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## **From Dualism to Pluralism: The relationship between international law, European law, and domestic law**

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## I. Introduction

For a young German Visiting Researcher at Harvard Law School in 1994-5, Detlev Vagts's class on Transnational Legal Problems opened up a new perspective on international law: pragmatic and pluralist rather than doctrinal and separated into public law, private law and criminal law.<sup>1</sup> In addition, the jubilee impressed me with his keen interest in German law and culture. Thus, while being forced to rethink the traditional German approach to all things legal, Detlev made the young German student feel at home both intellectually and personally. The following contribution to his Festschrift attempts to follow Detlev's example.

For one of the fathers of the transnational law approach, it will hardly come as surprise that both the German and the US legal orders are faced with an increasing fragmentation of the legal landscape, in which domestic law cannot but pay attention to European, international and, at times, foreign law. However, both are also concerned with democratic legitimacy and the preservation of domestic prerogatives of parliaments and courts. In Europe, the matter becomes even more complicated. While European law is not "domestic" in character, but has been established by a treaty between States,<sup>2</sup> its law is "supranational", e.g. directly applicable to individuals in its member States. Thus, the European legal order faces an additional difficulty when faced with international decisions: it must first decide "on which side it is", in other words, whether it regards its own legal order, in a monist perspective, as part of international law, or as a separate legal order that faces international law the same way as a domestic legal order.<sup>3</sup>

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<sup>1</sup> See H. J. Steiner, D. F. Vagts and H. H. Koh (eds.), *Transnational Legal Problems: materials and texts* 4th edn (Westbury, NY: Foundation Press, 1994).

<sup>2</sup> For Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union in the version of the Lisbon treaty that entered into force on 1 December 2009, see *Official Journal* (O.J.) C 115 (9 May 2008). For consolidated versions of the preceding Nice Treaty and the accession treaties of Bulgaria and Romania see Treaty on European Union and Treaty Establishing the European Community (consolidated texts), O.J. C 321E (29 December 2006).

<sup>3</sup> *Kadi v. Council of the EU*, Judgment (Grand Chamber), Case No. C-402/05 P, C-415/05 P, [2008] 3 C.M.L.R. 41 (3 September 2008) can be considered as having settled this question in favor of a dualist (or rather pluralist) perspective, see Chapter IV below. On pluralism in general see N. Walker, 'The Idea of Constitutional Pluralism' *Modern Law Review*, 65 (2002), 317; A. Paulus, 'The Emergence of the International Community and the Divide Between International and Domestic Law' in A. Nollkaemper and J. E. Nijman (eds.), *New Perspectives*

The European may be forgiven to consider the US debates on the very citation of foreign law sources<sup>4</sup> as slightly retrograde and illusionary, pretending that the US system could ignore international and foreign law sources altogether. But recent decisions of the European Court of Justice and the German Federal Constitutional Court (Bundesverfassungsgericht) demonstrate that US and European courts use similar concepts in response to the implementation of international decisions.

After the European Court of Justice, in its *Kadi* judgment,<sup>5</sup> had required the European Commission to give reasons for the listing of terrorists, Jack Goldsmith and Eric Posner concluded that 'European nations today are like the American states agreeing to form a federal union in the 18<sup>th</sup> century .... Their devotion to their Union is real. Their devotion to international law – even the U.N. Charter – is less pronounced. ... Here, as in other settings, Americans and Europeans have more in common than meets the eye.'<sup>6</sup> The opinion article by two of the leading US skeptics on international law<sup>7</sup> raises many questions – whether international law is a "belief", whether the US/European framework is correct, whether the comparison between the European Union and the 18<sup>th</sup> century founding of the United States makes sense,<sup>8</sup> whether European law and international law are to be treated differently in the domestic realm.

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on the Divide between International Law and National Law (Oxford University Press, 2007), pp. 228-34, with further references.

<sup>4</sup> See, eg, Antonin Scalia and Stephen Breyer, 'Constitutional Relevance of Foreign Court Decisions', American University, 13 January 2005, [www.wcl.american.edu/secler/founders/2005/050113.cfm](http://www.wcl.american.edu/secler/founders/2005/050113.cfm); Antonin Scalia, 'Keynote Address: Foreign Legal Authority in the Federal Courts', *ASIL Proceedings* 98 (2004) 505. For the discussion within the Supreme Court, see also *Roper v. Simmons*, 543 US 551 (2005) 551, 575; *Atkins v. Virginia*, 536 US 304, 316 n. 21; *ibid.*, at 321, 325 (Rehnquist, C.J., dissenting) and 536 US at 337 (Scalia J., dissenting), with further references.

<sup>5</sup> *Kadi*, *supra* note 3.

<sup>6</sup> J. L. Goldsmith and E. Posner, 'Does Europe Believe in International Law?' *The Wall Street Journal* (November 25 2008) 15.

<sup>7</sup> See J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (Oxford University Press, 2005).

<sup>8</sup> For a fruitful comparison, see R. Schütze, 'On "Federal" Ground: the European Union as an (Inter)national Phenomenon' *C.M.L.Rev.*, 46 (2009), 1069.

The recent judgment of the German Constitutional Court on the compatibility of the Lisbon Treaty on European Union<sup>9</sup> with the German constitution<sup>10</sup> casts doubt on Goldsmith's and Posner's contention that domestic European courts do indeed differ that much in their attitudes towards international and European law. As far as Europe is concerned, we will deal with the implementation of Security Council resolutions by the European legal order, as well as to the impact of European law on domestic law in general. For the first problem, I discuss the *Kadi* judgment of the European Court of Justice; for the latter, the Lisbon decision of the German Constitutional Court.<sup>11</sup> This latest judgment will constitute the largest part of this contribution.

It will turn out that European Courts share the concerns of their American brethren regarding the democratic legitimacy of international decisions, and use similar concepts to draw the line between the implementation of international decisions and their control on democratic and individual rights grounds.

Thus, while the "friendliness" or openness of German courts towards international and European law, as the German Constitutional Court calls it,<sup>12</sup> suggests a more forthcoming European attitude towards international regulation, it appears that Goldsmith and Posner are right – the US and Europe, including Germany, are far more skeptical towards international law and international tribunals than it appears on first sight. However, while Europe and the United States are indeed more similar than it appears, international law plays a larger role in both legal systems than the skeptics are prepared to concede.

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<sup>9</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *Official Journal* C 306 (17 December 2007).

<sup>10</sup> BVerfG, 2 BvE 2/08, (30 Jun. 2009), available in English at [www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html) [hereinafter Lisbon judgment].

<sup>11</sup> See supra note 10.

<sup>12</sup> BVerfGE 31, 58 at 75-6; Görgülü, supra note 12, at 317; 112, 1 at 26. On the concept in general, see A. Paulus, 'Germany' in D. Sloss (ed.) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press, 2009).

## II. The European Court of Justice and the Security Council: Legal Control in All But Name

In *Kadi*, the European Court of Justice struck down the EU regulation regarding the implementation of UN sanctions against alleged terrorists.<sup>13</sup> The Court held that the inclusion of one individual and of a foundation on a terror list violated the rights to defense, in particular the right to be heard, the principle of effective judicial protection, and the right to property under European law.<sup>14</sup>

What has been less mentioned, however, is that the Court did not hold the whole sanctions régime to be impermissible. Rather, the Court upheld the annulled regulations for another three months to give the EU organs time to bring EU practice in compliance with both European and international law.<sup>15</sup> In addition, the ECJ held that ‘the restrictive measures imposed by the contested regulation constitute restrictions of the right to property which might in principle be justified.’<sup>16</sup>

As a result, the European Commission informed the claimants on the ‘narrative summaries of reasons’ given by the Sanctions Committee and renewed the addition of the two claimants to the list, arguing that their listing continued to be ‘justified for reasons of [their] association with Al-Qaeda.’<sup>17</sup> Thus, the judgment did not put “Terrorism Financing Blacklists at Risk”, as the Washington Post had feared;<sup>18</sup> rather, the Sanctions Committee was forced to

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<sup>13</sup> Council Regulation (EC) No 881/2002 (27 May 2002) imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban.

<sup>14</sup> *Kadi*, supra, note 3.

<sup>15</sup> *Id.*, at 375-376.

<sup>16</sup> *Id.*, at 366, 374.

<sup>17</sup> Commission Regulation (EC) No 1190/2008 (28 Nov. 2008), OJ L 322/25 (2 Dec. 2008). The information was provided by the SC Committee established pursuant to resolution 1267 concerning Al-Qaida and the Taliban and associated individuals and entities (“1267 Committee”), see Grauls, Security Council, 63<sup>rd</sup> year, 6015<sup>th</sup> meeting, Nov. 12, 2008, S/PV.6015, at 6. *Kadi*’s challenge of the latter regulation is pending before the European Court of First Instance, *Kadi v. Commission*, Case No. T-85/09, 2009 O.J. (C90/37); see also Peter Fromuth, ‘The European Court of Justice *Kadi* Decision and the Future of UN Counterterrorism Sanctions’, *ASIL Insight* 30 (2009), Issue 20, www.asil.org.

<sup>18</sup> C. Whitlock, *Terrorism Financing Blacklists At Risk*, Washington Post, 2 November 2008, A1.

give at least some reasons for its decisions, and the EU did simply transmit them to the individuals concerned.

In a situation that involves the delegation of powers to an international organization, the European Court of Human Rights, in its *Bosphorus Airways* decision relating to EU sanctions against Milošević's Yugoslavia, had ruled that the delegating member State would be held responsible for the actions of that organization if the organization lacked an equivalent system of human rights protection.<sup>19</sup> In case that such system was in place, the Court created a rebuttable presumption that the system was not deficient in the protection of human rights.

In *Kadi*, however, the European Court of Justice has chosen another path. Whereas earlier judgments could have been understood as following a "monist" interpretation of European law with regard to international law, the Court now emphasises the "constitutional" character of the European Treaties that did not allow for the violation of its basic principles, in particular human rights (Article 6 § 1 TEU).<sup>20</sup> Whereas the Court of First Instance arguably misinterpreted the extent of human rights protection in Charter law,<sup>21</sup> the European Court of Justice refused to acknowledge that, as the only independent Court with jurisdiction in the matter, it should have included the relationship between international and European law into its terms of reference.

Thus, the ECJ has been criticised – correctly, in my view – because the multiplicity of legal orders requires not blindness, but dialogue,<sup>22</sup> and for its

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<sup>19</sup> *Bosphorus v. Ireland*, [2005] ECHR-VI. Cf. *Kadi*, supra note 3, paras. 322-26.

<sup>20</sup> *Kadi*, supra note 3, paras. 283-85, 316.

<sup>21</sup> In this sense also Human Rights Committee, *Sayadi v. Belgium*, Communication No. 1472/2006, Views, Oct. 22, 2008, Doc. CCPR/C/94/D/1472/2006, Ind. Op. Iwasawa, p. 34; Nigel Rodley, *ibid.*, at 36 (arguing that Council action need to be interpreted as intending to maintain human rights).

<sup>22</sup> For a similar critique, see J. Weiler, 'Editorial', *Eur. J. Int'l. L.* 19 (2008), 895-96; A. Gattini, 'Comment', *C.M.L. Rev.* 46 (2009), 213-4, 226-7; G. de Burca, 'The EU, the European Court of Justice and the International Legal Order after *Kadi*' *Harvard International Law Journal*, 51 (2009), forthcoming, <http://ssrn.com/abstract=1321313>; D. Halberstam and E. Stein, 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order' *C. M. L. Rev.*, 46 (2009), 13, 71-72. See also the position taken by the European Commission in *Kadi* supra note 3, paras. 269-70, 319; but see B. Kunoy and A. Dawes, 'Plate tectonics in Luxembourg: The ménage a trois between EC law, international law and the European Convention on Human Rights following the UN sanctions cases' *C. M. L. Rev.*, 46 (2009), 73, 103-04.

disregard for the Charter claim of prevalence under Article 103. But if we look at the result in the specific case, the judgment has opened such dialogue with the Council. Even before the publication of the judgment, the Security Council, in resolution 1822 (2008), had further amended the sanctions régime by providing for the publication of the reasons for listing and an annual review.<sup>23</sup> Ideally, this would also lead to an identification of the provider of information that could be sued before domestic courts.

Thus, the ECJ, by interpreting European law in accordance with the most recent international decisions, did much more to accommodate an internationalist point of view than Posner and Goldsmith would make us believe.<sup>24</sup>

#### **IV. The German Constitutional Court and the Lisbon Treaty: Dualism Cloaked as Pluralism**

Contrary to the intentions of its drafters, the example of the treatment of international law by the European Court of Justice has apparently not been lost on another court, namely the German Constitutional Court. In its judgment on the compatibility of the Lisbon Treaty on European Union<sup>25</sup> with the German Grundgesetz, the Bundesverfassungsgericht explicitly cites the European Court of Justice for the proposition that '[t]here is ... no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with the law of international agreements ... provided this is the only way in which a violation of fundamental principles of the constitution can be averted', adding that this was 'familiar in international legal relations as reference to the *ordre public* as the boundary of commitment under a treaty'.<sup>26</sup>

This view has important consequences, allowing the Constitutional Court to claim a residual power of oversight over European integration with regard to human rights protection,<sup>27</sup> the respect of the limits of competences transferred

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<sup>23</sup> SC res. 1822 (2008), paras. 13, 25, 26.

<sup>24</sup> See Goldsmith and Posner, *supra* note 6.

<sup>25</sup> *Cf.* *supra* note 10.

<sup>26</sup> Lisbon judgment, *supra* note 10, para. 340, citations omitted.

<sup>27</sup> *Id.*, para. 191, the Court explicitly confirms its famous „Solange“ (“as long as”)-*Rechtsprechung*, BVerfGE 37, 271; BVerfGE 73, 339 in this regard, and adds another “Solange” regarding the respect for the principle of limited powers, *id.*, para. 262: ‘As long as, and to the extent to which, the principle of conferral is adhered to in an association of

to the Union,<sup>28</sup> and for the protection of the core of “national identity”.<sup>29</sup> Just like its earlier Maastricht ruling,<sup>30</sup> the German Constitutional Court now places not only the European Court of Justice, but all European and State organs including the national German parliament under its own supervision.<sup>31</sup> The irony has not been lost on observers that the Court – itself only indirectly democratically legitimated – thus claims a right of supervision over the democratically elected parliament in the very name of democracy.<sup>32</sup>

Early commentary on the judgment, while highly critical, has centred on the Court’s treatment of the “democratic deficit” of the European Union and its concomitant “state law” approach, according to which the transfer of competences to the EU required the consent of the domestic legislative bodies rather than the executive branch only.<sup>33</sup> In the absence of popular consent as expressed in the failed referenda on the Lisbon Treaty in Ireland and the preceding Constitutional Treaty in France and the Netherlands, however, the Court is correct to point out that the European Union derives its legitimacy not directly from the people, but from the States that ratified its

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sovereign states with marked traits of executive and governmental cooperation, the legitimisation provided by national parliaments and governments, which is complemented and carried by the directly elected European Parliament is, in principle, sufficient’. For an overview see A. Paulus, ‘Germany’ in D. Sloss (ed.), *supra* note 12.

<sup>28</sup> *Id.*, para 238-239.

<sup>29</sup> *Id.*, para 240. Article 79 § 3 GG reads: ‘Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.’ Article 20, in turn, contains the principles of democracy, of the rule of law (Rechtsstaat), and the “social state” (Sozialstaat).

<sup>30</sup> BVerfGE 89, 155 [hereinafter Maastricht judgment].

<sup>31</sup> See already C. Tomuschat, ‘Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts’ *Europäische Grundrechtezeitschrift*, (1993), 489 commenting on the Maastricht judgment. However, as representative of the federal government in the oral proceedings on the Lisbon Treaty, Tomuschat seemed to have warmed up to such control of the outer limits of European integration, Lisbon judgment, *supra* note 10, para. 240.

<sup>32</sup> C. Calliess, ‘Unter Karlsruhe Totalaufsicht’ *Frankfurter Allgemeine Zeitung* (27 August 2009), 8; M. Nettesheim, ‘Entmündigung der Politik’ *Frankfurter Allgemeine Zeitung* (27 August 2009), 8; M. Nettesheim, ‘Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG’ *Neue Juristische Wochenschrift*, (2009), 2867; see also D. Halberstam and C. Möllers, ‘The German Constitutional Court says “Ja zu Deutschland!”’ *German Law Journal*, 10 (2009), 1241, 1252-53; C. Schönberger, ‘Lisbon in Karlsruhe: Maastricht’s Epigones At Sea’ *German Law Journal*, 10 (2009), 1201, 1216-18.

<sup>33</sup> Lisbon judgment, *supra* note 10, paras 296-7.



constituent treaties.<sup>34</sup> However, the Court apparently fails to understand that a return to classical sovereignist solutions would not lead to more democratic decision-making in the European Union.

It is remarkable that the Bundesverfassungsgericht seems to regard European law in a similar way as international law in general. It thus uses the same terminology of 'friendliness' – or, in the quasi-official translation of "Freundlichkeit", 'openness' – as it does with regard to international law.<sup>35</sup> The direct effect between individuals that distinguishes EU law from the bulk of public international law does not impress the Court in this regard, because it exacerbates the democratic deficit rather than attenuating it. The Court thus challenges the European orthodoxy according to which European law constitutes a decisive advance over international law by being directly legitimated at citizen level.<sup>36</sup> The main justification for the autonomy of the Community legal order lies, as with international law, in the benefits all its members derive from membership, which might be endangered if every one of them can decide for itself whether or not to implement collective decisions.

But I do not intend to go into detail here. Rather, I concentrate on four points that demonstrate the attitude of the Court towards international law. The first point relates to the effects of European – or international – acts that are regarded as *ultra vires* by domestic institutions – a central part of the judgment that piles on the famous passage of the Maastricht judgment creating the theory of the "ausbrechenden Rechtsakt",<sup>37</sup> e.g. European legal acts not respecting the limits of EU powers.<sup>38</sup> Secondly, I address the claim that international law contains a 'principle of reversible self-commitment'<sup>39</sup> with

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<sup>34</sup> Id., paras. 231-2. For the contrary position, see, for example, I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' *Common Market Law Review*, 39 (1999), 703, 717; but see Schütze, *supra* note 8, p. 1079 n. 47.

<sup>35</sup> Id., paras. 225, 240, 340. On the openness to international law, see *supra* note 12.

<sup>36</sup> See, eg., J. Weiler and U. R. Haltern, 'The Autonomy of the Community Legal Order - Through the Looking Glass' *Harvard International Law Journal*, 37 (1996), 411, 420; against T. Schilling, 'The Autonomy of the Community Legal Order' *Harvard International Law Journal*, 37 (1996), 389.

<sup>37</sup> Maastricht Judgment, *supra* note 30, at 188.

<sup>38</sup> Lisbon judgment, *supra* note 10, para. 240. The provisional, but quasi-official translation speaks of 'legal instruments transgressing the limits'.

<sup>39</sup> Id., para. 233.

regard to international unions in general. Thirdly, I comment on the related point that international law – or, for that matter, the German constitution – allows for a tacit reservation of the domestic *ordre public* when concluding international treaties. Finally, I look at the extensive attempt by the Court to substantiate a “*domaine réservé*” for States that cannot be transferred to international organizations.<sup>40</sup> As a result, I come to the conclusion that the judgment reverts to a view of European and international law that has a lot in common with the judgment of the US Supreme Court in *Medellín*,<sup>41</sup> but seems ill-equipped for the 21<sup>st</sup> century challenge to democratise international relations.

### **(1) *Ultra vires* – a return to an international framework?**

From the primacy of State over European or international models of democracy, the Court concludes that democracy prohibits a European *Kompetenz-Kompetenz* (competence-competence) in the broad sense of the term, i.e. a competence of the Union to extend its competences without member State consent, and requires a narrow reading of the competences of the European Union.<sup>42</sup> It thereby espouses a universalist Statism that regards electoral democracy within the national state as the only model of democracy.<sup>43</sup> My Goettingen colleague Frank Schorkopf emphasises that, with its new *ultra vires* terminology, ‘the Lisbon treaty both linguistically and dogmatically follows international law by taking up the classical notion of public power acting without competence.’<sup>44</sup>

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<sup>40</sup> Id., paras. 249, 352 ff.

<sup>41</sup> *Medellín v. Texas*, 552 U.S. 491, 128 S.Ct. 1346 (2008); see also *Sanchez-Llamas v. Oregon*, 548 US 331, 126 S.Ct. 2669 (2006). For a comparative analysis see C. Hoppe, ‘Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights,’ *European Journal of International Law*, 18 (2007), 317.

<sup>42</sup> Lisbon judgment, supra note 10, paras. 233, 236, 240. However, the overbreadth of some of the ECJ judgments was inviting such a response.

<sup>43</sup> Id., paras. 268-72. See F. Schorkopf, ‘The European Union as An Association of Sovereign States: Karlsruhe’s Ruling on the Treaty of Lisbon’ *German Law Journal*, 10 (2009), 1219, at 1221.

<sup>44</sup> See Schorkopf, id., at 1231. Interestingly, his citations to Gerhard Leibholz and Rudolf Bernhardt rather point to limitations of the domestic invocation of the *ultra vires* quality of international acts, see Gerhard Leibholz, ‘Das Verbot der Willkür und des Ermessensmißbrauches im völkerrechtlichen Verkehr von Staaten’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1 (1929) 77, 94; referring to A. V. Dicey and A. B. Keith, *A Digest of the Law of England with reference to the Conflict of Laws*, 4th edn,

The *Certain Expenses* opinion of the ICJ agrees with the proposition that, in the absence of delegation to an international organization, member States retain freedom of action.<sup>45</sup> But it also emphasises that the Organization benefits from a presumption of legality when acting within its purpose.<sup>46</sup> In international law, the consequences of international organization arguably acting beyond their competences are unclear. Just like in European law, traditional approaches emphasise the auto-interpretation of States that may disregard decisions of international organizations they deem unlawful under international law, whereas others give primacy to the view of the organization, even in the absence of a judicial interpretation by an international court.<sup>47</sup> Others are resigned to the insolvability of the riddle of who is the final arbiter of the lawfulness of acts of international organizations.<sup>48</sup>

In the presence of an international court, however, whose task precisely is to decide questions of competences for all, collective determination, such as the one by the European Court of Justice, is clearly preferable,<sup>49</sup> with the possible exception in egregious cases of abuse. Only obvious violations of the powers of international organizations can thus be disregarded by States with the *ultra vires* argument.<sup>50</sup> The international implied powers-doctrine that the court

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(London: Stevens 1927) p. 23 (regarding *ultra vires* as example for the French doctrine of *excès des pouvoirs* and abuse of rights and applying it to States); R. Bernhardt, *Ultra Vires Activities of International Organizations*, in: J. Makarczyk (ed), *Theory of International Law at the Threshold of the 21<sup>st</sup> Century, Essays in Honour of Krzysztof Skubiszewski* (The Hague: Kluwer 1996), 599, 604 (arguing for primacy of international determinations of *ultra vires* acts).

<sup>45</sup> *Certain Expenses of the United Nations, Advisory Opinion*, ICJ Rep. 1962, 151 (168).

<sup>46</sup> 'But when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.' This jurisprudence has been confirmed in the *Lockerbie Preliminary Measures Case, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. UK), ICJ Reports 1992, 3 (15), para. 39.

<sup>47</sup> In this vein Bernhardt, *supra* note 44, at 604.

<sup>48</sup> J. A. Frowein, *The Internal and External Effects of Resolutions by International Organizations*, *Heidelberg Journal of International Law* 49 (1989), 778, at 783.

<sup>49</sup> That was also the position of L. Gross, 'States as Organs of International Law and the Problem of Autointerpretation', in *Essays on International Law and Organization* (1993), Volume I, 367, 394, strangely invoked by T. Schilling, *supra* note 36, at 389, 404, for the opposite conclusion; on the whole matter see J. Weiler and U. R. Haltern, *supra* note 36, at 425-28.

<sup>50</sup> In the same vein, recently, N. Weiß, *Kompetenzlehre internationaler Organisationen* (Heidelberg: Springer, 2008) 420-3, 436 (English summary). See also Article 46 of the 1969

seems to embrace in the judgment<sup>51</sup> shows that such overstepping of competences cannot lightly be presumed.<sup>52</sup> Whatever one thinks of some ECJ judgments, it is difficult to maintain that they fall under this category.

The best approach to what constitutes a decision or judgment *ultra vires* would probably take up the *Solange* criteria as developed in the case law of the Bundesverfassungsgericht.<sup>53</sup> In other words, only if the EU organs systematically disregard the legal basis of their activity, namely the treaties establishing the Union, resulting in a general 'decline below the required standard'<sup>54</sup> of treaty interpretation, Germany and its courts could end their practice of implementing the judgments of the European Court of Justice. I consider such a scenario highly unlikely.

Thus, the Bundesverfassungsgericht cannot point to international law for extending member States control over arguable *ultra vires*-acts of the organization, even less so because the member States have entrusted that task to an independent Court.<sup>55</sup>

## **(2) The right to withdrawal in international law**

In the very same paragraph in which the Court draws the conclusion from its analysis by excluding the transfer of *Kompetenz-Kompetenz* to the EU, it also provides that

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Vienna Convention on the law of treaties, 1155 U.N.T.S. 331, on the related problem of treaties violating a domestic constitution. See also the identical provision in the Vienna Convention on the law of treaties between States and International Organizations or between International Organizations, *opened for signature* 21 March 1986 (not yet in force), UN Doc.A/CONF.129/15 (1986), ILM 25 (1986) 543.

<sup>51</sup> Lisbon judgment, *supra* note 10, para. 237.

<sup>52</sup> On implied powers, see *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949, 174 (182); K. Schmalenbach, 'International Organizations or Institutions, General Aspects' in R. Wolfrum (ed.) *Max Planck Encyclopedia of International Law* 3rd edn (Oxford University Press, 2009), [www.mpepil.com](http://www.mpepil.com), paras. 47-49.

<sup>53</sup> See *supra* note 27

<sup>54</sup> *Bananenmarktordnung* [Banana Market Regulation], BVerfGE 102, 147, at 164, Engl. transl BVerfG, 2 BvL 1/97 (6 July 2000), para. 39, *available at* [http://www.bverfg.de/entscheidungen/ls20000607\\_2bv1000197en.html](http://www.bverfg.de/entscheidungen/ls20000607_2bv1000197en.html) (last accessed 22 April 2009)

<sup>55</sup> J. Weiler and U. R. Haltern, *supra* note 36, at 423-24, refuting the misconstruction of auto-interpretation of international law by T. Schilling, *supra* note 36, at 407.

‘withdrawal from the European union of integration (*Integrationsverband*) may, regardless of a commitment for an unlimited period under an agreement, not be prevented by other Member States or the autonomous authority of the Union. This is not a secession from a state union (*Staatsverband*), which is problematic under international law, but merely the withdrawal from a *Staatenverbund* which is founded on the principle of the reversible self-commitment.’<sup>56</sup>

In this provisional translation the passage is almost impossible to understand. It intends to say that while secession from a federal State is problematic under international law, an international federation (*Staatenverbund*, a term coined by the Court for the European Union) must allow for an individual right of withdrawal, and this proposition is supposed to be in accordance with international law.

First, the statement by the Court is *obiter* because one of the central modifications introduced by the Lisbon Treaty is an explicit right to withdrawal (Art. 50 para. 1) coming into effect by the conclusion of a treaty with the Union on its modalities.<sup>57</sup>

Secondly, a right to withdrawal is highly controversial in international law. A State may withdraw from a treaty – institutional or other – if and to the extent one of the parties is in ‘material breach’ of the treaty, or in case of a fundamental change of circumstances (*clausula rebus sic stantibus*).<sup>58</sup> In other cases, Article 56, para. 1, of the Vienna Convention on the Law of Treaties provides that a

‘treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

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<sup>56</sup> Lisbon judgment, supra note 10, para. 233, citation omitted.

<sup>57</sup> Art. 50, para. 1, TEU (L) reads: ‘Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.’ For the previous situation see Kirsten Schmalenbach, in: C. Calliess and M. Ruffert *EUV/EGV 2007*, Art. 312 EGV para. 4, with further references.

<sup>58</sup> See Art. 60 and 62 VCT, supra note 50.

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.'

While Article 53 of the Treaty on European Community in the pre-Lisbon version,<sup>59</sup> according to which the treaty is 'concluded for an unlimited period', indicates that the parties did originally not intend to allow for denunciation or withdrawal, the matter depends on whether the "nature" of a treaty of a regional supranational organization implies an individual right to withdrawal. Letter (b) was added by the Vienna Conference. The original draft of the Convention by the International Law Commission had not contained this provision.<sup>60</sup> As the ILC commentary indicates, there was no agreement on the matter.<sup>61</sup> Contemporary writers hold divergent views.<sup>62</sup>

The practice of international organisations is not very helpful. The UN Charter does not contain any clause of withdrawal. The matter was discussed at the San Francisco Conference and resolved in favour of a declaration according to which 'if ... a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization.'<sup>63</sup> One may understand this resolution as a statement on the

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<sup>59</sup> Official Journal C 321E (29 December 2006), (consolidated version).

<sup>60</sup> See Article 53 of the ILC draft articles, ILC Yearbook 1966, vol. II, p. 250, [www.un.org/law/ilc](http://www.un.org/law/ilc). Letter b was added by a majority of one vote in the Drafting Committee of the Vienna Conference on the law of treaties with the purpose of providing a remedy in case of treaties that did not contain a clause on their unlimited duration, see Report of the Committee of the Whole, in: 1 UN Conference on the Law of Treaties, Official Records, p. 177, para. 490 (c) as well as the proceedings in 2 UN Conference on the Law of Treaties, pp. 336 (Cuba) and 339 (F. Vallat for the UK). For an overview of the drafting history, see I. Sinclair, *The Vienna Convention on the Law of Treaties* 2d edn (Manchester: Manchester UP, 1984) at 186-88, who tends to the view that the unlimited nature of a treaty counsels against the application of Article 56.

<sup>61</sup> *Id.*, at 251.

<sup>62</sup> See A. Aust, *Modern Treaty Law and Practice* 2nd ed. (Cambridge: Cambridge University Press, 2007), 398 favouring such right; but see his main source, K. Widdows, 'The Unilateral Denunciation of Treaties Containing No Denunciation Clause' BYBIL, 53 (1982), 83 at 102, with extensive analysis to practice; see also Christakis, in: O. Corten and P. Klein (eds.), *Les Conventions de Vienne sur le Droit des Traités* (Bruxelles: Bruylant, 2006), vol. III, 2008-09 (arguing in favour of an explicit provision in the European treaties).

<sup>63</sup> *UNCIO Documents*, vol. VII, 267, Doc. 1043, I/2/70 (17 June 1945). The remainder of the resolution dealt with a special case – namely the adoption of an amendment by majority against the will of a member. For a thorough review of the debates in San Francisco on the

law. It can also be read as merely allowing for a withdrawal on the basis of the *clausula rebus sic stantibus*.<sup>64</sup> The better reading appears to be that it was designed to maintain constructive ambiguity.

When Indonesia “withdrew” its membership on January 20, 1965, and asked for re-entry one year later on September 19, 1966, it simply “resumed” membership without re-admission.<sup>65</sup> Thus, the claim of a right to withdrawal was ignored, and Indonesia re-assessed its own interests in the membership of the organization. In the time between withdrawal and resumption, however, Indonesia seems not to have been counted as UN member.

The Court thus presents a highly controversial matter as one of course. If anything, the language of the German constitution that provides for German cooperation in the establishment of the Union (Article 23, para. 1, Preamble, sentence 1) argues against a withdrawal as long as the Union remains faithful to its founding treaties.

### **(3) A general reservation of ‘ordre public’?**

The Court’s views on withdrawal and of “reversible self-commitment” only constitute a subset of a larger argument according to which States are only bound under reservation of their *ordre public*. The doctrine stems from private international law according to which States may fail to apply foreign (not international!) law if and to the extent it violates their *ordre public*, e.g. the body of rules containing the core principles of the forum state. As such it is a domestic, not an international legal concept<sup>66</sup> and does not affect the foreign rule as such, but merely its impact in the forum State.<sup>67</sup> In addition, it only applies to private international law conventions when explicitly permitted therein; and Courts need to keep in mind the need of uniform interpretation in all State Parties.<sup>68</sup> In addition, the *ordre public* may limit the recognition and

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matter, see N. Feinberg, 'Unilateral Withdrawal From an International Organization' BYBIL, 39 (1963), 189, 199-02.

<sup>64</sup> Feinberg, supra note 63, at 201; K. Widdows, supra note 62, at 100.

<sup>65</sup> K. Ginther, in B. Simma (ed.), *The Charter of the United Nations : a commentary* 2nd ed. (Oxford University Press, 2002), Art. 4 para. 40.

<sup>66</sup> See M. Gebauer, 'Ordre Public (Public Policy)' in R. Wolfrum (ed.) *Max Planck Encyclopedia of International Law* 3rd edn (Oxford University Press, 2009), www.mpepil.com, paras. 1-11.

<sup>67</sup> Id., para. 10.

<sup>68</sup> Id., para. 9.

enforcement of foreign judgments and arbitral awards in the domestic legal sphere.<sup>69</sup>

The Federal Constitutional Court invokes this doctrine in the passage in which it cites to the view held by the ECJ in *Kadi*:

'The Basic Law ... does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with the law of international agreements – accepting, however, corresponding consequences in international relations – provided this is the only way in which a violation of fundamental principles of the constitution can be averted.'<sup>70</sup>

This passage correctly argues, from a dualist viewpoint, that the domestic legal order may reject foreign law in exceptional cases, when it is ready to suffer the consequences for violating a rule of international law, namely State responsibility.<sup>71</sup>

While this first passage suggests that the Court was aware that such unilateral derogation is contrary to international law (while, strangely enough, the Court speaks of 'consequences in international relations' rather than using the legal term "state responsibility"), a second passage of the same paragraph sounds quite different: 'Such a legal figure is not only familiar in international legal relations as reference to the *ordre public* as the boundary of commitment under a treaty; it also corresponds, at any rate if used in a constructive manner, to the idea of contexts of political order which are not structured according to a strict hierarchy.'

But it will remain the Court's secret how it can, by allowing for the violation of international law, be "constructive". "Constructive" it could only be by beginning a dialogue, but not by derogating outright from the binding commitments of a member State. This was the secret behind the success of

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<sup>69</sup> *Id.*, para. 14.

<sup>70</sup> Lisbon judgment, para. 340.

<sup>71</sup> See already *Görgülü*, *supra* note 12, at 317-318.



the famous “Solange”-jurisprudence of the Court.<sup>72</sup> But the dialogue it now seems to contemplate is the “dialogue des sourds”. The consequence of breach is not dialogue, but responsibility and eventual reparation.

In addition, by speaking consistently of “international relations” rather than “international law”, the Court maintains a profound ambiguity as to the source of the proposed reservation of the *ordre public*. The ambiguity of the Court suggests that a State could violate its international obligations with impunity, even with a sense of righteousness. On the contrary, every violation of an international agreement is unlawful and entails international responsibility, including a duty to full reparation of the injury caused to others.<sup>73</sup> Thus, wilful disregard of international obligations contradicts any pretension to an “openness” or “friendliness” towards international law.

#### **(4) The objectivation of the *domaine réservé*: history of a failure**

While the *ultra vires*-, right to withdrawal and *ordre public*-points are of a similar nature – emphasizing domestic control over the extent of international integration – the fourth point is different: it does not constitute a direct challenge to international or European law as such, but rather constitutes an attempt to defend an objective, substantive view of the “minimum State” vis-à-vis international and European law. According to the Court,

[t]he principle of democracy as well as the principle of subsidiarity... require to factually restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner particularly in central political areas of the space of personal development and the shaping of the circumstances of life by social policy. In these areas, it particularly suggests itself to draw the limit where the coordination of circumstances with a cross-border dimension is factually required.<sup>74</sup>

While thus paying lip service to the ‘great successes of European integration’<sup>75</sup> and recognizing that there is no ‘hard core’ of State

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<sup>72</sup> On this point see A. Paulus, ‘Germany’ in D. Sloss (ed.), *supra* note 12; F. C. Mayer, ‘The European Constitution and the Courts’ in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford/Portland: Hart, 2006) 281, 296.

<sup>73</sup> See *only* Articles 1, 31 of the ILC Articles on State responsibility, in *Responsibility of States for Internationally Wrongful Acts*, GA res. 56/83 of 12 Dec. 2001, Annex.

<sup>74</sup> Lisbon judgment, *supra* note 10, para. 251 (references omitted).

<sup>75</sup> *Id.*

competences not open to transfer,<sup>76</sup> the BVerfG uses the language of democracy to defend national prerogatives. By identifying substantial areas in which democracy requires domestic freedom of decision, the Court thus contradicts international developments with regard to the *domaine réservé* as contained in Article 2 § 7 of the UN Charter, according to which domestic jurisdiction is determined by the current state of international law rather than by objective criteria. In the *Nationality Decrees* case, the Permanent Court of International Justice held: 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question: it depends on the development of international law.'<sup>77</sup> In other words: when States are not only free to remain outside international organization, but also to enter into international obligations,<sup>78</sup> it appears impossible to arrive at a "hard core" of domestic competences.

As Halberstam and Möllers have pointed out, it has proved impossible to determine a precise list of "State tasks".<sup>79</sup> Instead, the Court draws up a list of tasks currently not delegated to the European Union. In other words, the Court's theory of sovereign prerogatives is equivalent to a political statement aimed at bringing further losses of sovereignty under its control.

At a time when international law covers almost every area of international life, the unlimited freedom of States to assume international obligations towards other States reduces the area of domestic jurisdiction to the point where it ceases to exist. In the words of Georg Nolte, '[t]he development of international law after the Second World War ... has led to the coverage of so many fields by (consensual or customary) rules of international law that the definition ... by the PCIJ does not leave very much room for this concept any longer.'<sup>80</sup> The addition of the words "essential" to the domestic jurisdiction in Art. 2 § 7 of the UN Charter constituted an attempt to reserve certain

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<sup>76</sup> *Id.*, para. 248.

<sup>77</sup> *Nationality Decrees in Tunis and Morocco*, PCIJ, Ser. B No. 4 (7 Feb. 1923), p. 24.

<sup>78</sup> See, famously, *S.S. Wimbledon*, PCIJ, Ser. A., No. 1, 1923, p. 24.

<sup>79</sup> D. Halberstam and C. Möllers, *supra* note 32, at 1250: 'But is there any theory or argument behind this list? We find none in the opinion. The Court merely refers to its own imagination of past sovereignty.' And further, *id.*, at 1251: 'The deep irony of this part of the decision lies in the fact that the alleged theory of the sovereign state simply stems from a negative reading of the European Treaties. ... What the Court deems to be protected are merely the leftovers of European integration recycled as necessary elements of state sovereignty.'

<sup>80</sup> G. Nolte, in: B. Simma (ed.), *supra* note 65, Article 2 (7) para. 29.

competences for States.<sup>81</sup> Instead of defining a substantive hard core of State sovereignty, however, Georg Nolte has proposed to regard Article 2 § 7 ‘as encompassing a principle of proportionality’.<sup>82</sup> In other words, international intervention should only go as far as necessary. It is not by accident that Nolte invokes the principles of subsidiarity and proportionality as contained in Article 5 §§ 3 and 4 TEU for this proposition. Again, it turns out that an “internationalist” and a “European” view on the Lisbon Treaty come to the same conclusions.

While aiming at drawing an outer limit to European integration, the Court does not devise these areas as absolute limits, but seems to regard them as considerations for a proportionality analysis in which ‘coordination of circumstances with a cross-border dimension is factually required.’ There is some contradiction in the way the Court first defines these areas as limits to internationalization and then allows nevertheless for regulation of “cross-border dimensions”. This reintroduces subsidiarity and proportionality in the way that Nolte has proposed. It opens up the possibility for the court to limit the “identity protection” review of European decisions.

But the Court thus fails to provide, just like Article 2 § 7 of the UN Charter, a clearly defined area of domestic jurisdiction. The protection of the domestic area remains both relativist and indeterminate. This has two consequences: First, it empowers the Court to determine the outcome of the analysis, instead of the domestic parliament or the ECJ, and secondly, it comes down to a relative rather than absolute protection of the “hard core”. Legal certainty is, in spite of the substance of the list, basically lost.

Let us now briefly look to the substance of the list of the Constitutional Court:

‘What has always been deemed especially sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior (2), the fundamental fiscal decisions on public revenue and public expenditure, with the latter being particularly motivated, inter alia, by social-policy considerations (3), decisions on the shaping of

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<sup>81</sup> *Id.*, para. 32.

<sup>82</sup> *Id.*, para. 75.

circumstances of life in a social state (4) and decisions which are of particular importance culturally, for instance as regards family law, the school and education system and dealing with religious communities (5).<sup>83</sup>

As to criminal law, which played a large role in the oral proceedings, this is a reaction to the perceived overbearing of the ECJ in these matters.<sup>84</sup> As to the monopoly of the use of force, this is a criterion which certainly makes sense regarding the domestic use of the military. In view of current military realities, the second component of this element, the 'military monopoly on the use of force towards the exterior' appears particularly dubious, however. Thereby, the Court seems to intend to immunise the parliamentary prerogative – according to which the German armed forces are a “parliamentary army” – against centralised European decision-making.<sup>85</sup> The historical and constitutional irony of this step, however, is that the European Defense Community devised by some of the very framers of the German Grundgesetz<sup>86</sup> is now apparently held to be unconstitutional, whereas the concept of the “parliamentary army” was an invention by the Court by which it successfully arbitrated a constitutional dispute within government and parliament enabling Germany to participate in military operations abroad after the end of the cold war.<sup>87</sup> The assertiveness by which the Court counts the external security under sovereign prerogatives appears ironic if one looks at the constitutional requirement to use armed forces only in a system of collective security (Article 24.2 of the Basic Law<sup>88</sup>). In fact, Germans are well aware that the German armed forces could not even move their personnel without the support of its allies. National abilities do not match national prerogatives. This is exactly a situation where subsidiarity requires communal decision-making at a higher level. It remains unclear, however, whether,

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<sup>83</sup> Lisbon judgment, *supra* note 10, para. 252 (references omitted).

<sup>84</sup> See, eg., *Environmental Penalties*, Commission v. Council, Case C-176/03, [2005] ECR I-7879 (7928), paras. 48, 52.

<sup>85</sup> See Lisbon judgment, *supra* note 10, at 254, speaking of a 'similarly determined limit'.

<sup>86</sup> BGBl (German Fed. Gazette), II 1954, 343. Among the spiritual fathers of the EDC was Konrad Adenauer, the chairman of the Parliamentary Council drafting the German Grundgesetz and first Chancellor of the FRG.

<sup>87</sup> *AWACS/Somalia*, BVerfGE 90, 286, 382.

<sup>88</sup> See *id.*, at 344 ff.

according to the judgment, a truly European army would be permissible that includes German contingents not belonging to the Bundeswehr.<sup>89</sup>

The other three considerations – fiscal, social, cultural – relate both to the financial interests of the largest economy in Europe, as well as to the alleged threat of a forced cultural homogenization. Even though I doubt that the latter will ever happen, it merits mention that the true equalizing force of culture in Europe certainly does not emanate from Belgian chocolate or French movies, but from a globalised cultural industry. To protect cultural sovereignty, the Court determines that the member States need to remain members of the WTO even when they have lost all their competences justifying their presence.<sup>90</sup> Whether cultural protectionism will help nation States to maintain their identity, however, remains to be seen.

The list as a whole has no basis in the text of the constitution, but in the circumstances of the case, in particular in the list of complaints (from neo-liberal hardliners to reformed communists). Rather than having a strong legal basis, the list is based on a particular social theory that combines traditional (sovereignty) and postmodern (reflexivity) elements.<sup>91</sup> But was the political expediency of some of the rulings of the ECJ not precisely the reason for Karlsruhe's intervention?

In view of the relativism of the criteria both for the substance of the prerogatives and for their application, it appears that the mass of *obiter dicta*

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<sup>89</sup> In para. 255 of the Lisbon judgment, supra note 10, the Court emphasises that '[t]his, however, does not set an insurmountable boundary under constitutional law to a technical integration of a European deployment of armed forces ... Only the decisions on the respective specific deployment depend on the mandatory approval of the German *Bundestag*.' See also C. D. Classen, 'Legitime Stärkung des Bundestages oder verfassungsrechtliches Prokrustesbett?' *Juristenzeitung*, (2009), 881, 887 (with a skeptical view as to the permissibility of a European Army under the judgment).

<sup>90</sup> Lisbon Judgment, supra note 10, para. 375.

<sup>91</sup> Lisbon Judgment, supra note 10, para 249, which reads: 'European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament.'

will not shape the future of European integration, but rather constitute a concession to populist, but transient sentiments.

### **(5) The Lisbon judgment and international law**

In conclusion, in the Lisbon judgment, the Court not only treats European law as, at the core, still suffering from the traditional deficiencies of international law, namely ineffectiveness and democratic deficit, but seems to have missed important developments in international law itself. It is thus difficult to square the Lisbon judgment with the earlier case law of the Karlsruhe court with regard to the domestic effect of international law. On the other hand, ironically, the Court takes up the sceptical elements of the US jurisprudence of the *Medellin* variety at a time when its moment in the US seems to be waning. While this conclusion would ignore the considerable difference between the density of European integration and the much less intrusive ICJ jurisprudence, a considerable nexus between the two judgments is hard to deny.

Nevertheless, the earlier Karlsruhe case law also shows that the theoretical dualism of the BVerfG, in practice, often gives way to a pragmatic approach in favour of implementing international as well as European law, as demonstrated by the *Görgülü* and *LaGrand* decisions. As in the human rights cases, the court is not in a position to serve as a court of last resort towards the European Court of Justice. When it invokes the 'idea of contexts of political order which are not structured according to a strict hierarchy'<sup>92</sup> the court makes clear that it shares, in principle, a pluralist approach with regard to the relationship of legal orders, but demands the last word for itself as the guardian of democracy and of the core principles of the domestic constitutional order.

This is not worrying in itself. But it is precisely the necessity for tackling common problems such as global warming or transnational terrorism that has spurred the creation of international organizations with collective decision-making processes. National parliaments, as well as national courts, are incapable of fine-tuning these decisions. They can only provide a check on the executive branch *before*, and on the implementation of the results *after*

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<sup>92</sup> Lisbon judgment, supra note 10, para. 340. Unfortunately, however, this approach is not fully in line with the claim of primacy in the same paragraph, see H.P. Aust, Case Note, *International Law in Domestic Courts* (ILDC) 1364 (DE 2009), [www.oxfordlawreports.com](http://www.oxfordlawreports.com).

their international adoption. Only in a limited set of cases, however, they will be able to influence outcomes. They may destroy, not build. This counsels for a cautious use of domestic prerogatives in order to maintain the ever-precarious international process of decision-making indispensable to the solution of international problems. In the age of globalization, the existence of and the participation in such machinery is in the common interest as well as in the national interest. In the German case, it is even mandated by its constitution.<sup>93</sup> The future will show how careful the Court will make use of its self-attributed powers of review of international decisions.

At the same time, the democratic legitimacy of international decisions is one of the central challenges in a globalizing world.<sup>94</sup> This is the reason why it appears troubling when the court correctly emphasizes, on the one hand, the need not to schematically subject international organization to models of domestic democracy, but appears to shut the door, on the other hand, to a practical realization of supranational democracy by the introduction of “degressive proportionality” in the European Parliament (Art. 14 para. 2 TEU)<sup>95</sup> and by the inclusion of elements of “participatory democracy” (Art. 11 TEU).<sup>96</sup> At least, the BVerfG recognizes that participatory elements can ‘ultimately increase the level of legitimisation’.<sup>97</sup> Indeed, they were never intended ‘to replace the majority rule which is established by an election.’ But it remains to be emphasized that while strictly majoritarian democracy may

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<sup>93</sup> See the preamble: ‘Conscious of their responsibility before God and man, 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’ as well as Article 23: ‘With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.’

<sup>94</sup> For a more comprehensive treatment see S. Besson, ‘Institutionalizing global democracy’, in L. Meyer (ed.), *Justice, Legitimacy and Public International Law* (Cambridge: Cambridge University Press, 2009) 58-91; A. Paulus, ‘Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?’, in: T. Broude and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Oxford, Hart 2008) 193, pp. 198-206; J. H. H. Weiler, *The Constitution of Europe* (Cambridge 1999), pp. 264-85; each with further references.

<sup>95</sup> Treaty on European Union, supra note 2.

<sup>96</sup> See Lisbon judgment, supra note 10, para. 219, on the one hand, and paras. 279-95, on the other.

<sup>97</sup> *Id.*, para. 294.

not be suitable for the international level, seeking consensus among stakeholders should not be discarded lightly as an alternative that may indeed, and not only “ultimately”, increase the legitimacy of international decision-making.

## **V. Towards a Dialogue of Courts in a multi-level and pluralist legal system**

By way of conclusion, let me emphasize the following points:

1) The relationship between international and local law – and even less so between international and domestic courts – cannot be described by a simplistic monist or dualist framework. Rather, in the contemporary world, every legal régime must relate, by one way or the other, to other legal systems and their judicial “products”.<sup>98</sup>

2) Every legal system will also attempt to maintain its distinct character and its main source of legitimacy, in particular popular sovereignty, and protect the basic rights of its citizens. Through judicial control, international cooperation can therefore be balanced with constitutional values.

3) On the other hand, the implementation of international obligations and of international adjudication constitutes a value in itself that is recognised both by the U.S. and the German constitutions. Digressions must therefore be exceptional and reserved for extreme cases. Thus, I will not hide my preoccupation with suggestions that domestic courts should preserve an “option of noncompliance” with international obligations<sup>99</sup> or could rely on a domestic *ordre public* for not implementing international decisions. I am also concerned with the parochial European human rights absolutism from the ECJ and the European Advocate-General that ultimately helps neither human rights nor collective interests. Rather, courts must try to accommodate different legal systems while preserving their distinctness. Dialogue, however, pre-supposes open engagement with other legal systems.

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<sup>98</sup> Similarly H. H. Koh, 'International Law as Part of Our Law' *American Journal of International Law*, 98 (2004), 43, 56; A.-M. Slaughter, 'A Global Community of Courts' *Harvard International Law Journal*, 44 (2003), 191, at 192; S. D. O'Connor, 'Keynote Address' *ASIL Proceedings of the 96th Annual Meeting*, 96 (2000), 348.

<sup>99</sup> See *Medellín*, 552 U.S. 491 ■, 128 S.Ct. 1346, 1360 (Roberts, C.J., writing for the Court).



I know very well that, in the United States as well as in Europe, many people are anxious that giving too much space to international courts would abrogate democracy at home. But in a globalized world, human beings do not live in isolation, and common problems such as climate change or a return to financial sanity require common responses, even at the prize of national prerogatives. Accommodation as advocated here neither means abdication nor parochialism. Domestic courts may serve as defenders of national rights, but only to the extent strictly necessary for maintaining the rule of law. While States are sovereign, international rules as well as decisions by international organizations are binding on States that freely undertook to observe them.

Does Europe believe in international law? Certainly. But it also believes in human rights and democracy. Bringing these principles into a principled and practical balance is the province of contemporary jurisprudence. In other words: Transnationalism liveth.