://www.constitution.ru/en/10003000-01.htm>.

liability at the international level. Such exceptions run counter to international human rights guarantees – provided that these guarantees (e.g. Article 14, paragraph 7, of the International Covenant on Civil and Political Rights – ICCPR) as well as Article 50 of the Russian Constitution prohibit double conviction not only within a state but also in relation to foreign and international courts.

Regarding Article 89, paragraph 1, of the Rome Statute on the surrender of persons to the ICC and Article 61 of the Russian Constitution, which enshrines the principle of non-extradition of a citizen of the Russian Federation to another State, there is a need to clarify the relationship between or the substantive significance respectively of both the “transfer of a person to the disposal of the international criminal court” and the “extradition of a person”. When the Rome Statute is ratified, this requires additional interpretation.

Finally, the Rome Statute does not have a norm securing the right of a convicted person to ask for pardon as provided for in Articles 50, paragraph 3, and 89 of the Constitution of the Russian Federation.

12.2 Need for Implementation Legislation

The ratification of the Rome Statute does not automatically lead to a criminalisation of international crimes in national legislation.⁵ Therefore, in case of ratification, there is a need to add new articles to the criminal code of the Russian Federation. A comparative legal analysis of the Rome Statute and the criminal law of the Russian Federation shows that it would be necessary to add 35 crimes falling within the jurisdiction of the ICC into national Russian law,⁶ as well as to amend existing crimes enshrined in the criminal code of the Russian Federation.

12.3 Conflicts with other Norms and Legal Principles

In contrast to Section 12 of the Russian Code of Criminal Procedure, the Rome Statute does not provide for a jury trial, which violates the rights of the accused.⁷ Article 98 of the Rome Statute obliges State Parties to transfer their own citizens to the ICC for trial. However, Article 462 of the Russian Code of Criminal Procedure provides only for the extradition of foreign persons and stateless persons. Article 27 of the Rome Statute on the irrelevance of official capacity provides that its provisions apply equally to all persons. This provision completely

⁵ Ryabko, N. V., Russia’s Ratification of the Rome Statute of the International Criminal Court is a Threat to the National Security of the Country. 2014, see [here](#), pp. 29-33 at p. 30.

⁶ Muratova, N. G., Problems of Implementation of the Rome Statute of the International Criminal Court in Russia. 2007, see [here](#), pp. 58-62 at p. 59.

⁷ Ksenofontov, V. V., The Problem of Correlation between the Rome Statute and the criminal procedure legislation of the Russian Federation. 2005, see [here](#), pp. 69-71 at p. 70.

contradicts Articles 447 et seq. of the Russian Code of Criminal Procedure on the peculiarities of criminal proceedings in relation to certain categories of persons.

12.4 Conclusion and Outlook

Considering the above-mentioned legal conflicts, we conclude that it is impossible to realise the call of the principle of complementarity to prosecute the international core crimes on the national level (Article 17 of the Rome Statute) in full.⁸ Accordingly, Russia should use the experience of States that have successfully resolved these conflicts. Summarizing the existing foreign experiences, we can offer two main ways to solve these problems: the first is to amend the current Constitution; the other is to bring national legislation in line with the provisions of the Rome Statute.⁹

Based on two declarations on the ad hoc acceptance of the ICC's jurisdiction of the Ukraine (Article 12, paragraph 3, of the Rome Statute), the Prosecutor of the ICC initiated in 2014 preliminary examinations in the Ukraine which inter alia concerns alleged crimes committed by Russian military personnel committed in Crimea.¹⁰ In 2016, Russia withdrew its signature from the Rome Statute. Representatives of Russia stated that this withdrawal is due to the national interests of Russia and is not related to the issue of the occupation of Crimea. We do not want to touch on the political aspects of this situation, but propose to consider the legal consequences of the withdrawal of the signature by Russia.

Currently, the Prosecutor of the ICC conducts in two situations (preliminary) investigations, which may result in criminal proceedings against Russian nationals. The first concerns alleged crimes committed in the context of an international armed conflict in 2008 in South Ossetia, Georgia.¹¹ In the parallel proceedings before the International Court of Justice concerning state responsibility, Georgia accuses Russia of having violated the International Convention on the Elimination of all Forms of Racial Discrimination. Georgia claims that "the Russian Federation, through its state bodies, state agents, other people and entities that exercise state power, as well as through South Ossetian and Abkhaz separatist forces, acting on the basis of its instructions and under its leadership and control, is responsible for serious violations of their fundamental obligations under the convention." According to Georgia, violations by Russia occurred during three separate phases of "its intervention in South Ossetia and Abkhazia" from 1990 to August 2008.¹²

⁸ Podshibyakin, A. S., *The Rome Statute and the Solution of the Problems of its Ratification by Individual States*. 2008, see [here](#), pp. 66-70 at p. 68.

⁹ Bogush, G. I., and Trikoz, E. N. (eds.), *International Criminal Court: Problems, Discussions, Search for Solutions*. Moscow 2008, at pp. 26-27.

¹⁰ Cf. <https://www.icc-cpi.int/ukraine>.

¹¹ Cf. <https://www.icc-cpi.int/georgia>.

¹² Cf. <https://www.icj-cij.org/en/case/140>.

The second situation relates to the conflict between the Ukraine and Russia. As already mentioned, the Prosecutor conducts preliminary investigations in the situation in Ukraine that focuses on alleged crimes committed in the context of the “Maidan Protests” and on the events in the Crimea and in the Donbass.¹³ At the same time, the Ukraine has instituted proceedings against Russia before the International Court of Justice concerning alleged violations of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination. The Ukrainian side accuses Russia of having violated these conventions during the annexation of Crimea and aggressive actions in the Donbass. The lawsuit was filed back in January 2017, and already in April the International Court of Justice introduced temporary measures against Russia as part of the second part of this lawsuit: the Kremlin was obliged to refrain from violating the rights of the Crimean Tatars and to ensure the right to study in Ukrainian in Crimea. Now Ukraine is working to prove its allegations on the merits.

In case the ICC Prosecutor concludes that there are reasonable grounds to believe that a Russian national has committed an international crime falling within the jurisdiction of the Court, the competent Pre-Trial Chamber may issue an international arrest warrant, which could lead to the arrest of the suspect in a country that has ratified the Rome Statute, or in other countries that have established cooperation relations with the ICC.¹⁴ For now, it only remains to monitor the further development of events and if they will result in Russia refusing to participate in the international (criminal) justice system.

¹³ Cf. <https://www.icc-cpi.int/ukraine>.

¹⁴ Glotova, S. V., *The Russian Federation and the International Criminal Court: Some Problems of Implementation of the Rome Statute*. 2007, see [here](#), pp. 72-78 at pp. 76-77.

13 The Relationship between European Union Law and the German Legal Order in the View and under the Review of the Federal Constitutional Court of Germany

Judith Sikora

13.1 Introduction

The relationship between national and European Union (EU) law is both of great theoretical and practical importance. The EU is not only a large producer of norms. In 2018 alone, 493 new legal acts and 98 amendments were adopted. Furthermore, its legislation heavily influences the national legislation. Although the impact varies largely by sector, it is assumed that up to 80 % of national economic legislation is influenced by EU law. The conflict between national and EU law is therefore an everyday occurrence that becomes more and more frequent. As the EU still has 28 member states,¹ the conflict arises in 28 different manners. This presentation focuses on the conflict between the Court of Justice of the European Union (CJEU) and the German Federal Constitutional Court (FCC). As no static solution for this conflict can be found, several lines of development shaped out of the two courts' case law will be presented.

This presentation aims in particular at demonstrating how the relationship between German and EU law has developed. First, we will look at the perspective of EU law and the case law of the CJEU. Afterwards, I will contrast this view with the case law of the FCC and present three types of review the FCC has developed: the review of fundamental rights, the review of constitutional identity, and the *ultra vires* review.

13.2 European Union Law and the Case Law of the CJEU

To begin with EU law, the founding treaties make no stipulation on the normative status of Union law. Therefore, the task to determine the relationship between EU law and national law fell to the CJEU. It established the basic principles of supremacy and direct effect in three fundamental judgments, known as *van Gend en Loos*, *Costa v. ENEL* and *Internationale Handelsgesellschaft*.

¹ Although the United Kingdom withdrew from the EU on 30 January 2020, no contractual agreement has been reached yet on the extent to which EU law will continue to apply there.

13.2.1 The Principle of Primacy of Union law

13.2.1.1 *Van Gend en Loos*, CJEU, Judgement of 5 February 1963

The CJEU established the supremacy and direct effect of EU law in *van Gend en Loos*. In the case, a Dutch company imported goods from Germany into the Netherlands. Under a pre-existing Dutch law, the Dutch Customs Authorities imposed an import duty, which was prohibited by the principle of free movement of goods.² The CJEU rules that the provision of the EU Treaty is directly applicable and does not need to be transposed into national law. This is the so-called direct effect of EU law.³ Furthermore, the provision of the EU Treaty overrules the contradicting national norm.⁴ The conflicting national law does not apply. The supremacy of EU law – in the respective case, the EU Treaty provision – is justified with the new, autonomous legal order the EU created in international law. The CJEU then followed this line and continued to extend the primacy of EU law.

13.2.1.2 *Costa v. ENEL*, CJEU, Judgement of 15 July 1964

In the case *Costa v. ENEL*, the respondent Mr. Costa, was sued for non-payment of an electricity bill.⁵ The obligation to pay existed due to an Italian law which was passed after the European Treaties came into force. The Italian Constitutional Court ruled that according to the *lex posterior derogat legi priori* principle,⁶ the Italian law took precedence. So the conflict arose between EU law and a subsequent national law.

The solution the CJEU found was, again, that the EU Treaty provision overruled national law. The fact that the Italian law had been passed after the Treaty came into force was considered irrelevant. Signing the Treaty, the Member States transferred powers to the EU. Thus, a Member State cannot subsequently pass a law breaching the agreement. According to the CJEU, the strict obligation to EU law is based on the self-commitment of the Member States in the Treaty of Rome.⁷

² Now Article 30 of the Treaty on the Functioning of the European Union (TFEU); cf. Craig, P., and de Búrca, G., *EU Law*. Oxford University Press: Oxford 2011, at pp. 612-620, 664-665.

³ Craig, P., and de Búrca, G., *EU Law*. Oxford University Press: Oxford 2011, at pp. 106, 180-199; Chalmers, D., Davies, G., and Monti, G., *European Union Law*. Cambridge University Press: Cambridge 2019, at pp. 291-293.

⁴ CJEU, Judgement of 5 February 1963, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 26/62, ECLI:EU:C:1963:1.

⁵ CJEU, Judgement of 15 July 1964, *Flaminio Costa v. ENEL*, 6/64, ECLI:EU:C:1964:66.

⁶ Fellmeth, A., and Horwitz, M., *Guide to Latin in International Law*. Oxford University Press: Oxford 2011, at p. 174.

⁷ Cf. for the history of the European Community and EU Foster, N. G., *EU Law*. Oxford University Press: Oxford 2017, at pp. 8-9.

13.2.1.3 *Internationale Handelsgesellschaft*, CJEU, Judgement of 17 December 1970

Finally, the CJEU ruled that the normative rank of the conflicting national law does not impact the primacy of EU law.⁸ In *Internationale Handelsgesellschaft*, a German company challenged a system established under an European Economic Community (EEC) regulation whereby deposits had to be paid for import and export licences for cereals. This was considered as a violation of the German Constitution⁹ protecting the freedom of action and economic liberty. The question was whether EU law would take precedence over national law, even if the conflicting provision was a fundamental right. The CJEU held that EU law always took precedence over conflicting provisions of Member States' constitutions. Otherwise, it would have an adverse effect on the uniformity and efficacy of EU law and would call into question the legal basis of the EU.¹⁰

13.2.2 Conclusion: EU Law Always Prevails

The conclusion drawn from these cases is, that in all conflicts between EU law and national law, EU law always takes precedence. As highlighted in *Internationale Handelsgesellschaft*, the CJEU developed the principle of supremacy to ensure that EU law is applied evenly across the different Member States. If the Member States were able to choose when to apply EU law, it would hinder the achievement of the aims of the EU – such as the European Single Market.¹¹ Thus, the principle seeks to avoid the divergent application of Union law amongst the Member States, even if it clashes with the Member States' constitutions.

Van Gend en Loos was the seminal case in relation to the CJEU's perception of its constitutional role. From this position, the court established that the Union law order was a new legal order. It noted that the *acquis communautaire* and the EU Treaties were directly applicable in all Member States, whether or not they follow a monistic or dualistic integration system, provided the provision met certain conditions, namely, they were clear, precise and unconditional. In later cases, the CJEU extended the scope of direct applicability by transferring it to secondary law.¹²

⁸ CJEU, Judgement of 17 December 1970, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 11/70, ECLI:EU:C:1970:114.

⁹ Article 2, paragraph 1, of the Basic Law (*Grundgesetz*). Actually, the deposits had been declared forfeited after they haven't been used fully. The EEC regulation only stipulated the duty of payback in case of *force majeure*.

¹⁰ CJEU, Judgement of 17 December 1970, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 11/70, ECLI:EU:C:1970:114, at para. 3.

¹¹ Article 3 of the TEU and Article 26-67 of the TFEU; Edward, D., and Lane, R., *Edward and Lane on European Union Law*. Edgar Elward Publishing: Cheltenham 2013, at p. 412.

¹² Craig, P., and de Búrca, G., *EU Law*. Oxford University Press: Oxford 2011, at pp. 256-268.

13.3 The Reaction of the Member States' Courts, Especially the German FCC

The Member States gradually accepted the core principles of the primacy of EU law.¹³ However, some courts found that the legal basis of primacy and direct effect result from their own domestic constitutions. So does the German FCC. The EU law is considered to be applied in the national legal system only on the basis of the order giving effect on a national level or transformation order. Union law is therefore applicable for the same reason as international law.¹⁴ As a result, constitutional courts reserve powers of exceptional review for themselves. In the following I will shed light on the development of these reviews.

13.3.1 Reservation Concerning Fundamental Rights Protection: Review of Fundamental Rights

One of the reservations derives from the fact that in the early days as an economic community, the EU was primarily interested in free markets but not – yet – in the protection of individual rights. The situation was aggravated when the CJEU decided that the supremacy allowed EU law to overrule national constitutions' provisions, including such relating to fundamental rights. As a consequence, there was no direct protection of fundamental rights against EU legal acts. Of course this situation attracted the attention of the national constitutional courts, especially those charged with the protection of fundamental rights. At this point, they threatened to ensure fundamental rights protection against EU legal acts themselves.

13.3.1.1 *Solange I* (As Long As I) FCC, Decision of 29 May 1974

In Germany, the FCC issued the threat in the *Solange I* decision. The case was a subsequent decision to *Internationale Handelsgesellschaft* presented above. As a reminder, the conflict arose between an EEC regulation and the German constitution, the Basic Law (*Grundgesetz*).

The FCC stated that Article 24 of the Basic Law (*Grundgesetz*) allowed the transfer of sovereign rights to interstate institutions such as the EU. At the same time, Article 24 of the Basic Law (*Grundgesetz*) limits the possibility of transfer in cases where the constitution itself requires a formal amendment. In an argument based on the legal principle of *nemo plus iuris*¹⁵, the FCC rules that the constitutional limits applying to national legislative bodies also applied

¹³ From the perspective of the Member States Haltern, U., *Europarecht – Dogmatik im Kontext*. 3rd edn., Vol. 2, Mohr Siebeck: Tübingen 2017, at pp. 425-435 mn. 1048-1067.

¹⁴ Cf. for the relationship between international law and the German national legal system the contribution of Manoharan, J., *The Federal Constitutional Court of Germany on the Openness of National Law to International Treaty Law*. In this volume, Chapter 5, pp. 58-65.

¹⁵ The principle of *nemo plus iuris transferre ad alium transferre postest quam ipse habet* means “one cannot transfer to another more rights than he has”. This principle of continental civil law originates from the Digests (Dig. 50.17.54); cf. further Fellmeth, A., and Horwitz, M., *Guide to Latin in International Law*. Oxford University Press: Oxford 2011, at p. 195; Honsell, H., *Römisches Recht*. Springer: Berlin 2015, at p. 211.

to supranational legislation.¹⁶ The limits of Article 24 of the Basic Law (*Grundgesetz*) lie in the very foundation and basic structure(s) of the Constitution, the so-called constitutional identity. Especially the fundamental rights constitute an inalienable, essential feature that cannot be transferred without reservations. At that time, the Community lacked a catalogue of fundamental rights. The Court further decided that “as long as” – and this is where the case got its name from – “as long as an application of fundamental rights which in substance and effectiveness is essentially similar to the standard required by the constitution, is not achieved [...], the reservation of Art. 24 [...] applies.”¹⁷

Thus, in case of conflict between Community law and the guarantee of fundamental rights in the Basic Law, the latter prevails. In the *Solange I* decision, the FCC accepted the primacy of Union law as a primacy of application but subjected it to the limitation of Article 24 of the Basic Law (*Grundgesetz*). At the same time, the FCC claimed the competence of judicial review for itself.

13.3.1.2 *Solange II* (As Long As II) FCC, Decision of 22 October 1986

Since 1974, the CJEU developed protection standards for fundamental rights against the sovereign powers of the Community. Declarations on rights and democracy were made by the Community institutions.¹⁸ This led the FCC to revise its *Solange I* approach. In *Solange II*, the FCC made an exception from its threat to review EU legal acts, as long as the fundamental rights protection in the EU was evident.

The FCC recognized that the European Community and in particular the case law of the CJEU generally ensured an effective protection of fundamental rights against the Community’s sovereign powers. It considered the protection as substantially similar to the protection of fundamental rights that were essentially and unconditionally required by the Constitution. It further ruled that *as long as* this requirement was fulfilled, it would not exercise its competence of judicial review. The FCC thus claimed a competence of judicial review, but decided to let it rest as long as an equivalent protection of fundamental rights was guaranteed by the CJEU.¹⁹

In the same year as the Maastricht Treaty, Article 23 of the Basic Law (*Grundgesetz*) was adopted. The so-called Europe Article²⁰ contains a special authorization for the transfer of sovereign rights to the EU and codifies the case law of the FCC, especially with regard to the *Solange II* decision.²¹

¹⁶ FCC, Decision of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (279), at para. 43.

¹⁷ Cf. *ibid.*, FCC, BVerfGE 37, 271 (280), at para. 44.

¹⁸ FCC, Decision of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339 (378-387), at paras. 102-117.

¹⁹ Cf. *ibid.*, FCC, BVerfGE 73, 339 (387), at para. 117.

²⁰ Wollenschläger, F., Art. 23. In: H. Dreier (ed.), *Grundgesetz Kommentar*. 3rd edn., Vol. 2, Mohr Siebeck: Tübingen 2015, at mn. 1-3.

²¹ Streinz, R., Art. 23. In: M. Sachs (ed.), *Grundgesetz Kommentar*. 8th edn., C. H. Beck: München 2018, at mn. 12-13.

13.3.1.3 *Maastricht Treaty, FCC, Judgement of 12 October 1993*

The scope and breadth of this judicial review was further examined in the FCC's decision concerning the Maastricht Treaty. At first, the FCC confirmed its intention of protecting the individuals' fundamental rights against the sovereign powers of the Community. However, the FCC ruled to exercise its review in a "co-operative relationship" with the CJEU.²² The FCC divided the competences between the courts. The CJEU guarantees the protection of fundamental rights in individual cases, and the FCC limits its judicial review to a general guarantee of the indispensable fundamental rights standard. The FCC assigns itself this "guardian function".²³ The question arose, whether the reference to the cooperative relationship meant that the Solange II approach was abandoned.

13.3.1.4 *Banana Market, FCC, Decision of 7 June 2000*

The FCC rejected this idea in the later banana market decision.²⁴ In the case, 19 importers of fruits challenged a system of import licenses for bananas established under the Common organisation of the markets in the banana sector. The FCC affirmed the Solange II standard at first, but added a procedural component to the standard of the Maastricht decision: An action challenging Union law shall be admissible only if its grounds state that the evolution of EU law – including the rulings of the CJEU – has resulted in a general decline below the required standard of fundamental rights of the Solange II decision.²⁵

This special condition of admissibility has been strongly criticized. First of all, it does not help the party in the individual case to demonstrate that the standard of fundamental rights is generally undermined. Secondly, it is almost impossible to consider the entire case law of the CJEU. Finally, after the Charter of Fundamental Rights on 1st December 2009 came into force, it could be assumed that since then, the equivalent protection of fundamental rights was generally guaranteed. So the review competence was discussed as being an idle threat only.²⁶

13.3.1.5 *European Arrest Warrant II, FCC, Decision of 15 December 2015*

But in 2015 the FCC reactivated the review of fundamental rights and changed the scope of the review. In the European arrest warrant II case, the complainant claimed that his extradition

²² FCC, Judgement of 12 October 1993, 2 BvR 2134, 2159/91, BVerfGE 89, 155 (174-175), at para. 70.

²³ Dederer, H.-G., Die Grenzen des Vorrangs des Unionsrechts – Zur Vereinheitlichung von Grundrechts-, Ultra-vires- und Identitätskontrolle. In: *JuristenZeitung* 69 (2014) pp. 313-322 at pp. 320-321; Mayer, F., Art. 19 EUV. In: E. Grabitz, M. Hilf and M. Nettesheim (eds.), *Das Recht der Europäischen Union*. C. H. Beck: München 2019, at mn. 78-82; Sauer, H., *Staatsrecht III*. 5th edn., C. H. Beck: München 2018, at p. 194.

²⁴ FCC, Decision of 7 June 2000, 2 BvL 1/97, ECLI:DE:BVerfG:2000:ls20000607.2bv1000197, BVerfGE 102, 147 (164), at para. 62.

²⁵ Cf. *ibid.*, FCC, BVerfGE 102, 147 (164), at para. 62.

²⁶ Sauer, H., *Staatsrecht III*. 5th edn., C. H. Beck: München 2018, at pp. 194-195.

to Italy violated the principle of individual guilt, due to a possible conviction in absentia. The FCC accepted the complaint and exercised the review. It argued that the principle of individual guilt is part of the human dignity, which in turn, is an integral part of the constitutional identity protected by Article 79, paragraph 3, of the Basic Law (*Grundgesetz*).²⁷ The FCC ruled that the protection of these indispensable fundamental rights is guaranteed absolutely and in every individual case, irrespective of any potential conflict with obligations under Union law.²⁸ In this case, human dignity as part of German constitutional identity was ruled to prevail over Union law. This is why the decision is also called review of constitutional identity.

13.3.1.6 Conclusion

The scope of review of fundamental rights varied largely but has finally settled on the yardstick of the constitutional identity found in Article 79, paragraph 3, of the Basic Law (*Grundgesetz*). As the *Solange II* standard proved unsuitable for effective control of EU acts, the FCC ruled that the Basic Law (*Grundgesetz*) guarantees only the protection of the indispensable fundamental rights absolutely and in each individual case. These main fundamental rights, which form the core contents of the constitution, the so-called constitutional identity, include the human dignity and the core of human dignity in fundamental rights.

13.3.2 Reservation Concerning the Observance of Competences: *Ultra Vires* review

The second reservation concerns the observance of competences by EU bodies. The transfer of sovereign rights or competences respectively from the Member States to the EU leads to the principle of conferral of powers stated in Article 5, paragraph 2, of the Treaty on European Union (TEU). The EU is only entitled to use explicitly or implicitly conferred powers, but cannot extend the competences on its own (no *Kompetenz-Kompetenz*).²⁹ So the question is about the implications for a legal act potentially exceeding the limits of competences. This is the meaning of the Latin words *ultra vires*: beyond the limits (of competences).

From the point of view of the CJEU, the CJEU is the sole guardian of the Treaties (Article 19, paragraph 1, subparagraph 1, sentence 2, of the TEU). All cases concerning the validity of Union law must be presented to the CJEU. Only the CJEU controls the observance of primary law, in particular the competences codified in the treaties. In contrast, the FCC exercises a review of competence vis-à-vis the Union bodies on the basis of national law. The review of competences is not sufficient when exercised only vis-à-vis the consenting Act of Parliament because it can only be a display of the current situation. The actual extent of the transfer of

²⁷ FCC, Decision of 15 December 2015, 2 BVR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514, BVerfGE 140, 317 (342), at para. 51.

²⁸ Cf. *ibid.*, FCC, BVerfGE 140, 317 (334), at para. 36.

²⁹ Cf. with further references Lo, P.Y., Master of One's Own Court. In: *Hong Kong Law Journal* 34 (2004), pp. 47-65 at pp. 54-57.

competences will become apparent with their application over time.³⁰ Therefore the national courts follow another strategy. They claim the competence to control the limits of competences on the occasion of an individual case.

13.3.2.1 *Maastricht Treaty, FCC, Judgement of 12 October 1993*

This is what has been emphasised in the Maastricht Treaty judgement of the FCC. The FCC claimed the possibility to review “whether legal acts of the European institutions and bodies keep within or exceed the limits of the sovereign rights granted to them”.³¹ Although recognizing the CJEU’s competence to interpret and control primary law, the FCC assumes nevertheless that a review of competences is necessary to effectively safeguard the principle of conferral. Otherwise the Union could gain competences that have never been transferred to it. However, the FCC tries to be compliant towards the European legal system and exercises its jurisdiction again in a “co-operative relationship” with the CJEU.³²

13.3.2.2 *Lisbon Treaty, FCC, Judgement of 30 June 2009*

But the question of who has the ultimately binding power to decide whether a legal act of the European institutions and bodies keeps within or exceeds the limits of the transferred sovereign rights remained unsettled until the Lisbon Treaty Decision. In 2009, the FCC granted itself this special position. On the one hand, the FCC stresses the mandatory principle of conferral is at stake “if institutions of the European Union may unrestrictedly, i.e. without any outside control [...] decide about how the law under the Treaties is interpreted”.³³

The yardstick of this review of competences emerges from the principle of democracy. “The principle of conferral is [...] not only a principle of European law [...], it includes constitutional principles from the Member States.”³⁴ Compliance with the competences of the EU is essential for protecting the Basic Law’s principle of democracy, as the FCC stated in a later decision.³⁵ It is the predominant justification for the decrease in the level of democratic legitimation of the public authority exercised by the EU. The principle of conferral therefore has an “interface function”, that must have an effect on the methodical review of whether it is being respected. If fundamental interests of the Member States are affected, and they are affected if the EU exceeds their competences, judicial review may not simply accept the positions of EU organs

³⁰ Sauer, H., *Staatsrecht III*. 5th edn., C. H. Beck: München 2018, at pp. 189-190.

³¹ FCC, Judgement of 12 October 1993, 2 BvR 2134/92, 2159/92, BVerfGE 89, 155 (188), at para. 106.

³² Cf. *ibid.*, FCC, BVerfGE 89, 155 (175, 178), at paras. 70, 80.

³³ FCC, Judgement of 30 June 2009, 2 BvE 2/08 et al, ECLI:DE:BVerfG:2009:es20090630.2bve000208, BVerfGE 123, 267 (352), at para. 238.

³⁴ Cf. *ibid.*, FCC, BVerfGE 123, 267 (350), at para. 234.

³⁵ Cf. FCC, Judgement of 21 June 2016, 2 BvE 13/13, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813, BVerfGE 142, 123 (219), at para. 185.

claiming to be within their competences.³⁶ But on the other hand, as an expression of the „principle of openness towards EU law“³⁷ the review exercised shall be “very moderate and regarded [...] as an exceptional one”.³⁸

The ultra-vires review was given special significance by a case pending at that time before the CJEU. It was a discrimination case about the unfounded fixed terms of an older worker, Mr. Mangold.³⁹

13.3.2.3 *Honeywell*, FCC, Decision of 6 July 2010

The complaint in the subsequent *Honeywell* decision was that the CJEU had acted *ultra vires* by endorsing the discrimination in the *Mangold* case. The FCC rejected the complaint, but it specified its standard of *ultra vires* review.⁴⁰ The review can only be considered if firstly, prior to the assessment of an *ultra vires* act, the CJEU has been given the opportunity to interpret the European Treaties, as well as to rule on the validity and interpretation of the acts in question, particularly in a preliminary ruling.⁴¹ Secondly, the breach of competences on the part of the European bodies must be sufficiently qualified.⁴² This means, that the act of the European authority must be manifestly in breach of competences and the impugned act must lead to a structurally significant shift to the detriment of the Member States in the structure of competences.⁴³

13.3.2.4 *European Stability Mechanism* (ESM), FCC, Judgement of 18 March 2014

The judgement on the European Stability Mechanism⁴⁴ is one of a whole series of decisions of the FCC concerning measures of the EU and its Member States against the sovereign debt and euro crisis since 2010. In line with the previous decision on the euro rescue package to maintain the solvency of Greece,⁴⁵ the FCC confirmed the detailed limits of the democratic principle of the Basic Law for the extension of the EU’s competences which in principle had already been set out in the Maastricht and Lisbon Treaty decision. The Court ruled that Article 38, paragraph 1, sentence 1, of the Basic Law (*Grundgesetz*) which guarantees everyone the

³⁶ Cf. *ibid.*, FCC, BVerfGE 142, 123 (219-220), at para. 186.

³⁷ Cf. FCC, Judgement of 30 June 2009, 2 BvE 2/08 et al., ECLI:DE:BVerfG:2009:es20090630.2bve000208, BVerfGE 123, 267 (347), at para. 225.

³⁸ Cf. *ibid.*, FCC, BVerfGE 123, 267 (353-354), at para. 240.

³⁹ CJEU, Judgement of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709.

⁴⁰ Sauer, H., *Staatsrecht III*. 5th edn., C. H. Beck: München 2018, at pp. 197-201.

⁴¹ FCC, Decision of 6 July 2010, 2 BvR 2661/06, ECLI:DE:BVerfG:2010:rs20100706.2bvr266106, BVerfGE 126, 286 (304), at para. 60.

⁴² Cf. *ibid.*, FCC, BVerfGE 126, 286 (304), at para. 61.

⁴³ Cf. *ibid.*, FCC, BVerfGE 126, 286 (304-305), at para. 61.

⁴⁴ FCC, Judgement of 18 March 2014, 2 BvE 6/12 et al., ECLI:DE:BVerfG:2014:rs20140318.2bvr139012, BVerfGE 135, 317.

⁴⁵ FCC, Judgement of 7 September 2011, 2 BvR 987/10 et al., ECLI:DE:BVerfG:2011:rs20110907.2bvr098710, BVerfGE 129, 124.

individual right to vote, implicitly grants a “right to democracy” which is directed against the fact that central political decisions are no longer taken by the elected parliament, the *Bundestag*, but by organs of the EU. Thus, the FCC made the limitation of European competences a subjective right enforceable by the individual. In order to ensure their possibilities of influence on the European integration process, citizens are entitled to the right that a transfer of sovereign powers only takes place in accordance with the indispensable requirements of democratic legitimacy the Basic Law (*Grundgesetz*) has set out in Article 23, paragraph 1, sentences 2 and 3, Article 20, paragraph 1 and paragraph 2, and Article 79, paragraph 3, to that end. Otherwise there is a risk that citizens' right to vote will be undermined if the electoral acts have no real impact.⁴⁶

The standard of the Court's review is thereby limited to this core content of the principle of democracy which is a part of the constitutional identity of the Basic Law that is beyond the reach even of the constitution-amending legislature. And this applies not only to the limits of the transfer of sovereign powers to the EU (transfer control) but also to the limits of the EU's exercise of transferred powers (exercise control), which must not be *ultra vires*.

13.3.2.5 *Outright Monetary Transactions (OMT), FCC, Judgement of 21 June 2016*

The latter was the result of the OMT judgement.⁴⁷ The case concerned the European Central Bank's (ECB) announcement on the implementation of “Outright Monetary Transactions”, i.e. the purchase of government bonds on the secondary market from those Eurozone Member States that already receive financial aid from the ESM but require additional support. The project became the subject of *ultra vires* control by the FCC because it was dubious whether the ECB acted thereby within its competencies or had exceeded them.

Here, the yardstick of the *ultra vires* review along the Honeywell criteria⁴⁸ was specified. Initially, the FCC sought a preliminary ruling from the CJEU.⁴⁹ This was the first time the FCC referred a question to the CJEU. The CJEU, however, ruled that the ECB had the competence to adopt the OMT programme.⁵⁰

⁴⁶ See FCC, Judgement of 18 March 2014, 2 BvE 6/12 et al., ECLI:DE:BVerfG:2014:rs20140318.2bvr139012, BVerfGE 135, 317 (386, 399), at paras. 125, 159; with references to Judgement of 12 October 1993, 2 BvR 2134, 2159/91, BVerfGE 89, 155 (171-172), at paras. 60-64; Judgement of 30 June 2009, 2 BvE 2/08 et al., ECLI:DE:BVerfG:2009:es20090630.2bve000208, BVerfGE 123, 267 (330, 340), at paras. 174, 209; Judgement of 7 September 2011, 2 BvR 987/10 et al., ECLI:DE:BVerfG:2011:rs20110907.2bvr098710, BVerfGE 129, 124 (167-170, 177), at paras. 98-102, 120; Judgement of 12 September 2012, 2 BvE 6/12 et al., ECLI:DE:BVerfG:2012:rs20120912.2bvr139012, BVerfGE 132, 195 (238), at para. 104.

⁴⁷ FCC, Judgement of 21 June 2016, 2 BvE 13/13, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813, BVerfGE 142, 123.

⁴⁸ See above under point 13.3.2.3.

⁴⁹ FCC, Decision of 14 January 2014, 2 BvR 2728 et al., ECLI:DE:BVerfG:2014:rs20140114.2bvr272813, BVerfGE 134, 366, summarizing the jurisprudence of the FCC at pp. 380-389, paras. 17-31.

⁵⁰ CJEU, Judgement of 16 June 2015, *Gauweiler*, C-62/14, ECLI:EU:C:2015:400.

Nonetheless, in view of the requirement of sufficient democratic legitimacy the ECB's programme might be *ultra vires* and therefore unconstitutional in terms of the German Basic Law (*Grundgesetz*). According to the above mentioned second Honeywell criteria this is the case, when the FCC considers that there is a sufficiently qualified exceeding of competences, i.e., breaching manifestly the competences leading to a structurally significant shift to the detriment of the Member States. Such "a shift of competences [...] can only be found [...] if the exceeding of competences carries considerable weight for the principle of democracy and the sovereignty of the people. This is for instance the case if it is capable of altering the fundamental competences of the European Union [...] and thereby of undermining the principle of conferral".⁵¹ Thus, the FCC can contradict the CJEU on the question of whether the EU remains within its competences, but only under the strict conditions mentioned. These high conditions or, in other words, the reduced control density not only respects the principle of openness towards EU law⁵² but follows from the fact that "the citizens' right to democratic self-determination enshrined in Article 38, paragraph 1, sentence 1, of the Basic Law [...] is strictly limited to the core of the principle of democracy that is rooted in human dignity (Article 1 in conjunction with Article 79, paragraph 3, of the Basic Law)".⁵³ The reason for this is that the purpose of the *ultra vires* review, as already said in the decision on the Euro rescue package in favour of Greece,⁵⁴ "is not to monitor the content of democratic processes but rather to facilitate them".⁵⁵ In the end, the FCC decided that these constitutional limits of the validity of European legal acts in Germany were not violated, however, only if certain requirements for the government bond purchases under the OMT programme were met.⁵⁶

To summarise, the yardstick of the *ultra vires* review is quite a strict one. Only legal acts of the European organs that exceed competences and at the same time violate the constitutional identity of Article 79, paragraph 3, Article 38, paragraph 1, sentence 1, of the Basic Law (*Grundgesetz*) constitute unconstitutional *ultra vires* acts. Therefore, the *ultra vires* control coincides with the identity control.⁵⁷

⁵¹ Cf. FCC, Judgement of 21 June 2016, 2 BvR 2728 et al., ECLI:DE:BVerfG:2016:rs20160621.2bvr272813, BVerfGE 142, 123 (201-202), at para. 151.

⁵² See above point 13.3.2.2 and 13.3.2.3, FCC judgements on Lisbon Treaty and Honeywell.

⁵³ Cf. FCC, Judgement of 21 June 2016, 2 BvR 2728 et al., ECLI:DE:BVerfG:2016:rs20160621.2bvr272813, BVerfGE 142, 123 (190, 200), at paras. 126, 147.

⁵⁴ FCC, Judgement of 7 September 2011, 2 BvR 987/10 et al., ECLI:DE:BVerfG:2011:rs20110907.2bvr098710, BVerfGE 129, 124 (168-169), at paras. 99-100.

⁵⁵ Cf. FCC, Judgement of 21 June 2016, 2 BvE 13/13, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813, BVerfGE 142, 123 (190), at para. 126.

⁵⁶ Cf. *ibid.*, FCC, BVerfGE 142, 123 (228-230), at paras. 205-209.

⁵⁷ Cf. *ibid.*, FCC, BVerfGE 142, 123 (203) at para. 153.

13.3.2.6 *Comprehensive Economic and Trade Agreement (CETA), FCC, Judgement of 13 October 2016*

The review of competences was also raised in several proceedings concerning CETA, a free trade agreement between Canada, the EU and its Member States.⁵⁸ As a mixed agreement, the content of CETA falls within the competences of the EU as well as within the competences of its Member States.⁵⁹ When the Council of the European Union decided to apply CETA provisionally, the question arose whether the decision as well as the content of CETA constitutes an *ultra vires* act. Exceptionally, the FCC already entered into a full examination of the case in the preliminary injunction proceeding because the issue at stake was the unconstitutionality of an consenting act to an international treaty that either cannot be revoked or can only be revoked with difficulty.⁶⁰

But it rejected the request on two grounds, one factual and one legal. Firstly, the draft acts or proposals for decision were not sufficiently specific, so that it had not been clarified which CETA provisions are exempt from provisional application and how the participation within the EU will be designed in detail.⁶¹ Secondly, although it cannot be ruled out that the Council decision on the provisional application of CETA or the content at stake could qualify as an *ultra vires* act,⁶² the FCC considered that the risk of *ultra vires* acts could be effectively avoided for the period of provisional application.⁶³

13.3.2.7 *Public Sector Asset Purchase Programme (PSPP), FCC, Decision of 18 July 2017*

In the provisionally last decision, the FCC referred again a question to the CJEU for a preliminary ruling.⁶⁴ The FCC asked the CJEU whether the Public Sector Asset Purchase Programme implemented by the ECB in order to increase the economy and the inflation rate was a monetary policy measure, thus lying within its competence (Article 127 of the Treaty on the Functioning of the European Union – TFEU), or an economic policy measure. For the latter, the EU has only a coordination competence (Article 5, paragraph 1, Article 121 of the TFEU), so that the ECB would clearly have acted *ultra vires*. Under the PSPP, the ECB and the national central banks, both of which form the so-called Eurosystem, have been buying securities issued by the public sector, e.g. by Member States, on the secondary market. Since 2015 the purchases

⁵⁸ Text available at: <http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf>.

⁵⁹ Cf. for the concept of mixed agreements further Edward, D., and Lane, R., *Edward and Lane on European Union Law*. Edgar Elward Publishing: Cheltenham 2013, at pp. 48-51.

⁶⁰ FCC, Judgement of 13 October 2016, 2 BvR 1368/16 et al., ECLI:DE:BVerfG:2016:rs20161013.2bvr136816, BVerfGE 143, 65 (87-88), at para. 36. The same applied in the ESM case, see FCC, Judgement of 12 September 2012, 2 BvR 1390 et al., ECLI:DE:BVerfG:2012:rs20120912.2bvr139012, BVerfGE 132, 195 (233), at para. 88.

⁶¹ Cf. *ibid.*, FCC, BVerfGE 143, 65 (98-101), at paras. 66-72.

⁶² Cf. *ibid.*, FCC, BVerfGE 143, 65 (93-98), at paras. 51-64.

⁶³ Cf. *ibid.*, FCC, BVerfGE 143, 65 (98-101), at paras. 66-72.

⁶⁴ FCC, Decision of 18 July 2017, 2 BvR 859/15 et al., ECLI:DE:BVerfG:2017:rs20170718.2bvr085915, BVerfGE 146, 216.

have reached the volume of more than 2.000 Billion Euro, and they will be continued. The CJEU decided that the PSPP was an lawful monetary policy measure.⁶⁵ The Court held that an overriding of the ECB's monetary mandate was not significant due to the absence of obvious evaluation deficiency and because of the recognition that the monetary character did not change due to the economic effects the policy may have.⁶⁶ And second, according to the CJEU the purchases of government bonds on the secondary market are not violating the prohibition on monetary public financing (Article 123 of the TFEU).⁶⁷

As in the OMT case, this is not the end of the matter. It is now up to the FCC, after the preliminary ruling by the CJEU, to decide whether the ECB's PSPP, as interpreted by the CJEU, violates the core requirements of the principle of democratic legitimacy and is therefore unconstitutional. The judgement is going to be expected in spring 2020.

13.4 Conclusion

In summary, the FCC accepts the supremacy of EU law, albeit only with the reservations inherent to the Basic Law (*Grundgesetz*). These reservations are expressed procedurally in different types of review. The reviews shall be exercised in a "co-operative relationship" with the CJEU and in compliance with the "principle of openness towards EU law". The scope of the review of fundamental rights and the review of competences have varied, but finally settled on the constitutional identity. This means, that acts of the EU are assessed in the light of human dignity, the core of fundamental rights and democracy.

⁶⁵ CJEU, Judgement of 11 December 2018, *Weiss et al.*, C-493/17, ECLI:EU:C:2018:1000.

⁶⁶ Cf. *ibid.*, CJEU, C-493/17, at paras. 61-67, see also CJEU, Judgement of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756, at paras. 64-70.

⁶⁷ Cf. CJEU, Judgement of 11 December 2018, *Weiss et al.*, C-493/17, ECLI:EU:C:2018:1000, C-493/17, at paras. 101-158.

14 The German Pharmaceutical Law in Conflict with the European Product Liability Directive

Johannes Rein

14.1 Introduction

The European Product Liability Directive¹ leaves little room for manoeuvre to the EU Member States. In this context, the question arises whether the German Pharmaceutical Law (*Arzneimittelgesetz*) complies with European law. The German Pharmaceutical Law (*Arzneimittelgesetz*) and the Product Liability Directive have a very special relationship. While in other countries, transposition acts had to be adopted because it became clear after a judgment of the Court of Justice of the European Union (CJEU) that the directive was aiming at full harmonisation, there is a debate in Germany as to whether pharmaceutical law should deal with the Product Liability Directive at all. It is still unclear whether German Pharmaceutical Law (*Arzneimittelgesetz*) and its liability regulations are bound by the provisions of the Product Liability Directive or whether they are capable of independent further development as a separate law. If German pharmaceutical liability is to be based on the Product Liability Directive, it could be that the regulations of the German pharmaceutical liability partly violate European law.

To this end, it is therefore essential to clarify how directives generally work and how the Product Liability Directive differs from that. I will then go on to address the conflicts of content between German pharmaceutical liability and the Product Liability Directive. Finally, I make a prediction about the risks and opportunities arising from the current legal situation and how to act in the future.

14.2 The European Product Liability Directive

14.2.1 Directives in General

The Directive is an instrument of cooperative legislation.² The purpose of a directive is to approximate the law within the European Union while preserving sovereignty with regard to the Member States. The sovereignty of the Member States is safeguarded by the fact that a directive lays down a legislative objective which must be implemented by the Member States

¹ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ EC L 210 of 7 August 1985 at p. 29.

² Ruffert, M., Artikel 288 AEUV. In: C. Calliess and M. Ruffert (eds.), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar*. 5th edn., C. H. Beck: München 2016, at mn. 23.

in a binding manner. Ideally, therefore, the method of implementation should be left to the Member States themselves to take account of the specific features of their national legal systems. A directive, as a matter of principle, defines a standard of protection which the Member States must not fall below.³ However, Member States are normally allowed to exceed this standard.

Since there is no complete freedom of action with regard to the implementation of a directive, it is necessary to take the measures that are most appropriate for the implementation of directives (“*effet utile*”). Directives are intended to provide the approximation of the law within the European Union. Harmonisation does not mean the realisation of the lowest standard of protection of a Member State at the European level. Rather, a high level of protection should be established.⁴

Directives often go beyond the purpose of approximation of law when they are so detailed that there is no room for manoeuvre. In addition to the Product Liability Directive, the area of labour law is particularly noteworthy. The former Data Protection Directive 95/46/EC⁵ shall be mentioned here as an example. This was also a fully harmonising directive.⁶ In these cases, full harmonisation rather than partial harmonisation is the legislative intention. It is then more a matter of legal standardisation than of legal harmonisation.⁷ Generally speaking, this aim is achieved by regulations in terms of Article 288, paragraph 2, of the Treaty on the Functioning of the European Union (TFEU), which have direct effect for all Member States and do not require an implementing act. The prominent Product Liability Directive is another example of a legally unifying directive, which will be dealt with in the following.

With such detailed directives the European Union does not set a minimum standard, but determine the implementation completely. There is no room for manoeuvre as mentioned above and thus there is no longer any protection of sovereignty.⁸ As a consequence, there were considerable cuts in national law and implementation difficulties, some of which are still

³ Schroeder, W., Artikel 288 AEUV. In: R. Streinz (ed.), *EUV/AEUV Kommentar*. 3rd edn., C. H. Beck: München 2018, at mn. 53.

⁴ Schroeder, W., Artikel 288 AEUV. In: R. Streinz (ed.), *EUV/AEUV Kommentar*. 3rd edn., C. H. Beck: München 2018, at mn. 75; Ruffert, M., Artikel 288 AEUV. In: C. Calliess and M. Ruffert (eds.), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar*. 5th edn., C. H. Beck: München 2016, at mn. 26.

⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ EC L of 23 November 1995 at p. 31.

⁶ Franzen, M., Artikel 88 DS-GVO. In: M. Franzen, I. Gallner and H. Oetker, (eds.), *Kommentar zum europäischen Arbeitsrecht*. 3rd edn., C. H. Beck: München 2020, at mn. 9.

⁷ Riehm, T., 25 Jahre Produkthaftungsrichtlinie – Ein Lehrstück zur Vollharmonisierung. In: *Europäische Zeitschrift für Wirtschaftsrecht* 21 (2010) pp. 567-571 at p. 568.

⁸ Schroeder, W., Artikel 288 AEUV. In: R. Streinz (ed.), *EUV/AEUV Kommentar*. 3rd edn., C. H. Beck: München 2018, at mn. 54.

unresolved today. This consequence is foreseeable in the case of full harmonisation, because the Member States are denied both a downward and an upward deviation.⁹

As explained above, unlike the Regulation, the Directive, as a rule, does not have direct effect in the Member States, but requires national implementation. A directive needs to be transposed into national law by the States to which the directive is addressed. The Member States concerned must then enact new law or adapt existing law. In the case of a federal state such as the Federal Republic of Germany, this means that either the Federal Republic or the states are obliged to transpose the directive into national law.¹⁰ This entails the risk that Member States deprive their citizens of standards and guarantees of the European Union law by not transposing the Directive. In order to avoid this, directives can be applied directly in exceptional cases. If the individual citizen is favoured by a directive and a Member State has not transposed the directive within the transposition period, the respective citizen can refer directly to the directive vis-à-vis the Member State, provided the directive is unconditional and sufficiently specific.¹¹ Conversely, a state cannot rely on a non-transposed directive to the detriment of a citizen of the Union; nor can – as a rule – an unimplemented directive apply between two EU citizens.¹² Only a regulation has this effect.¹³ It is disputed to what extent a directive has a preliminary effect, in other words, whether or not it has effect before the end of the transposition period. It is deduced from the binding character of a directive that the respective Member States are prohibited from taking measures that seriously question the objectives of the directive even before the end of the transposition period.¹⁴ In this respect, directives already have a pre-effect from the time of their adoption pursuant to Article 297, paragraph 1, of the TFEU.¹⁵ If the legislator

⁹ Schroeder, W., Artikel 288 AEUV. In: R. Streinz (ed.), *EUV/AEUV Kommentar*. 3rd edn., C. H. Beck: München 2018, at mn. 54; Riehm, T., 25 Jahre Produkthaftungsrichtlinie – Ein Lehrstück zur Vollharmonisierung. In: *Europäische Zeitschrift für Wirtschaftsrecht* 21 (2010) pp. 567-571 at p. 567.

¹⁰ Ruffert, M., Artikel 288 AEUV. In: C. Calliess and M. Ruffert (eds.), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar*. 5th edn., C. H. Beck: München 2016, at mn. 41; Kössinger, W., *Die Durchführung des europäischen Gemeinschaftsrechts im Bundesstaat*. Duncker & Humblot: Berlin 1989, at p. 36.

¹¹ CJEU, Judgement of 4 December 1974, *van Duyn v. Home Office*, C-41/74, ECLI:EU:C:1974:133; CJEU, Judgement of 12 July 1990, *Foster v. British Gas*, C-188/89, ECLI:EU:C:1990:313; CJEU, Judgement of 23 November 1977, *Enka BV v. Invoerrechten en Accijnzen Arnhem*, C-38/77, ECLI:EU:C:1977:190; Fisahn, A., and Mushoff, T., Vorwirkung und unmittelbare Wirkung europäischer Richtlinien. In: *Europarecht* 40 (2005) pp. 222-230 at p. 223.

¹² CJEU, Judgement of 12 May 1987, *Traen*, C-372/85, ECLI:EU:C:1987:222; CJEU, Judgement of 4 December 1997, *Verband deutscher Daihatsu Händler e. V. v. Daihatsu Deutschland GmbH*, C-97/96, ECLI:EU:C:1997:581.

¹³ Ruffert, M., Artikel 288 AEUV. In: C. Calliess and M. Ruffert (eds.), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar*. 5th edn., C. H. Beck: München 2016, at mn. 57.

¹⁴ CJEU, Judgement of 18 December 1997, *Inter-Environnement Wallonie ASBL v. Région wallonne*, C-129/96, ECLI:EU:C:1997:628; CJEU, Judgement of 26 May 2011, *Stichting Natuur en Milieu and Others v. College van Gedeputeerde Staten van Groningen and College van Gedeputeerde Staten van Zuid-Holland*, C-165/09, C-166/09 and C-167/09 ECLI:EU:C:2011:348.

¹⁵ Fisahn, A., and Mushoff, T., Vorwirkung und unmittelbare Wirkung europäischer Richtlinien. In: *Europarecht* 40 (2005) pp. 222-230 at p. 222.

threatens to frustrate the directive, it is the courts which are called upon to interpret the law in conformity with the directive.¹⁶

From the outset, the Product Liability Directive pursued objectives which are atypical for a directive. In the following, I give a brief description of the objectives of the Product Liability Directive. In addition, the content of the Directive relevant to German pharmaceutical liability will be presented.

14.2.2 The European Product Liability Directive

The Product Liability Directive takes on a special role among the directives. It has proved its worth since its entry into force in 1985 and has only been marginally changed. Nevertheless, there is potential for conflict, particularly with the German Pharmaceutical Law (*Arzneimittelgesetz*).

The 1985 Product Liability Directive is designed to avoid distortions of competition in the internal market caused by different liability regimes in the Member States in order to ensure cross-border trade and, of course, to protect consumers from defective products by means of a uniform liability regime.¹⁷ The Directive establishes above all a strict liability with a low burden of proof (Article 4), an exclusion of liability for development risks (Article 15), and a limitation of liability for major damages (Article 16). Article 4 of the Product Liability Directive is of particular importance insofar as the German Pharmaceutical Law (*Arzneimittelgesetz*) deviates from this provision. Article 4 of the Product Liability Directive states that the injured party must prove the damage, the defect, and the causal link between the defect and the damage. The burden of proof is therefore in principle on the injured party.

In 2002, the CJEU emphasised these purposes of the Directive when it stated that the Member States' scope for regulating liability for defective products is entirely determined by the Directive.¹⁸ Thus, the Product Liability Directive aims at full harmonisation and not partial harmonisation as it is usually the case with directives. As a result, many Member States had to make improvements because they had regarded the Directive as partially harmonising and had transposed it accordingly. In this respect, harmonisation has blatantly missed its core purpose, which is to create legal certainty and legal unity.¹⁹ Even today, particularly with regard to German Pharmaceutical Law (*Arzneimittelgesetz*), it is still unclear which claims for

¹⁶ Nettesheim, M., Artikel 288 AEUV. In: E. Grabitz, M. Hilf and M. Nettesheim (eds.), *Das Recht der Europäischen Union*. 68th edn., C. H. Beck: München 2019, at mn. 134.

¹⁷ Riehm, T., 25 Jahre Produkthaftungsrichtlinie – Ein Lehrstück zur Vollharmonisierung. In: *Europäische Zeitschrift für Wirtschaftsrecht* 21 (2010) pp. 567-571 at p. 567.

¹⁸ CJEU, Judgement of 25 April 2002, *Commission v. Hellenic Republic*, C-154/00, ECLI:EU:C:2002:254, at para. 12.

¹⁹ Riehm, T., 25 Jahre Produkthaftungsrichtlinie – Ein Lehrstück zur Vollharmonisierung. In: *Europäische Zeitschrift für Wirtschaftsrecht* 21 (2010) pp. 567-571 at p. 569.

harmonisation are expressed in the Product Liability Directive.²⁰ For Germany, this mainly concerns Article 13 of the Product Liability Directive. Article 13 of the Product Liability Directive provides for a historically unique exception. It states that claims for damages, which the injured party has on the basis of other regulations, remain unaffected. This refers to the regulations on German pharmaceutical liability.²¹ The then German legislator refused to abandon the achievements of German pharmaceutical liability because of the Product Liability Directive.²²

In Germany, two serious pharma tragedies occurred in the 1970s and 1980s. For this reason, a pharmaceutical law was introduced, which in 1976 already contained a no-fault compensation claim in Section 84 of the German Pharmaceutical Law (*Arzneimittelgesetz*). In 2002, a claim for information (Section 84a) and a presumption of causality (Section 84, paragraph 2, sentence 1) were incorporated into German Pharmaceutical Law (*Arzneimittelgesetz*) as part of the second law amending the law on damages. The German rules on the burden of proof in Section 84, paragraph 2, sentence 1, of the German Pharmaceutical Law (*Arzneimittelgesetz*), which the Federal Court of Justice interprets as legal presumptions, are suspected of violating the Product Liability Directive. For this reason, it is necessary to clarify how the burden of proof is basically distributed in German pharmaceutical liability law and how the legal presumption works.

14.3 The Burden of Proof in German Pharmaceutical Liability According to Section 84, paragraph 2, sentence 1, of the German Pharmaceutical Law

The Product Liability Directive places the burden of proof entirely on the injured party. The Directive does not regulate the standard of evidence that must be observed. In German procedural law, there are simplifications of the burden of proof that lower the standard of proof and those that reverse the burden of proof.

14.3.1 The Proof of Causality in General

In general, the use of the medicinal product and the health impairment that has occurred must be scientifically related.²³ For the proof of this causality the standard of proof of Section 286 of the Code of Civil Procedure (*Zivilprozessordnung*) applies, in other words the full

²⁰ Bomsdorf, T., and Seehawer, D., Arzneimittelhaftung und EU-Produkthaftungsrichtlinie. In: *Neue Juristische Wochenschrift* 68 (2015) pp. 908-911 at p. 908.

²¹ Franzki, D., § 84 AMG. In: A. Spickhoff (ed.), *AMG, beck-online. Großkommentar zum Zivilrecht*. C. H. Beck: München 2019, at mn. 9.

²² Wandt, M., Deutsche Arzneimittelhaftung und EG-Produkthaftung. In: *Versicherungsrecht* 49 (1998) pp. 1059-1064 at p. 1060; Bomsdorf, T., and Seehawer, D., Arzneimittelhaftung und EU-Produkthaftungsrichtlinie. In: *Neue Juristische Wochenschrift* 68 (2015) pp. 908-911 at p. 909.

²³ Brock, I., and Stoll, V., § 84 AMG. In: J. W. Kügel, R.-G. Müller and H.-P. Hofmann (eds.), *Arzneimittelgesetz. Kommentar*. 2nd edn., C. H. Beck: München 2016, at mn. 33.

judicial conviction.²⁴ The burden of proof with regard to the connection between the use of the medicinal product and the infringement of a legal interest is in principle placed on the injured party.²⁵ This proof of a scientific connection between the taking of a medicinal product and the infringement of a legal right is, as always with scientific connections, almost impossible to provide. Accordingly, the user of the medicinal product is obliged to prove that he has taken a medicinal product of the defendant pharmaceutical entrepreneur and that he has suffered an infringement of a legal right as a result of this intake, which is a drug-specific consequence of the intake.²⁶

14.3.2 Facilitation of Evidence under Section 84, paragraph 2, sentence 1, of the German Pharmaceutical Law

Section 84, paragraph 2, sentence 1, of the German Pharmaceutical Law (*Arzneimittelgesetz*) establishes a presumption according to which, in the case of a specific aptitude of the pharmaceutical to cause damage, the cause of the damage is inferred in the individual case. The suitability in the individual case is assessed according to the composition and dosage, the type and duration of the intended use, the time connection to the occurrence of the damage, the damage and the health condition of the injured person at the time of use of the pharmaceutical, as well as all other circumstances which in the individual case speak for or against the cause of the damage. The Federal Court of Justice classified the provision as a legal presumption.²⁷ Legal presumptions reverse the burden of proof and impose on the opponent evidence to the contrary.²⁸ Curiously, the opponent of the evidence then also benefits from a legal presumption, that is Section 84, paragraph 2, sentence 3, of the German Pharmaceutical Law (*Arzneimittelgesetz*). To prove the contrary (and to be relieved from liability), the pharmaceutical entrepreneur only has to show that another circumstance is also suitable to have caused the damage.²⁹

The Product Liability Directive does not provide for evidence rules of this kind. It has thus been disputed for a long time whether such a regulation corresponds to the distribution of the burden of proof in the European product liability directive and above all, whether the German

²⁴ Brock, I., and Stoll, V., § 84 AMG. In: J. W. Kügel, R.-G. Müller and H.-P. Hofmann (eds.), *Arzneimittelgesetz. Kommentar*. 2nd edn., C. H. Beck: München 2016, at mn. 33.

²⁵ Krüger, C., *Arzneimittelgefährdungshaftung unter besonderer Berücksichtigung alternativer Kausalität*. Pmi-Verlag: Frankfurt am Main 2006, at p. 19.

²⁶ Hart, D., Kausalität und Unbedenklichkeit in der Arzneimittelhaftung. In: *Medizinrecht* 27 (2009) pp. 253-256 at p. 254.

²⁷ Federal Court of Justice, Judgement of 26 March 2013, VI-ZR 109/12, *Neue Juristische Wochenschrift* 66 (2013), 2901, paras. 27-29.

²⁸ Foerste, U., § 286 ZPO. In: H.-J. Musielak and W. Voit (eds.), *Zivilprozessordnung. Kommentar*. 16th edn., Verlag Franz-Vahlen: München 2019, at mn. 18.

²⁹ Federal Court of Justice, Judgement of 26 March 2013, VI-ZR 109/12, *Neue Juristische Wochenschrift* 66 (2013), 2901 – Guiding principle.

pharmaceutical law (*Arzneimittelgesetz*) is subject to the European product liability directive at all.

14.4 Conflict between the Product Liability Directive and German Pharmaceutical Liability

14.4.1 Validity of the European Product Liability Directive

Initially, it is already disputed whether German pharmaceutical liability must be based on the European Product Liability Directive at all.³⁰ The reason for this is Article 13 of the Product Liability Directive, which, as already mentioned, provides an exception for German pharmaceutical liability. In particular, it is disputed whether Article 13 of the Product Liability Directive also provides for an exception for the period after the adoption of the Product Liability Directive, or whether this is a cut-off date rule. The consequence of a cut-off date rule would be that the Product Liability Directive would only accept rules that were already in force when the Directive was adopted. If Article 13 were to contain a sectoral exception, German pharmaceutical liability would be allowed to develop independently of the European Product Liability Directive.³¹

Article 13 of the Product Liability Directive first of all refers to the date of adoption of the Directive. Conversely, it can be concluded that all liability regulations which are subsequently incorporated into the German Pharmaceuticals Law must comply with the Directive.³² A further indication is provided by Article 7 of the Product Liability Directive. Article 7 places the burden of proof on the producer for certain liability exclusions. From this, it can be concluded that the legislator wanted to limit the reversal of the burden of proof to precisely these cases.³³

A different view could only be reached if the purpose of the Product Liability Directive was not primarily to eliminate distortions of competition, but rather to assign it purely to consumer protection. If the Product Liability Directive were to be interpreted purely in terms of its consumer protection purpose, it would be possible to consider that only downward deviations from the standard of protection would be inadmissible. However, such a view does not seem to be necessary. The product liability directive is based on old Article 100 of the Treaty on the

³⁰ Brock, I., and Stoll, V., Vorbemerkung zu den §§ 84-94a AMG. In: J. W. Kügel, R.-G. Müller and H.-P. Hofmann (eds.), *Arzneimittelgesetz. Kommentar*. 2nd edn., C. H. Beck: München 2016, at mn. 10.

³¹ Bomsdorf, T., and Seehawer, D., Arzneimittelhaftung und EU-Produkthaftungsrichtlinie. In: *Neue Juristische Wochenschrift* 68 (2015) pp. 908-911 at p. 909; Brock, I., and Stoll, V., Vorbemerkung zu den §§ 84-94a AMG. In: J. W. Kügel, R.-G. Müller and H.-P. Hofmann (eds.), *Arzneimittelgesetz. Kommentar*. 2nd edn., C. H. Beck: München 2016, at mn. 10; Franzki, D., § 84 AMG. In: A. Spickhoff (ed.), *AMG, beck-online. Großkommentar zum Zivilrecht*. C. H. Beck: München 2019, at mn. 9.

³² Moelle, H., Schlussanträge des Generalanwalts Maciej Szpunar: Zur Vereinbarkeit des deutschen Arzneimittelhaftungsrechts mit der EU-Produktionshaftungsrichtlinie. In: *Pharmarecht* 36 (2014) pp. 351-353 at p. 352.

³³ Wandt, M., Deutsche Arzneimittelhaftung und EG-Produkthaftung. In: *Versicherungsrecht* 49 (1998) pp. 1059-1064 at p. 1062.

European Community (EC). Directives based on this Article are intended above all to eliminate distortions of competition between companies from different Member States by harmonising national legal rules.³⁴ In addition, the already mentioned case law of the European Court of Justice must be taken into account.³⁵ According to this, the directive pursues full harmonisation, which is why this argument will no longer need to be considered.

This point of view was also reflected in a submission to the European Court of Justice in the context of the claim for information under Section 84a of the German Pharmaceutical Law (*Arzneimittelgesetz*) within the German pharmaceutical liability system. The question submitted at that time was broadly formulated and also included the question of the extent to which the presumption of causality under Section 84, paragraph 2, sentence 1, of the German Pharmaceutical Law (*Arzneimittelgesetz*) corresponded to the Product Liability Directive. The European Court of Justice did not answer this question.³⁶ However, conclusions can be drawn from the judgement.

With regard to the right to information under Section 84a of the German Pharmaceutical Law (*Arzneimittelgesetz*), the Advocate General at the European Court of Justice first stated in his opinion that the provision of Article 13 of the Product Liability Directive is a cut-off date solution. Thus, the Advocate General also assumes that liability regulations which are without fault and which were introduced after the directive came into force are to be measured against the directive.³⁷

Article 13 provides that claims for damages may only exceed those provided for in the Directive if this was already the case when the Directive entered into force. Next, the Advocate General states that the right to information under Section 84a of the Pharmaceutical Law does not regulate the burden of proof and does not establish a reversal of the burden of proof, which is why it is not subject to Article 4 of the Product Liability Directive. On the other hand, the facilitation of evidence and actual presumptions were unobjectionable. Conversely, this means that a reversal of the burden of proof violates Article 4 of the Product Liability Directive. Such a reversal of the burden of proof is contained in Section 84, paragraph 2, sentence 1 and 3, of the German Pharmaceutical Law (*Arzneimittelgesetz*).

Since the Federal Court of Justice does not assume that the presumption of causality is based on facilitating evidence but on a legal presumption, it must be assumed that the presumption of causality in Section 84, paragraph 2, sentences 1 and 3, of the German Pharmaceutical Law (*Arzneimittelgesetz*) does not correspond to the Product Liability Directive. Moreover, there are both practical and historical arguments in favour of such a classification.

³⁴ Riehm, T., 25 Jahre Produkthaftungsrichtlinie – Ein Lehrstück zur Vollharmonisierung. In: *Europäische Zeitschrift für Wirtschaftsrecht* 21 (2010) pp. 567-571 at p. 568; Tietje, C., Artikel 94 EGV. In: E. Grabitz and M. Hilf (eds.), *Das Recht der europäischen Union*. 40th edn., C. H. Beck: München 2009, at mn. 1.

³⁵ CJEU, Judgement of 25 April 2002, *Commission v. Hellenic Republic*, C-154/00, ECLI:EU:C:2002:254.

³⁶ CJEU, Judgement of 20 November 2014, *Novo Nordisk Pharma GmbH/S*, C-310/13, ECLI:EU:C:2014:2385.

³⁷ Opinion of Advocate General M. Szpunar of 11 June 2014, ECLI:EU:C:2014:1825; cf. Moelle, H., Schlussanträge des Generalanwalts Maciej Szpunar: Zur Vereinbarkeit des deutschen Arzneimittelhaftungsrechts mit der EU-Produktionshaftungsrichtlinie. In: *Pharmarecht* 36 (2014) pp. 351-353 at p. 352.

At the time of the adoption of the Product Liability Directive, German pharmaceutical liability was the only specific liability regime in the area of the Member States.³⁸ There is no objective reason why only German pharmaceutical liability should be allowed to develop independently of the Product Liability Directive. The assumption of a sectoral exception for German drug liability alone seems extremely questionable. Rather, the exception established in Article 13 of the Product Liability Directive is likely to have been particularly influenced by historical events in Germany.

The strict liability for pharmaceuticals, which was introduced in 1976, came about under the particular influence of the thalidomide tragedy, which resulted in the death of hundreds of unborn children and the deformity of thousands of children.³⁹ The then German Federal Government did not want to abandon this achievement and refused to implement the Product Liability Directive, abandoning its own liability regime. This approach was accepted by the European Union.⁴⁰ However, it cannot be concluded from this that the European Union at the time wanted to allow the Federal Republic of Germany to establish a pharmaceutical liability independent of the Product Liability Directive. It is more likely that the exception under Article 13 of the Directive was made against the background of the specific internal political situation in Germany.

14.4.2 Forecast

It can therefore be assumed that the European Court of Justice will follow the opinion of the Advocate General if a pharmaceutical liability case ends up before the Court of Justice of the European Union. For German jurisdiction, this provides an opportunity to reconsider the case law on the presumption of causality from the year 2013. This case law leads to the fact that claims for damages are no longer possible under the German Pharmaceutical Law (*Arzneimittelgesetz*). Although the burden of proof of causality is reversed, the pharmaceutical manufacturer can disburden himself by claiming that any other circumstance could also have been causal.

So far, the easing of the burden of proof has not led to the desired success. A claim for damages according to Section 84 German Pharmaceutical Law (*Arzneimittelgesetz*) due to damage to drugs has never been successful in Germany. Such an interpretation of the law can lead to considerable injustice in the 21st century. In times in which pharmaceuticals are

³⁸ Franzki, D., § 84 AMG. In: A. Spickhoff (ed.), *AMG, beck-online. Großkommentar zum Zivilrecht*. C. H. Beck: München 2019, at mn. 19; Rolland, W., *Produkthaftungsrecht*, Bundesanzeiger Verlagsgesellschaft mbH.: Köln 1990, at p. 287

³⁹ Kirk, B., *Der Contergan-Fall: Eine unvermeidbare Arzneimittelkatastrophe?* Wissenschaftliche Verlagsgesellschaft mbh Stuttgart: Stuttgart 1999, at p. 9.

⁴⁰ Wandt, M., Deutsche Arzneimittelhaftung und EG-Produkthaftung. In: *Versicherungsrecht* 49 (1998) pp. 1059-1064 at p. 1061; Brock, I., and Stoll, V., Vorbemerkung zu den §§ 84-94a AMG. In: J. W. Kügel, R.-G. Müller and H.-P. Hofmann (eds.), *Arzneimittelgesetz. Kommentar*. 2nd edn., C. H. Beck: München 2016, at mn. 10.

manufactured industrially and in masses, major damage can occur, which requires social processing, including the payment of compensation. The contamination of medicines with the drug substance valsartan in particular is a current example of how quickly a tragedy can occur in the pharmaceutical industry. The user of medicines, who is dependent on the intake of medicines, must not be left defenceless. The European Product Liability Directive recognised this potential danger and, in addition to avoiding distortions of competition in the internal market, wanted to strengthen consumer protection.

Furthermore, it can be stated that directives aiming at full harmonisation lead to legal uncertainties, because achieving full harmonisation is the purpose of the regulation. In addition, partial harmonisation would make it possible to extend consumer protection without further effort. Full harmonisation prevents the Member States from such an extension. Such a rigid system is particularly problematic in a market geared to development, such as the pharmaceutical market.

The same applies to the exception in Article 13 of the Product Liability Directive, which was introduced specifically for the German legal system. To grant a state of exception for the regulations of German pharmaceutical liability was a wrong decision at that time. Especially against the background of the objective of the directive, which in the long term aims at full harmonisation, this decision appears extremely questionable.

There should be a uniform system of protection within the European Union with regard to the liability of pharmaceutical products. The Product Liability Directive, which regulates the burden of proof in its Articles 4 and 7, basically meets this standard. The Member States are free to determine the standard of proof. The standard of proof is therefore determined by the national codes of procedure. In the area of pharmaceutical liability, in particular, the difficulties involved in the law of evidence make it advisable to facilitate the burden of proof. The German legislator has recognised this need and introduced the presumption of causality in Section 84, paragraph 2, of the German Pharmaceutical Law (*Arzneimittelgesetz*). Whether this provision will survive the times is, as explained, not certain.

The provision will at some point have to be measured against the yardstick of the Product Liability Directive.

15 Correlation of EAEU law and National Law according to recent Case Law of the Court of the Eurasian Economic Union

Yulia Grishko and Vladislava Kitsaeva

In this paper, using the example of the Eurasian Economic Union (hereinafter the EAEU, Union), the question of the relationship between the national law of the Member States and the law of the Union will be considered.

There are two major theories on the relationship between international law and national law. The first is the dualist theory. The second is the monist theory.¹ Accordingly, the main question of this study is what theory of the correlation of international and national law is applicable to the EAEU law. Moreover, it is known that the EAEU functioning mechanism has similar features as the European Union. Therefore, there is also the question of whether supranational regulation exists in the EAEU.

The consideration of this problem will be based on the study and analysis of the EAEU Court decision of 21 February 2017 on the application of the Russian Federation on the dispute on compliance by the Republic of Belarus with the Treaty on the Eurasian Economic Union, Article 125 of the Customs Code of the Customs Union, Articles 11 and 17 of the Agreement on Mutual Administrative Assistance of Customs Authorities of Member States of the Customs Union.

To sum up the facts:

Some companies located in the Kaliningrad region are manufacturers and owners of household appliances. These household appliances are transported from other states, and then assembled in a new way in this region of the Russian Federation. Consequently, it was produced on the territory of the Eurasian Economic Union. In 2014, during the transportation of household appliances of Russian companies to the mainland part of the Russian Federation, there were twenty-five cases of systematic detention of such transportations by the customs authorities of the Republic of Belarus. After that, household appliances were subject of forfeiture and converted to revenue of the Republic of Belarus. Four cases of detention and confiscation of household appliances took place after 1 January 2015 (1 January 2015 is the date of entry into force of the EAEU Treaty). In 2016 Russia appealed to the Court of the Eurasian Economic Union.

The positions of the parties are:

Russia argued: On 21 May 2010 Russia and Belarus entered into the Agreement on Mutual Administrative Assistance of Customs Authorities of Member States of the Customs Union. According to this Agreement, in case of such situations, Belarus had to send these goods to

¹ Shaw, M. N., *International Law*. 7th ed., Cambridge University Press: Place 2014, at p. 29; see the contribution of Horn, H.-D., *International and Constitutional Law Doctrines on the Correlation between National and International Law*. In this volume, Chapter 1, pp. 7-21.

Russia for customs control. The procedure was to be carried out by Russian customs authorities. Moreover, Russia insisted that the transported household appliances were manufactured in Russia.

Representatives of the Belarusian side, however, tried to prove the fact that Russia has transported foreign-made goods. In this case, it is necessary to apply the norms of national legislation, and not the norms of the agreement concluded between the countries. The norms of the national legislation of Belarus provided for a mechanism of suspending the transit of goods and the conduct of customs control by the authorities of Belarus. Besides, Belarus insisted on the application of measures of administrative liability to Russia in accordance with the Code of the Republic of Belarus on Administrative Offenses of 21 April 2003.²

The main issues in this case were as follows:

The problem in question was: Which position does the decision of a customs authority of EAEU Member States hold in the hierarchy of legal norms? What law is applicable in this case: national law of a Member State of the EAEU or law of the EAEU?

The reason for the discussion was the lack of legal regulation of such a situation. In this case, it is worth mentioning that the Treaty contains Article 6, which provides a list of legal acts that form the law of the EAEU. According to this article, the law of the EAEU shall include: the present Treaty, international agreements within the EAEU, international agreements between the EAEU and the third party, and decisions and resolutions of the institutions of the Union.³ Despite the fact that Article 6 of the Treaty establishes an internal hierarchy of sources of the Union law, the issue of a conflict between the law of the EAEU and the conflicting national law has not been resolved. The question is whether in this case the law of the EAEU will have priority.

The Court in the judgement indicated that “decisions taken by customs authorities are mutually recognized in cases defined by customs legislation of the Customs Union by default, without reservations or conditions. Such decisions of the customs authorities are considered to be in full conformity with the specified requirements, i.e. with the legislation of the Customs Union, until proven otherwise”. This refers to the presumption of reliability of an official document. This means that this document is mutually recognized and has equal legal force throughout the customs territory of the Customs Union.

In addition, the Court recognized the direct applicability of the Agreement on Mutual Administrative Assistance of Customs Authorities of Member States of the Customs Union of 21 May 2010 (the rules of this international treaty are directly applicable and due to their specific nature shall have a higher priority when conducting customs control procedures). This means that the customs authorities of the EAEU Member States must directly apply this agreement, which takes precedence over conflicting national legal acts (provisions are of

² Ispolinov A., Priority, Direct Applicability and Direct Effect of the Eurasian Economic Union Law. In: *Journal of International Law and International Relations* 80-81 (2017), No. 1-2, pp.11-21 at p. 14.

³ Article 6 of the Treaty on the Eurasian Economic Union.

mandatory nature, do not contain exemptions or references to other provisions and therefore are directly applicable).⁴

It is worth noting the separate opinion of the judge from Russia K. L. Chaika. He argued that if the EAEU Member States have concluded the EAEU Treaty, it means that they have created “an autonomous body of law of legal norms that are binding on all member states”. K. L. Chaika drew an analogy with the reasoning of the Court of Justice of the European Union (CJEU) in the cases *Costa / ENEL*⁵ and *Simmenthal II*⁶. The judge insists on the absolute priority of the EAEU rules of law over any national norms.⁷ This priority should not depend on whether these norms are adopted before or after the foundation of the Union. It was widely expected that this reasoning would be contained in the decision of the Court, but now it is only in a dissenting opinion.⁸

In view of the foregoing, it can be concluded that a supranational regulatory mechanism is being formed in the EAEU. Nevertheless, we observe this phenomenon only in a narrow sphere – in the field of customs regulation. It is significant that these findings are progressive, given the fact of the early stage of the development of Eurasian integration. It is possible that this judgement could provide a basis for the development of a supranational regulatory mechanism in the EAEU.

⁴ Court of the EAEU, Judgement of 21 February 2017, No. CE-1-1/1-16-BC. See [here](http://courteurasian.org/page-25431). Engl.: <http://courteurasian.org/page-25431>.

⁵ CJEU, Judgement of 15 July 1964, *Costa v. E.N.E.L.*, 6/64, ECLI:EU:C:1964:66.

⁶ CJEU, Judgement of 9 March 1978, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 106/77, ECLI:EU:C:1978:49.

⁷ Court of the EAEU, Judgement of 21 February 2017, No. CE-1-1/1-16- BC, separate opinion of Judge K. L. Chaika. URL: <http://courteurasian.org/doc-17993>.

⁸ Ispolinov A., Priority, Direct Applicability and Direct Effect of the Eurasian Economic Union Law. In: *Journal of International Law and International Relations* 80-81 (2017), No. 1-2, pp. 11-21 at p. 15.

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