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The Role of Domestic Courts in Treaty Enforcement: A Comparative Study

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I. Introduction: International Treaties and German Practice

After the traumatic experience of German self-isolation from the democratic world in the Nazi era and World War II, the founders of the new (West-)German constitution, the Grundgesetz, regarded integration into the world community as a primary goal, perhaps *the* primary goal, for the establishment of a democratic and federal Germany. Accordingly, the Grundgesetz became famous for its 'friendliness' towards international legal relations.¹

Under the prevailing interpretation of Article 59 of the Grundgesetz,² duly ratified treaties are part of German law and enjoy the same status as federal statutes, similar to the Supremacy Clause of the US Constitution. Under the prevailing canons of interpretation, however, this is only part of the story: German courts are also bound to interpret domestic law, as far as possible, in a way that avoids the breach of international legal obligations.³ Cases of open and intentional conflict between an international treaty and domestic legislation are extremely rare.⁴ Thus, the role of German courts in the domestic implementation of international treaties appears to be considerable, but straightforward: their task is to allow Germany to fulfil her international obligations by faithfully interpreting German law in accordance with Germany's international obligations, in particular treaty obligations.

¹ Decisions of the Federal Constitutional Court [hereinafter: BVerfGE], 112, 1 at 26; 92, 26 at 48; 6, 309 at 362; C. Tomuschat, 'Die staatsrechtliche Entscheidung für die internationale Offenheit' in J. Isensee and P. Kirchhof (eds.), *7 Handbuch des Staatsrechts der Bundesrepublik Deutschland* (2d ed., CF Müller, Heidelberg 1992) 483 at 485 para 3, 8. For the related terms of 'offener Verfassungsstaat' (open constitutional state), see K. Vogel, *Verfassungsentscheidung für eine internationale Zusammenarbeit* (Mohr, Tübingen 1964).

² See *infra* text accompanying note 27 (discussing Article 59, para. 2). For the view that treaties have a status equal to domestic legislation, see BVerfGE 74, 358 at 370; BVerfGE 82, 106, at 120.

³ BVerfGE 74, 358 at 370, transl. in, *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany* (Nomos, Baden-Baden 1992) Volume 1 Part II, at 634

⁴ For the 'treaty override' in international tax law, see A. Rust and E. Reimer, 'Treaty Override im deutschen Internationalen Steuerrecht', *Internationales Steuerrecht* (2005) 843-849; for examples of open violation in German law see *id.*, p 844.

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If it was ever so simple, this is no longer true. As a member of the United Nations and the European Union, Germany has become a State party to a great number of international treaties so that potential conflicts become increasingly frequent. In European Community law, what used to be considered the exception became the rule: if it is detailed enough, EC law claims both direct effect and supremacy over domestic law.⁵ Classical international law left the choice of whether to recognize the direct applicability of international treaties in the domestic legal order to domestic law itself. However, the case law of the European Court of Justice – which enjoys, under Article 220 of the Treaty on the European Community (TEC), the prerogative to ensure the observance of the Treaty⁶ – establishes that European law requires the direct effect of community law in the domestic legal order. Moreover, the ECJ demands supremacy of European over domestic law, including domestic constitutional law.⁷ Thus, compared to classical international law, the permanently expanding European law has a much greater potential for generating conflicts with domestic law.

Similarly, there is an increasing potential for conflict between general international law and domestic law. Like European law, general international law deals increasingly with issues that are not limited to inter-State affairs, but that regulate daily life and, in particular, the relationship between States and individuals. In the *LaGrand* and *Avena* cases,⁸ the International Court of Justice interpreted international law to require a minimum standard of protection for the right to consular information; it also derived individual rights of foreigners from Article 36 of the Vienna Convention

⁵ See *Van Gend & Loos*, Case 26/62, [1963] ECR 1 (direct effect); *Costa/ENEL*, Case 6/64 [1964] ECR 585 (supremacy over domestic law).

⁶ Art. 220, para. 1 of the TEC states: “The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.”

⁷ *Internationale Handelsgesellschaft*, Case 11/70, [1970] ECR 1125, para. 3.

⁸ *LaGrand (Germany v US)* [2001] 466; *Avena and Other Mexican Nationals (Mexico v. USA)*, Judgment [2004] ICJ Rep 12. In the *LaGrand* case, the author served as counsel for Germany.

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on Consular Relations,⁹ a multilateral treaty otherwise limited to inter-State affairs.

That was not quite the same as according direct effect to the treaty in the domestic legal order. The Court directed its Provisional Measures in the *LaGrand* case, however, not only to the United States as a State, but also to the Governor of Arizona.¹⁰ As an organ of the United States, she was considered bound by the United States' treaty commitments, even though she was the Governor of a state, rather than the Union.

In Europe, the European Court of Human Rights interprets the European Convention on Human Rights as implying a duty of the State to give effect to the rights enshrined in the Convention by way of legislation or other means of its own choosing,¹¹ whereas the text of the Convention provides for compensation in cases in which the internal law allows only for partial reparation.¹²

Another reason for the increasing potential for conflict between domestic and international law lies in the changing substance of international legal obligations. Traditional international law consisted mainly – but not exclusively – of reciprocal obligations between States that were not directly binding on private parties. And even in cases in which some provisions were considered self-executing, that is applicable within the domestic legal order, this was not considered controversial as long as they created rights and obligations in the relationship between the State and

⁹ Convention on Consular Relations of 24 April 1963, 596 UNTS 261.

¹⁰ *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999* [1999] 9, at 26, para. 28.

¹¹ In one case, the Court indicated specific measures to be taken for remedying a systemic failure of human rights protection, see *Broniowski v. Poland*, ECHR 2004-V, at 2, paras. 193-94; see also *Assanidze v. Georgia*, ECHR 2004-II, at 223, paras. 202-03, ordering the release of a detained person independent of damages due to him.

¹² Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter ECHR], Council of Europe Treaty Series (CETS) No. 5, last amended by Additional Protocol No. 11, ETS No. 155, entry into force on 1 Nov. 1998, Art. 41; see also Additional Protocols 12, CETS No. 177 (non-discrimination), and 13, CETS No. 187 (abolition of the death penalty in war time). Additional Protocol 14, which amends the Convention to allow, *inter alia*, for accession of the European Union to the Convention, awaits ratification by Russia to enter into force.

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its citizens only. In other words: when individual citizens claimed rights against the State on the basis of international law, it was quite natural that the State that had given its word to other states could be regarded also bound towards its own citizens. However, in contemporary European and human rights law, many rights – and respective obligations – apply in the relationships between citizens, the State only intervening by its Courts to delimit, define and implement these rights and obligations.¹³ Thus, the individual citizen does not only gain rights against the State through international and European law, but may also incur additional responsibilities towards her fellow citizens. In these cases, the interventions of international courts may strike the balance between the rights and obligations of citizens involved differently from domestic courts – an intervention which is not always welcome and may at times be regarded as patronizing. Certainly, the European Court of Human Rights has developed the doctrine of the “margin of appreciation” to account for the legitimate differences between member States. But it is the Court, not the individual country, who decides on the limits of this margin.¹⁴

In many cases in which international or European law has direct consequences in the domestic legal order, the task of determining the precise content and application of international obligations falls to the courts. However, with the increasing judicialization of international law,¹⁵ international courts and tribunals may interpret international rules differently than domestic courts. In fact, one might expect that international courts and tribunals would tend to extend the role of international law, whereas domestic courts would tend to limit it. The picture is more complicated than

¹³ For a recent example see *I.A. v. Turkey*, ECHR 2005-VIII 251, para. 27 (freedom of expression vs. freedom of religion).

¹⁴ See *I.A. v. Turkey*, *supra* note ■, para. 25, and *infra* note ■ and accompanying text.

¹⁵ Regarding the debate on ‘legalization’ and ‘judicialization’, see J. Goldstein, “Legalization and World Politics: A Special Issue of International Organization,” 54 *International Organization* (2000) 385 ff.

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that,¹⁶ but the potential for conflict remains. If international and European law means what the ICJ, ECJ or the European Court of Human Rights say it means, then domestic courts would become mere executioners of their decisions. This sits badly, however, with the traditional prerogatives of domestic courts, such as the US Supreme Court¹⁷ and the German Federal Constitutional Court, the Bundesverfassungsgericht (BVerfG).

This chapter analyses the way German courts have dealt with these questions in several steps. First, it will parse the text of the German constitution with regard to international affairs. The German text is far more detailed than Article VI of the U.S. Constitution, for example. Second, the chapter will examine recent conflicts between German laws and court decisions on the one hand and international ones on the other hand. The analysis shows that the German Constitutional Court does not accept each and every international claim for primacy over domestic law, but it attempts to interpret German law in conformity with German treaty obligations and decisions of international courts and tribunals.

However, such conformity has its limits. The German Constitutional Court drew a line in the sand when it suggested, in its famous *Maastricht* judgment, that EU law that oversteps EU competencies (as determined by the German court) may be non-binding on Germany.¹⁸ Again, in its recent *Görgülü* decision,¹⁹ the German Court followed the European Court of Human Rights in the result only, but denied simple automaticity. Finally, in the most recent of these cases, namely the *Waldschlösschen*

¹⁶ See J.H.H. Weiler, *Constitution of Europe* (Cambridge UP, Cambridge 1999) 39-63 (explaining how the system of the Communities strengthened rather than weakened member State courts).

¹⁷ For the vigorous, if polite, reaction by the Supreme Court, see *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2686-87 (2006).

¹⁸ BVerfGE 89, 155 at 188, Engl. transl. as *Brunner et al. v. The European Union Treaty (Cases 2 BvR 2134/92 & 2159/92)* [1994] 31 CMLR 57 at 89.

¹⁹ *Görgülü*, BVerfGE 111, 307, Engl. transl. provided by the Court, available at BVerfG, 2 BvR 1481/04 of 14 October 2004, http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html (accessed 6 Sept 2007).

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case,²⁰ the Federal Constitutional Court suggested that domestic referenda might override an international treaty if the treaty had been concluded by the executive branch, but had not been approved by the domestic legislature.²¹ While this part of the judgment was an *obiter dictum*, it suggests that German courts are increasingly assuming a different role than they did in the past: they are playing the role of a 'gatekeeper'²² or border guard who decides which international rules may cross the bridge into domestic law.

Thus, the German Constitutional Court has made clear that the role of German courts is not limited to a mere rubber stamp for the decisions of international courts applying international treaties. On the other hand, as its recent decision involving the Vienna Convention on Consular Relations suggests,²³ the Court has shown great respect for international jurisprudence and its decisions have promoted a large measure of compliance with Germany's treaty obligations.²⁴ The pro-active attitude of the Federal Constitutional Court is further evidence of a pluralism of legal systems, in which no court or tribunal can claim to have exclusive jurisdiction over a particular territory or a single subject matter.²⁵ In this respect, German courts may indeed become forerunners of their international brethren.

²⁰ BVerfG (Federal Constitutional Court), 2 BvR 695/07 of 29 May 2007, available at http://www.bverfg.de/entscheidungen/rk20070529_2bvr069507.html (accessed 7 Sept 2007).

²¹ *Id.*, para. 35.

²² The gatekeeper metaphor is taken from P. Kirchhof, 'Der deutsche Staat im Prozeß der Europäischen Integration' in J. Isensee and P. Kirchhof (eds.), *7 Handbuch des Staatsrechts* (C.F. Müller, Heidelberg 1992) 855 § 183, para. 65.

²³ BVerfG, 2 BvR 2115/01 of 19 Sept. 2006, http://www.bverfg.de/entscheidungen/rk20060919_2bvr211501.html.

²⁴ In its final decision in the *Görgülü* affair, a Constitutional Court Chamber even suggested that the local court had misled the Court on purpose and vigorously ordered the court to implement its judgment giving effect to the decision of the European Court of Human Rights. See BVerfG, 1 BvR 2790/04 of 10 June 2005, available at http://www.bverfg.de/entscheidungen/rk20050610_1bvr279004.html (visited 7 Sept 2007), para. 32.

²⁵ On pluralism, cf. A. Fischer-Lescano and G. Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," 25 *Michigan Journal of International Law* 999 (2004); A. Paulus, "The Emergence of the International Community and the Divide Between International and

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II. Constitutional Text and the Role of Domestic Courts

Part II analyzes the text of the German constitution (the Grundgesetz, or Basic Law) as it relates to treaties and the role of courts. This analysis provides the foundation for the subsequent analysis of recent case law in Part III below.

A. Treaties in the German Basic Law

The text of the German constitution contains several provisions regarding international law, but little on the role of courts. According to Article 59, para. 1, sec. 2 of the Basic Law [hereinafter GG for Grundgesetz], international treaties are to be concluded by the Federal President. He or she must obtain the counter-signature of the Federal Chancellor or of the competent Federal Minister.²⁶ In addition, Article 59, para. 2, sec. 1, provides: “[t]reaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law.”²⁷ Thus, while ratification is performed by the Federal President together with the Chancellor or cabinet Minister, such ratification requires the prior consent of the Parliament if the treaty deals with the ‘political relations’ of the Federation, or if it relates to matters that would require legislation when regulated domestically.

The ‘political relations’ are those that “directly affect the existence of the state, its territorial integrity, its independence and its position or prominent weight within the community of states.”²⁸ This category includes, for example, alliances, treaties of

Domestic Law," in A. Nollkaemper and J.E. Nijman (eds.), *New Perspectives on the Divide between International Law and National Law* (Oxford UP, Oxford 2007) 216; N. Walker, "The Idea of Constitutional Pluralism," 65 *Modern Law Review* 317 (2002).

²⁶ Article 58 GG.

²⁷ Translation provided by the German Bundestag (Dec 2000), available at http://www.bundestag.de/htdocs_e/parliament/function/legal/germanbasiclaw.pdf (accessed 4 Sept 2007).

²⁸ BVerfGE 1, 372 at 382; 90, 286 at 359; transl. in *Decisions of the BVerfG* 1 I at 27. For a doctrinal view, see C. Calliess, "Auswärtige Gewalt," in J. Isensee and P. Kirchhof (eds.), 4 *Handbuch des Staatsrechts* (3rd ed., Heidelberg 2006) 589 at 605 para. 30 with further references.

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peace and disarmament, and arbitration agreements. The wording of Article 59, para. 2, relates to the way in which parliament provides its consent for the conclusion of a treaty by the executive branch. The distinction between “consent” and “participation” refers to the distinction between the Bundestag as the federal parliament and the Bundesrat (Federal Council) as the participatory body of the German Länder,²⁹ and thus does not imply two different *modi operandi*.³⁰ Recently, in the *Waldschlösschen* case, the question arose as to what extent treaties ratified without legislative consent are legally binding within the domestic legal order.³¹

As to the subjects requiring legislation, this relates to the separation of powers within the federal government between the legislative and executive branches. Whenever a single provision of a treaty touches upon a matter that would require legislation when regulated domestically, the treaty itself is subject to legislative consent prior to ratification.

The more difficult question concerns the matters domestically falling under the competences of the Länder, in other words, all matters that are not explicitly within federal jurisdiction pursuant to federal constitutional law.³² Some writers maintain that Article 59, para. 2 does not apply to them.³³ The textual reference to “federal legislation” supports this view. However, the dominant doctrine holds that, with respect to treaties, the federal legislature is empowered to regulate matters that would domestically be regulated exclusively by Länder legislatures, because Art. 32,

²⁹ Cf. Art 50 GG: “The Länder shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union.”

³⁰ Streinz, Article 59 para. 34, in M. Sachs (ed.), *Grundgesetz. Kommentar* (4th ed., Beck, München 2007). But see Pernice, Article 59 para. 48, in 2 H.H. Dreier (ed.), *Grundgesetz-Kommentar* (2nd ed., Mohr Siebeck, Tübingen 2006) (who regards ‘participation’ as an indication of the possibility of anticipated consent.). However, this distinction appears artificial: if consent is required for ratification, it will always happen before ratification.

³¹ See *supra* note 20 and accompanying text.

³² See Art. 30, 70, 83 GG.

³³ Pernice, Article 59, para. 34, in Dreier (ed), *GG*, *supra* note ■.

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para. 1, of the Constitution vests responsibility for the conclusion of treaties in the federation.³⁴ If one does not find Article 59, para. 2, applicable as such, one should at least consider an application *per analogiam* in order to preserve the rights of the legislature to protect the freedom of the citizens.

Taken literally, Article 59, para. 2 does not say anything about the rank accorded to treaties in domestic law. However, the Bundesverfassungsgericht has consistently maintained that the legal form of consent by legislation also determines the legal rank of the respective treaty provisions.³⁵ The doctrine also speaks of the 'double function' of the law providing prior consent for treaty ratification: namely, the function of empowering the federal president to ratify and that of determining the domestic rank of the treaty ratified on the basis of legislative consent.³⁶ The requirement of legislative consent guarantees democratic decision-making by preserving parliamentary control over legislative matters. It also ensures the implementation of international obligations through future legislation, if necessary³⁷ that is, it leads to a kind of self-binding of the parliament to pass further implementing legislation, if necessary.

Treaties not falling under Article 59, para. 2, sec. 1, can be ratified without prior legislative consent. These are so-called executive agreements. Under Article 59, para. 2, sec. 2, the competence for domestic implementation of these agreements is the same as the domestic provisions on domestic administrative matters.³⁸ These

³⁴ See, e.g., Streinz, Article 32 para. 42, in Sachs (ed.), *GG*, *supra* note ■; id., Article 59, para. 49. On the difficult matter of the division of competences regarding the jurisdiction to conclude treaties in the areas left to the Länder, see Calliess, "Auswärtige Gewalt," at 621-24; Streinz, Article 32, paras. 31- 42, in Sachs (ed.), *GG*, *supra* note ■.

³⁵ BVerfGE 1, 396 at 410 f; 99, 145 at 158.

³⁶ See, e.g., Jarass, Article 59 paras. 16-17, in H.D. Jarass and B. Pieroth (eds.), *Grundgesetz für die Bundesrepublik Deutschland. Kommentar* (9th ed., Beck, München 2007), with further references; Streinz, Article 32 paras. 59- 70, in Sachs (ed.), *GG*, *supra* note ■.

³⁷ Calliess, "Auswärtige Gewalt," at 603 para. 26.

³⁸ Article 59, para. 2, sec. 2 states: "In the case of executive agreements the provisions concerning the federal administration shall apply *mutatis mutandis*."

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provisions divide power between the federation and the Länder. In case executive agreements contain norms directly applicable to individuals, Article 80 of the Constitution narrowly circumscribes the competences of the executive branch. According to most writers, this provision applies by analogy to executive agreements.³⁹ Otherwise, their implementation in the domestic legal order follows the common provisions for administrative acts,⁴⁰ in particular with regard to the division of competences between the executive branch and the Federal Council that represents the interests of the Länder, who administer the bulk of German public law.

B. The incorporation of treaties in domestic law

The domestic rank of treaties concluded with legislative consent is equal to that of domestic legislation. This result can be explained by the incorporation of the treaty through an act of legislation. There exists, however, no agreement within German doctrine on the question of how this effect comes about. The complete incorporation ('adoption') of the treaty, as such, into domestic law is usually rejected as too radical and disrespectful of the distinction between international and domestic law.⁴¹ According to the traditional view, the theory of 'transformation', the legislative act of approval not only provides legislative consent for the international act of ratification, but also 'transforms' the treaty from the international into the domestic sphere. In contrast, the more progressive view, the theory of execution, regards the legislative

³⁹ Cf. Kempen, Article 59, para. 104, in H. von Mangoldt, F. Klein and C. Starck (eds.), *Kommentar zum Grundgesetz* (5th ed., Vahlen, München 2005).

⁴⁰ Art. 83 ff GG.

⁴¹ See, e.g., Streinz, Article 25 paras. 15-16, in Sachs (ed), *GG*, *supra* note 29; Herdegen, Article 25 para. 36, in T Maunz and G Dürig (eds), *Grundgesetz:Kommentar* (Beck, München 2007).

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act as an order to follow this particular treaty as *international law* within the domestic legal order.⁴²

The BVerfG first followed the transformation theory, later it leaned towards the theory of execution.⁴³ Lately, it has cited both theories without clarifying which one it follows.⁴⁴ While this is theoretically unsatisfactory, there does not appear to be much of a practical difference between the two theories.⁴⁵ Inasmuch as the theory of transformation maintains a rather artificial separation of domestic from international law, it also suggests that the legislative act that transforms the treaty, qua domestic law, can be interpreted differently from the international treaty from which it derives its content. The transformation theory thus creates the illusion that, by its incorporation into domestic law, international law somehow loses its international character and can therefore be interpreted independently of the other State parties. 'Moderate' supporters of the theory of transformation thus loosen its requirements in a way that makes it hardly distinguishable from the theory of execution.⁴⁶ The theory of execution, on the other hand, properly identifies the object of the law of consent, and thus better accords with the wording of Article 59, para. 2, which provides for legislative consent or participation in treaty-making rather than a

⁴² Pernice, Article 59 para. 47, in Dreier (ed.), *GG*, *supra* note ■; Streinz, Article 25 para. 15, in Sachs (ed.), *GG*, *supra* note ■; id., Article 59 para. 65; M. Schweitzer, *Staatsrecht III* (9th ed., CF Müller, Heidelberg 2008) paras. 420 ff.

⁴³ Compare BVerfGE 46, 342 at 363, 403-04; 75, 223, at 245-46 with BVerfGE 1, 372 at 389; 6, 309 at 332-33. For general discussion of the issue, see I. Seidl-Hohenveldern, "Transformation or Adoption of International Law into Municipal Law," 12 *International & Comparative Law Quarterly* 88 (1963).

⁴⁴ Görgülü, BVerfGE 111, 307. See, e.g., E. Klein, "Urteilsanmerkung", *Juristenzeitung* 1176 (2004) (attacking this return to earlier terminology).

⁴⁵ Pernice, Article 59 para. 47, in Dreier (ed.), *GG*, *supra* note ■; Klein, *supra* note 44, at 1176.

⁴⁶ See, e.g., Schweitzer, *supra* note ___, paras. 423, 435 (defending a moderate theory of transformation that can hardly be distinguished from the theory of execution).

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domestic ‘doubling’ of international law. It is thus hardly surprising that most academic writers tend to the latter view.⁴⁷

For all its apparent innocuousness, the recent ‘double speak’ of the BVerfG maintains an unfortunate ambiguity regarding the role of domestic courts in the interpretation of international law: the Court’s reluctance to abandon the transformation theory suggests that the domestic mirror image of international law is interpreted exclusively by national courts, without regard to its special international or inter-State character. It is thus no accident that the theory of transformation reappears in circumstances where the Bundesverfassungsgericht strives to set limits on the incorporation of treaties into the domestic legal order.

C. Treaties of integration and the special role of Europe

One overarching goal of the drafters of the Grundgesetz was the re-integration of Germany into Europe and the world community. In its second paragraph, the Preamble explains that, in drafting the Grundgesetz, the German people were “[i]nspired by the determination to promote world peace as an equal partner in a united Europe.” This clause was initially added in 1949; it was maintained when the preamble was amended in 1990 to accommodate the changes brought about by German reunification. The preambular language gives a strong indication that the Constitution treats German integration into the world community as an implementation of the constitutional writ.

In the earliest version of the Basic Law, adopted in 1949, the drafters included Article 24, which provides, *inter alia*, that “[t]he Federation may by a law transfer sovereign powers to international organizations“. Thus, there is no doubt that treaties made under Article 59 may provide for the direct intervention of international organizations in domestic affairs without implementing legislation. This distinguishes the

⁴⁷ In addition to the writers in note 42 above, see Kempen, Article 59 para. 90, in von Mangoldt, Klein and Starck (eds), *GG*, *supra* note 38; R. Geiger, *GG und VR* (3d ed., Beck, München 2002) at 164, 172.

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Grundgesetz from the US Constitution.⁴⁸ In spite of the wording of this provision, however, the 'transfer' of sovereign powers should not be taken literally. What is implied, rather, is the opening of the German legal space to regulation by international organizations, not a transfer of sovereignty to international organizations in the proper sense of the term.⁴⁹ Thus, for any particular treaty, the degree to which the German legal space is opened can be regulated by the act of parliamentary approval under Article 59, para. 2, sec. 1.

Article 24 does not state expressly that the transfer of sovereign powers is constrained by the other provisions of the Constitution. Consequently, it was once contested whether the transfer of powers was subject to the observance of the constitutional rights of individuals, or at least to the provisions for which Article 79, para. 3 of the Constitution prohibits constitutional amendments.⁵⁰ These principles are very broad – human dignity, democracy, rule of law – and the respective constitutional case law is extensive. Thus, making international regulation subject to the interpretation of these principles by the Constitutional Court would be akin to putting international organizations under the supervision of the Bundesverfassungsgericht.⁵¹ On the other hand, Article 24, para. 1, was hardly meant to imply an unconditional surrender of the most basic principles of German democracy to international organizations.

⁴⁸ See, in particular, the Supreme Court opinion in *Sanchez-Llamas*, *supra* note 17, at 2684-85 (arguing that international courts do not take away Supreme Court prerogatives of interpretation and application of domestic law), but see also *Medellín v Texas*, 128 S.Ct. 1346, 1365 (2008) (opining that delegation of judicial power is possible in the confines of the constitution).

⁴⁹ See *As long as ... Decision I*, BVerfGE 37, 271 at 279; Decision of the Bundesverfassungsgericht 1 I pg. 270 at 275. See also Geiger, *supra* note 47, at 138 ff; Streinz, Article 24, in Sachs (ed), *GG*, para. 18; id, Article 23 para. 57; Randelzhofer, Article 24 Abs. 1, para. 55, in Maunz and Dürig (eds.), *GG*, *supra* note ■; Classen, Article 24 Abs. 1 para. 11, in Mangoldt, Klein and Starck (eds.), *GG*, *supra* note ■.

⁵⁰ Article 79, para.3, states: "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 [human dignity, AP] and 20 [democracy, rule of law, separation of powers, federalism, AP] shall be inadmissible."

⁵¹ Cf. C. Tomuschat, "Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts" *Europäische Grundrechtezeitschrift* 489 (1993).

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Whereas traditional international law would usually not conflict with the grand principles of the Constitution, this was much less clear with respect to German integration into the European Union. The breadth and depth of European regulation was bound to lead to conflicts of European case law with judgments of the Bundesverfassungsgericht. Moreover, the principles of supremacy and direct effect of European Community law over domestic law, combined with the prerogative of the European Court of Justice to interpret the treaties of integration under Article 220 of the TEC,⁵² appeared to require absolute compliance.

Before ratifying the 1992 Maastricht treaty that provides for economic and monetary union, however, the legislature added a special provision to the Constitution to deal with European integration, namely Article 23.⁵³ The provision clarified that the transfer of powers to the European Union was not unconditional, but subject to respect for the limits for constitutional amendments as contained in Article 79, para. 3. Moreover, Article 23 explicitly requires a European commitment “to democratic, social, and federal principles, to the rule of law and to the principle of subsidiarity,” and it promises “a level of protection of basic rights essentially comparable to that afforded by this Basic Law.” Thus, Article 23 provided an opening for domestic courts to play a much greater role in enforcing compliance with constitutional guarantees.⁵⁴

Article 24 was not amended in the same way. However, the fact that the new Article 23 conditions a transfer of sovereign powers on respect for the unmodifiable core of

⁵² For the text of Article 220 of the TEC, *see supra* note 6.

⁵³ Article 23 (1) states, *inter alia*: “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. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.” The further paragraphs contain procedural provisions broadening the participation of the federal parliament and the Federal Council. On this point, *see e.g.*, Calliess, “Auswärtige Gewalt”, *supra* note ■, at 626-630.

⁵⁴ *See infra* note 80 and accompanying text.

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the German constitution, as codified in Article 79, para. 3, strongly suggests that the Article 23 limitations apply, with even greater vigor, to general international law.⁵⁵ The precise scope of these limitations has remained in dispute.⁵⁶ The abundant literature is, however, remarkably short of concrete examples of a violation of basic constitutional principles by an international organization. This is hardly surprising because any treaty transferring sovereign rights of intervention is itself subject to parliamentary approval under Article 59, para. 2, and it is difficult to imagine that parliament would approve a treaty openly defying basic constitutional principles.

D. The role of domestic courts

With regard to treaties, the Grundgesetz is silent as to the role of Courts. However, Article 100, para. 2, addresses the related question of which rules of general international law (i.e., custom and general principles of law)⁵⁷ are incorporated by Article 25 of the Basic Law,⁵⁸ and which of these rules create rights and duties for individuals. Article 100, para. 2, provides that, in cases of doubt, courts must refer the matter to the Federal Constitutional Court, which thereby enjoys an almost exclusive prerogative to decide on the domestic effect of general international law not enshrined in a treaty.⁵⁹ The BVerfG has emphasized, however, that this provision

⁵⁵ See e.g., BVerfGE 73, 339 at 375 f; 58,1 at 40 ff; Jarass, Article 24 paras. 9-11, in Jarass and Pieroth (eds.), *GG, supra* note ■.

⁵⁶ Cf. Classen, Article 24 paras. 24-32, in von Mangoldt, Klein and Starck (eds.), *GG, supra* note 38 (contending that Article 24, like Article 23, is also subject to the restrictions in Article 79, para. 3); Pernice, Article 24, paras. 32-38, in Dreier (ed.) *GG, supra* note 29 (contending that Article 24 is subject to greater limitations than Article 23). Both papers contain further references to an abundant literature.

⁵⁷ See Article 38 of the ICJ Statute. On their incorporation by Article 25 GG, see BVerfG, 2 BvM 1/03 of 8 May 2007, para. 31, available at http://www.bverfg.de/entscheidungen/ms20070508_2bvm000103.html (accessed 5 Sept 07); Koenig, Article 25 para. 35, in Mangoldt, Klein and Starck (eds.), *GG, supra* note 38; Herdegen, Article 25 paras. 19ff., 23ff., in Maunz-Dürig (eds.), *GG, supra* note 40; Streinz, Article 25 paras. 32ff., 34 ff., in Sachs (ed.), *GG, supra* note ■.

⁵⁸ Article 25 GG states: “The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”

⁵⁹ Article 100, para. 2 GG states: “If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.”

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does not extend to treaty law.⁶⁰ Rather, claims regarding the applicability of a treaty provision can be brought before regular courts or before the Bundesverfassungsgericht, pursuant to the same rules as domestic legal issues. Thus, in principle, the role of courts in enforcing treaties is no different from the judicial role in enforcing domestic laws.

In practice, however, the Federal Constitutional Court accords greater latitude to the federal government in matters involving international affairs, including international human rights.⁶¹ This approach has met with vigorous criticism among internationalists in Germany.⁶² Indeed, the Grundgesetz does not distinguish between the judicial role in the interpretation of treaties and its role in the application of domestic legislation. It is thus highly doubtful whether it is appropriate for the Court to apply this approach, which was developed with regard to treaties involving the primordial goal of German unification, to other, more pedestrian matters as well.

German courts play a significant role in the enforcement of treaties. Tensions between the transformation theory and the execution theory are largely irrelevant to the concrete analysis of the impact of international treaties on domestic affairs. Whether or not a treaty creates directly applicable provisions – in other words, whether it is self-executing – or whether it creates directly enforceable rights and obligations for individuals,⁶³ largely depends on its interpretation by domestic courts. For example, a case currently before German courts will require the courts to decide

⁶⁰ BVerfG-K (chamber of the BVerfG), *Europäische Grundrechtezeitschrift* 2001, p 76 at 77; BVerfGE 94, 315 at 328.

⁶¹ BVerfGE 94, 12 at 35; 68, 1 at 97.

⁶² *See, e.g.*, Pernice, Article 59 paras. 52-53, in Dreier (ed.), *GG*, *supra* note ■ (with further references); Kempen, Article 59 paras. 71ff., in von Mangoldt, Klein and Starck (eds.), *GG*, *supra* note ■. For a more measured view, *see* Calliess, "Auswärtige Gewalt", *supra* note ■, at 608.

⁶³ Kempen, Article 59 Abs. 2 para. 95, in Mangoldt, Klein and Starck (eds.), *GG*, *supra* note 38; Pernice, Article 59 para. 8, in Dreier (ed.), *GG*, *supra* note ■; Geiger, *supra* note __, at 159 ff; Schweitzer, *supra* note __, paras. 436 ff.

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whether recently introduced student fees comply with the International Covenant for Economic, Social, and Cultural Rights,⁶⁴ and to what extent the latter is directly applicable to individual students in the first place.⁶⁵

Recently, in the *Görgülü* decision, the Constitutional Court pointed out that it has a special role to play in ensuring the observance of international law by the Federal Republic of Germany. Thus, the Constitutional Court will also supervise lower courts in a way not appropriate in domestic cases:

[A]s part of its competence the Federal Constitutional Court is also competent to prevent and remove, if possible, violations of public international law that consist in the incorrect application or non-observance by German courts of international law obligations and may give rise to an international law responsibility on the part of Germany (see BVerfGE 58, 1 (34); 59, 63 (89); 109, 13 (23)). In this, the Federal Constitutional Court is indirectly in the service of enforcing international law and in this way reduces the risk of failing to comply with international law. For this reason it may be necessary, deviating from the customary standard, to review the application and interpretation of international law treaties by the ordinary courts.⁶⁶

Thus, in the view of the Court itself, the Constitutional Court fulfils a special role in the service not only of the domestic Constitution, but also “in the service of enforcing international law.”

⁶⁴ International Covenant on Economic, Social, and Cultural Rights, 993 UNTS 3, BGBl. (Federal Gazette) II 428 (1976).

⁶⁵ OVG NRW (Higher Administrative Court), *Deutsches Verwaltungsblatt* 1442-1448 (2007), paras. 44 ff. By wrongly holding that the German translation of the Covenant, and not its authentic wording in the official UN languages, was applicable to the interpretation of the treaty, *id.*, para. 42, the decision also shows the pitfalls of the theory of transformation; cf. Art. 33 Vienna Convention on the Law of Treaties, 1155 UNTS 331, requiring an interpretation in the official languages, that entered into force in Germany on 26 Nov. 1987, BGBl. (Fed. Gaz.) II 757 (1987), and thus governs the interpretation of the treaty in Germany under both theories.

⁶⁶ *Görgülü*, BVerfGE 111, 307 at 328; Engl. transl., *supra* note ■, para. 61.

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III. Towards an International Community of Courts? The German Bundesverfassungsgericht and Its International Interlocutors

Viewed against the background of the constitutional provisions, the recent case law of the Bundesverfassungsgericht is of particular interest. Indeed, the case law of the German Federal Constitutional Court has generated discussions on the ‘cooperation’ between national and international courts and tribunals. When the Court first used this terminology in its famous judgment on the compatibility of the Maastricht treaty on European Economic and Monetary Union with the Grundgesetz (the *Brunner* case),⁶⁷ the rather innocent formula was a hardly veiled threat of domestic resistance to a European Court of Justice whose decisions were regarded as biased in favor of European competences.⁶⁸ More recently, a divergence of views between the Bundesverfassungsgericht and the European Court of Human Rights on the relationship between privacy and freedom of the press has created a similar confrontation.⁶⁹ Many influential writers, such as Anne-Marie Slaughter, have transformed the veiled threat, more amicably, into a theory of a “global community of courts.”⁷⁰

⁶⁷ This is the denomination in the most commonly used translation, *Brunner v European Union Treaty*, *supra* note 18.

⁶⁸ See, in particular, the debate regarding the power of ‘small amendments’ under Article 235 TEC of the time. *Id.*, BVerfGE 89, 155 at 210, 31 CMLR 57, para. 99. Against the false citation to a commentary by the German ECJ judge of the time, see J.H.H. Weiler, “The State “über alles”: Demos, Telos and the German Maastricht Decision,” in O. Due, M. Lutter and J. Schwarze (eds.), *Festschrift für Ulrich Everling* (Nomos, Baden-Baden 1995) 1651, at 1655 ff and former ECJ judge M. Zuleeg, “Die Rolle der rechtsprechenden Gewalt in der europäischen Intergration” *Juristenzeitung* (1994) 1 at 3 ff.

⁶⁹ See *von Hannover v. Germany*, Application no. 59320/00, judgment of 24 June 2004, European Court of Human Rights [hereinafter ECtHR], ECHR 2004-VI, 1. For the original case in Germany, called the *Caroline* case, see BVerfGE 101, 361. For criticism of the ECtHR decision, see, e.g., the former BVerfG Judge and rapporteur in the respective BVerfG decision, D. Grimm, “Discussion Statement,” 66 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 427-28 (2007). For an extensive treatment, see S. Mückl, “Kooperation oder Konfrontation? - Das Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte,” 44 *Der Staat* 403 (2005) (with ample references).

⁷⁰ A. Slaughter, “A Global Community of Courts,” 44 *Harvard International Law Journal* 191 (2003).

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Indeed, at least as far as the relationship between European and German courts is concerned, cooperation by far exceeds confrontation. The following sections discuss, in chronological order, the recent case law of the highest German court, the Bundesverfassungsgericht, with regard to the implementation of decisions by international courts. The analysis shows that the attitude of German courts towards international treaties, especially those of a quasi-constitutional character, such as the Treaty on European Union⁷¹ and the European Convention on Human Rights,⁷² is indeed correctly described as cooperative. Neither the Bundesverfassungsgericht, nor the European Court of Justice, nor the European Court of Human Rights has been successful in maintaining supremacy. Rather, all three courts need to find an accommodation of views. Confrontation cannot last for long; dialogue is inevitable.

⁷¹ On its constitutional character, see *Les Verts*, Case 294/83, [1986] ECR 1357 at 1365; *EEA I*, Opinion 1/91, [1991] ECR I-6079, at 6102. On the boundaries of its competences, see, e.g., ECJ Judgement on the New Tobacco Directive [2000] ECR I-8419. See also I. Pernice, "Europäisches und nationales Verfassungsrecht," 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 149, 155 (2001) [postnational notion of a constitution]; A. Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot, Berlin 2001) 93 ff.; Weiler, *supra* note 16, p 221 ff.; and A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart, Oxford, Portland 2006). For the role of European courts in this process, see E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution," 75 *American Journal of International Law* 1 (1981). Distinguish the functional use of the term 'constitution' by the European Court of Justice, however, from the debate on the constitutional character of the (failed) European Constitutional Treaty. On this point, see Calliess, in C. Calliess and M. Ruffert (eds.), *Verfassung der Europäischen Union. Kommentar der Grundlagenbestimmungen* (Beck und Manz, München; Wien 2006), Art. I-1, paras 1-24. For the renaming of the former Constitutional Treaty into Reform Treaty see Brussels European Council, 21/22 June 2007, http://www.consilium.europa.eu/cms3_applications/applications/newsroom/loadDocument.ASP?cmsID=221&LANG=en&directory=en/ec/&fileName=94932.pdf (accessed 26 June 2007) p 15. However, the 'constitutional character' of the European treaties does not relate to their contents, but rather to their constitutional form and authority. For opponents of any application of the term "constitution" to international bodies, see, e.g., D. Grimm, "Ursprung und Wandel der Verfassung," in J. Isensee and P. Kirchhof (eds.), 1 *Handbuch des Staatsrechts* (3rd ed., CF Müller, Heidelberg 2003) 3 at 41-42 (constitution implies exclusivity); U. Haltern, "Internationales Verfassungsrecht? Anmerkungen zu einer kopernikanischen Wende," 128 *Archiv des öffentlichen Rechts* 511 (2003); J. Isensee, "Staat und Verfassung," in J. Isensee and P. Kirchhof (eds.), 2 *Handbuch des Staatsrechts* (3d ed., CF Müller, Heidelberg 2004) 3 at 4, 14-15 (no constitution without popular consent).

⁷² See Mückl, "Kooperation oder Konfrontation," *supra* note 69, at 407 ff.

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A. Between Dialogue and Confrontation: The German Courts and the European Court of Justice After the *Maastricht* Case

The most important relationship is the one between the Federal Constitutional Court and the European Court of Justice. If one examines the constituent documents, their confrontation appears inevitable. However, and remarkably so, in spite of the considerable potential for a clash, it has yet to happen. The basic propositions are contradictory. The ECJ, relying on Article 220 of the TEC, claims the prerogative to “ensure that in the interpretation and application of this Treaty the law is observed.”⁷³ The BVerfG maintains that it controls the act of transformation, and therefore controls the ‘opening’ of German legal space to European law.⁷⁴ The dialogue at times resembles a shouting match, even warning shots are fired, but both Courts have thus far avoided giving contradictory ‘commands’ to national courts in a concrete case.

In fact, the Constitutional Court has taken considerable steps to ensure that ordinary courts are meeting their obligation under Article 234 of the TEC to refer to the European Court of Justice cases in which the impact of European law is doubtful. The BVerfG has accorded the ECJ the status of a ‘legal court’ under Article 101, para. 1, sec. 2 of the GG, thus allowing individuals to raise a constitutional claim before the BVerfG against a lower court accused of disregarding its obligations under the TEC.⁷⁵ On the other hand, the European Court of Justice has adapted its case law to the demands of the Constitutional Court by incorporating human rights principles into European law, even before those principles were mentioned explicitly in what is now

⁷³ Article 220 TEC, para. 1. See *Foto Frost*, [1987] ECR 4199. On the boundaries of the competences, see, e.g., *Tabakwerberichtlinie* [2000] ECR I-8419; F. Mayer, “The European Constitution and the Courts,” in von Bogdandy and Bast (eds.), *Principles of European Constitutional Law*, supra note 71, pg. 281 at 291 ff. For a comprehensive treatment of the relationship between the ECJ and domestic courts, see the contributions to A. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence* (Hart, Oxford 1998).

⁷⁴ *Brunner v European Union Treaty*, BVerfGE 89, 155 at 188, 31 CMLR 57 at 89. See also the present BVerfG president, H-J Papier, ‘Interview’ *Frankfurter Allgemeine Zeitung* (Frankfurt 24 Jul 2007) pg. 5.

⁷⁵ *As long as ... Decision II*, BVerfGE 73, 339 at 366, *Decisions of the BVerfG* 1 II, p 613 at 618.

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Articles 6 and 7 of the European Union treaty.⁷⁶ Of course, controversy continues to exist, in particular regarding the ECJ's expansive view of EC and EU competences,⁷⁷ but recent amendments to the treaty – and those still to come in the Treaty of Lisbon⁷⁸ – may further reduce the potential for conflict.

Nevertheless, the Federal Constitutional Court continues to maintain, in principle, its prerogative, first pointed out in the Maastricht decision, to overrule the ECJ in two types of cases:

- 1) Human Rights: If human rights protection in the European Union breaks down, the BVerfG reserves the right to step in and ensure that basic human rights are respected. Note, however, that the BVerfG does not require the ECJ to satisfy the German standard for constitutional rights, but only that the EU upholds a 'minimum standard' for the preservation of human dignity and protection of the rights enshrined in the European Convention on Human Rights and its additional protocols. This is the standard the ECJ has vowed to guarantee anyway.⁷⁹ At one time, there was a debate about whether the Constitutional Court's threat to overrule the ECJ was applicable in each case where the EU disrespected the minimum standard of the BVerfG, or whether the reservation of BVerfG jurisdiction was meant to apply only in the unlikely case of a general break down of European human rights jurisprudence. The most recent case suggests a trend in the latter direction, in particular since the European human

⁷⁶ For the "Solange" (German for 'As long as') saga, in which the BVerfG threatened to apply domestic fundamental rights without approval by the ECJ, but backed off when the ECJ introduced human rights into Community law, see Mayer, *supra* note 73, at 295; J. Kokott, "Report on Germany," in A. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence* (Hart, Oxford 1998) 77 at 82-92.

⁷⁷ See, in particular, FCC president Papier, "Interview," *supra* note 74.

⁷⁸ 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 of 17 December 2007 at 01, available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:en:HTML> (not yet in force) (accessed 1 May 2008).

⁷⁹ See Treaty on the European Union, Article 6.

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rights case law has matured to provide effective protection.⁸⁰ Although the BVerfG has called its relationship with the ECJ one of 'cooperation', it still claims for itself the right to overrule the ECJ, however.⁸¹

- 2) In cases where European organs act beyond the scope of their legitimate authority, the Federal Constitutional Court maintains that it may decide that such an act does not have effect on German territory.⁸² This could have implied a complete control of the ECJ case law on EU competences by German courts. However, this reading of the relevant passage in the *Maastricht* judgment has not been confirmed in practice. In spite of some criticism by the Court's president of the European practice of adopting an expansive reading of European competences,⁸³ the BVerfG has never declared a European Act inapplicable in the German legal order. It continues to respect the legislative authority of the Council and the European Parliament.

The conclusion to be drawn is relatively clear-cut: the dialogue between the BVerfG and the ECJ may, at times, resemble a *dialogue des sourds*, but so far they have found an accommodation with each other. The introduction of human rights standards into European law may count as the greatest success of the BVerfG in its 'dialogue' with its brethren. It also appears that the ECJ has adopted a more cautious approach towards matters of European competences; this may also be connected to the position of the German constitutional court. On the other hand, the German court remains in an important position: while maintaining a very liberal customs regime, it

⁸⁰ See *Bananenmarktordnung [Banana Market Regulation]*, BVerfGE 102, 147, at 164, Engl. transl BVerfG, 2 BvL 1/97 of 06/07/2000, para. 39, http://www.bverfg.de/entscheidungen/ls20000607_2bv1000197en.html: (“[C]onstitutional complaints and submissions by courts are ... inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has resulted in a decline below the required standard of fundamental rights after the "Solange II" decision.”)

⁸¹ *Id.* See also Papier, "Interview," *supra* note 74.

⁸² *Brunner v European Union Treaty*, BVerfGE 89, 155 at 188, [1994] 31 CMLR 57 at 89.

⁸³ Papier, "Interview," *supra* note 74.

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still appears to be sitting on the fence, or in the gatehouse,⁸⁴ and may yet decide to prevent the crossing of a particular European legal act into Germany's domestic legal order. Meanwhile, the BVerfG ensures that lower courts observe their obligation to refer matters involving European law to the ECJ.

It would thus amount to a profound misunderstanding of the role of domestic courts to regard them as irrelevant. Rather, in most cases, it is the task of domestic courts to apply European law or refer a case to the ECJ. Indeed, it may well be the empowering of domestic courts – including the lower courts who may, but need not always, refer matters to the ECJ – rather than their disenfranchising, that has made this two-tier system one of the greatest success stories of European integration.⁸⁵

B. From Cooperation to Confrontation?⁸⁶ The European Convention on Human Rights Before German Courts

Whereas the relationship between the Federal Constitutional Court and the European Court of Justice seems to have developed into a mature relationship of reciprocal respect and accommodation, the corresponding relationship between German courts and the European Court of Human Rights (ECtHR) – which sits in Strasbourg, France, and has jurisdiction over the observance of the European Convention on Human Rights (ECHR)⁸⁷ – seems to have soured lately. Until recently, the two courts worked hand-in-hand. However, two recent cases have endangered the earlier camaraderie between the Courts, despite the fact that one former BVerfG judge, Renate Jaeger,

⁸⁴ See Kirchhof, *supra* note 22.

⁸⁵ See K. Alter, "Explaining National Court Acceptance of European Court Jurisprudence: a Critical Evaluation of Theories of Legal Integration," in A. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence* (Hart, Oxford 1998) 227; Weiler, W. Mattli and A-M Slaughter, "The Role of National Courts in the Process of European Integration," in A-M Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence* (Hart, Oxford 1998) 253 at 39-63.

⁸⁶ See Mückl, "Kooperation oder Konfrontation," *supra* note __ .

⁸⁷ See ECHR, Art. 19 ("To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights.")

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now sits on the ECtHR in Strasbourg. In one case, the BVerfG and the ECtHR reached opposite conclusions about the relationship between freedom of speech and the protection of privacy. In the second case, the European Court of Human Rights and the Bundesverfassungsgericht appear to have joined forces against the unwillingness of a regional court to implement a Strasbourg judgment. Nevertheless, the position of the Constitutional Court in the latter affair is more ambiguous than it appears at first sight.

1) The special role of the Convention in the German legal order

Until recently, there was a remarkable accord between German courts and the ECtHR. While the Convention itself enjoys the status of 'normal' legislation – that is, it is subject only to the constitution and to later or more specialized legislation (*lex superior*, *lex posterior* and *lex specialis*)⁸⁸ – German courts generally interpret national law in a way that renders it compatible, as far as possible, with international law, including treaty law.⁸⁹ This principle is known in the United States as the *Charming Betsy* canon of interpretation;⁹⁰ it also applies to the application of the ECHR in the German legal order.

However, and importantly, courts apply the canon differently in Germany than they do in the U.S.. For example, in the *Breard* case,⁹¹ which dealt with the right of foreign

⁸⁸ BVerfGE 79, 358 at 370; *Görgülü*, BVerfGE 111, 307 at 317; Mückl, "Kooperation oder Konfrontation," *supra* note __, at 407-408. *But see* C. Walter, "Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß," 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 961, 977 (1999); J.A. Frowein, "Die Europäisierung des Verfassungsrechts," in P. Badura and H. Dreier (eds.), *Festschrift 50 Jahre Bundesverfassungsgericht* (Mohr Siebeck, Tübingen 2002) 209 at 218 (arguing for a quasi-constitutional rank of the Convention).

⁸⁹ BVerfGE 74, 358 at 370 with further references; English translation in: *Decisions of the Bundesverfassungsgericht* 1 II, p 634 at 637.

⁹⁰ *See Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). On the different emphasis in application of this principle, *see, e.g.*, A.L. Paulus, "From Neglect to Defiance? The United States and International Adjudication," 15 *European Journal of International Law* 783, 803-04 (2004) (with further references).

⁹¹ *See Breard v Greene*, 523 US 371 (1998).

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detainees to receive information and to consult with a consular officer, the Supreme Court held that the Antiterrorism and Effective Death Penalty Act (AEDPA)⁹² had overruled the Vienna Convention on Consular Relations, in particular with regard to the applicability of procedural default rules. However, there is no indication whatsoever that the drafters of AEDPA had the Vienna Convention – or any other conflict with international law – in mind when drafting an Act that was designed to accelerate the domestic administration of justice. In the practice of German courts, this would normally result in a preference for the treaty as *lex specialis*. German courts assume that the legislature, had it anticipated a conflict between a treaty and a statute, would have provided a legislative exception to accommodate the treaty. In the words of the Bundesverfassungsgericht,

laws ... are to be interpreted and applied in harmony with ... international law, even when such laws have been enacted [after] an applicable international treaty; it cannot be assumed that the legislature, insofar as it has not clearly declared otherwise, wishes to deviate from the Federal Republic of Germany's international treaty commitments or to facilitate violation of such commitments.⁹³

Indeed, in one case, the Court modified its case law to comply with a ruling of the European Court of Human Rights.⁹⁴

Of course, this argument does not pertain to the arguably higher rank of procedural default as a constitutional principle stemming from federalism, which would be superior to a treaty, such as the Vienna Convention. But in *Breard* the U.S. Supreme Court did not even contemplate this discussion. Instead, the Court limited itself to the

⁹² Pub.L. No. 104-132, 110 Stat 1214 (1996).

⁹³ BVerfGE 74, 358 at 370, Engl. transl. in *Decisions of the Bundesverfassungsgericht* 1 II, p 634 at 638. The translation falsely renders “wenn sie zeitlich *später* erlassen worden sind als ein geltender Völkerrechtlicher Vertrag” by “enacted *prior to* an applicable international treaty” (my emphasis), a mistake that has been corrected above.

⁹⁴ *Feuerwehrabgabe [fire service levy]*, BVerfGE 92, 91; see *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, [ECHR] Series A, no. 291-B.

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statement that AEDPA conflicted with the Convention, and therefore the later-in-time statute prevailed.⁹⁵

By also interpreting the basic rights enshrined in the Grundgesetz in light of the guarantees of the European Convention and the decisions of the European Court of Human Rights,⁹⁶ the Bundesverfassungsgericht makes clear that it accepts the European Court as an equal, which deserves respect and should be followed whenever possible. The BVerfG also endeavours to harmonize domestic and European human rights law as far as possible. This harmonization is facilitated by the European Court's 'margin of appreciation' doctrine, which leaves member States some discretion in choosing how to implement the rights enshrined in the Convention.⁹⁷

2) *Caroline and the rise of the conflict*

However, there is one situation where the effort to harmonize domestic and European human rights law does not work: that is when the duty corresponding to an individual right belongs to another individual citizen, rather than the State. In such a case, the right of one citizen will be the obligation of the other, and any enhancement of one person's right will increase the burden on another citizen. In the *Caroline von Monaco* case decided by the European Court of Human Rights, there was a conflict between Caroline's right to privacy, as enshrined in Article 8, para. 1 of the Convention, and the right to freedom of expression of the Burda and Heinz Bauer publishing companies (who published the German magazines Bunte, Freizeit Revue and Neue Post), which is protected by Article 10, para. 1 GG. The German courts had resolved the conflict largely in favour of freedom of expression. However, the

⁹⁵ See supra notes ___ and accompanying text.

⁹⁶ BVerfGE 57, 358 at 370; Decisions of the Bundesverfassungsgericht 1 II p 638; confirmed in *Görgülü*, BVerfGE 111, 307 at 329, Engl. Translation, *supra* note 19, para. 62.

⁹⁷ *Lawless v. Ireland*, judgment of 14 November 1961, Series A, no. 1, para. 28; *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A, no. 260-A, para. 47.

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European Court of Human Rights, in a decision not appealed by the German government, decided in favour of the princess's privacy.⁹⁸ The clash was there.

Although the lower Courts have, in practice, largely followed the European Court of Human Rights, there was fierce opposition against the ruling, especially from previous members of the bench and the current president of the German Constitutional Court.⁹⁹ However, German opinion on the issue was divided. Thus, there were also voices in Germany supporting the substance of the European Court decision.¹⁰⁰ The thrust of the opposition by the Court president, Hans-Jürgen Papier, was that the European Court had not left enough discretion to the domestic court. Indeed, he argued that the European Court should guarantee only a minimum standard, leaving the rest to national jurisdictions.¹⁰¹ The debate is ongoing. But it is remarkable that the President of the Bundesverfassungsgericht leads an effort to limit the rise of a common European standard in favour of national prerogatives of treaty implementation. Regardless, two factors may limit the significance of the case:

- 1) The federal government, apparently advised by the Constitutional Court itself,¹⁰² chose not to appeal the *Caroline* ruling to the Grand Chamber of the European Court of Human Rights, as it was entitled to do under Article 43, para. 2 of the Convention. The motives for this decision are unclear. Institutional fairness would have required going before the Grand Chamber if the execution of the judgment had appeared impossible.¹⁰³ On the other hand,

⁹⁸ *Von Hannover*, *supra* note 69.

⁹⁹ *See supra* note 69.

¹⁰⁰ *See, e.g.*, R. Stürner, "Urteilsanmerkung," *Juristenzeitung* 1018 (2004).

¹⁰¹ Papier, "Interview," *supra* note 74.

¹⁰² *See* M. Hanfeld, *FAZ* of 25 June 2004, p 46.

¹⁰³ *See* A.L. Paulus, "Discussion Statement," 66 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 449 (2007).

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the government's decision not to appeal may indicate a willingness to comply, notwithstanding the vocal protest against the ruling.

- 2) Given that most of the rights accorded under the Convention protect individuals against the government, so-called three-polar cases, in which Courts are requested to protect individuals against each other, will be fairly rare.

Finally, as the following discussion shows, the Federal Constitutional Court remains willing to respect the rulings of the ECtHR.

3. *Görgülü* and the protection of ECHR law by the Constitutional Court

If lower courts might have believed that the *Caroline* controversy gave them a free pass to disregard adverse rulings of the European Court of Human Rights, the *Görgülü* case serves as a strong reminder that the *Caroline* case is an exception to the rule of compliance and cooperation between the highest German and European Courts.

In 2005, for the third time in six months, the Constitutional Court admonished the Regional Court (Oberlandesgericht) Naumburg to implement a judgment of the European Court of Human Rights regarding a father's right of access to his son, whom the regional Court had assigned to foster parents.¹⁰⁴ According to a newspaper report, both the Court in the German Land of Saxonia-Anhalt and the regional officials prevented the father from seeing his son, in spite of rulings by the ECtHR and the BVerfG to establish visitation rights.¹⁰⁵

¹⁰⁴ BVerfG, 1 BvR 1664/04, Entscheidung vom 5 April 2005 (Decision of 5 Apr. 2005), http://www.bverfg.de/entscheidungen/rk20050405_1bvr166404.html (accessed 23 May 2005).

¹⁰⁵ Bernd Fritz, "Vater ohne Sohn," FAZ of 14 April 2005, pg. 7.

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In the first of its three decisions in this case,¹⁰⁶ the Federal Constitutional Court emphasized that only the “violation of fundamental principles of the constitution” may justify the violation of international law.¹⁰⁷ As to the effect of judgments of international courts and tribunals, the highest German court added: “[s]ince the European Convention on Human Rights – *as interpreted by the ECtHR* – has the status of a formal federal statute, it shares the primacy of statute law and must therefore be complied with by the judiciary.”¹⁰⁸ With respect to the European Court’s interpretation of the Convention and its relationship to German law, the Constitutional Court added:

As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention. The situation is different only if observing the decision of the ECtHR ... clearly violates statute law to the contrary or German constitutional provisions, in particular also the fundamental rights of third parties. 'Take into account' means taking notice of the Convention provision as interpreted by the ECtHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law.¹⁰⁹

Thus, international law and decisions of international courts are subordinated to constitutional law, but the deference due to the rulings of the ECtHR is considerable. In particular, the German Constitutional Court accepts that not only the Convention itself, but also its interpretation by the European Court of Human Rights is authoritative.

However, some passages in the latter part of the judgment suggest that some members of the Court may also regard structures of simple German law as bars to

¹⁰⁶ BVerfGE 111, 307 (2004, in German). The following citations are to the English translation provided by the Court, available at BVerfG, 2 BvR 1481/04 of 14 October 2004, http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html (visited 6 Sept 2007).

¹⁰⁷ *Id.*, para. 35.

¹⁰⁸ *Id.*, para. 53 (emphasis added).

¹⁰⁹ *Id.*, para. 62.

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following international judgments. In a convoluted paragraph, it becomes clear that the Court regards international law and decisions of competent international courts as binding, provided that they can be incorporated into domestic law without destroying its basic structure:

“Take into account” means taking notice of the Convention provision as interpreted by the EC[t]HR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law. ... Here, it will always be important how taking account of the decision takes [place] in the [legal sub-]system ... in question. On the level of federal law too, the Convention does not automatically have priority over other federal law, in particular if in this connection it has not already been the object of a decision of the EC[t]HR.¹¹⁰

What emerges from the decision is that German courts are usually bound by the ECtHR’s interpretation of the European Convention. However, this is not true in a case where a decision to follow the ECtHR may violate the German constitution itself, because the Constitution is superior in rank to the Convention. In the case at hand, there was an arguable case of contradictory constitutional interpretations between the German court and the European Court of Human Rights. The Constitutional Court sent the case back to the lower court, and when that court did not comply, issued a provisional measure putting the judgment of the European Court of Human Rights into effect.¹¹¹ It remains unclear, however, how far the respect for basic structures of Germany’s domestic legal system may thwart the execution of a judgment. (The ‘in particular’ clause at the end of the cited passage suggests that a decision of the Court may clarify the matter, but not necessarily in all cases). The most appropriate understanding of the BVerfG decision limits the impact of non-constitutional law on the implementation of international judgments to cases where a collision of individual rights takes place and the European Court has failed to take all rights in

¹¹⁰ BVerfG 111, 307 at 329 (Engl. transl., *supra* note 19, para. 62.)

¹¹¹ BVerfG, Decision 1 BvR 2790/04 of 28 Dec. 2004, http://www.bverfg.de/entscheidungen/rk20041228_1bvr279004.html (no English translation available).

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question into account,¹¹² or has failed to account for the balance struck by the legislature between the rights involved.

The confusion created by the convoluted language of parts of the *Görgülü* decision, however, should not obscure its main message: German courts must ‘take account’ of international treaty law through the lens of the competent international court or tribunal, and need to cross a high threshold if they wish to disregard decisions by international courts and tribunals acting within their jurisdiction.

C. From Ignorance to Implementation? German Courts and the International Court of Justice

In the *LaGrand* case, in response to a German application, the International Court of Justice decided that Article 36, para. 1, of the Vienna Convention on Consular Relations (VCCR) grants individuals a right to consular notification.¹¹³ Moreover, under Article 36, para. 2, of the same Convention, state parties are required to provide remedies within their domestic legal systems for individuals whose rights under Art. 36(1) have been violated, at least in cases involving severe penalties.¹¹⁴ Since the ICJ decision in *LaGrand*, three cases regarding the VCCR reached the German Bundesgerichtshof¹¹⁵ (Federal Supreme Court) and later the Bundesverfassungsgericht.

In a 2006 Chamber decision, the Federal Constitutional Court applied the reasoning of the *Görgülü* decisions to the relationship between the International Court of Justice and the Federal Constitutional Court.¹¹⁶ Accordingly, the principle of ‘friendliness to

¹¹² See Klein, "Urteilsanmerkung," *supra* note __, at 1177-78.

¹¹³ *LaGrand (Germany v. US)*, ICJ Reports 2001, pg. 466, at 515, referring to the Vienna Convention on Consular Relations of 24 April 1963, 596 UNTS, pg. 261.

¹¹⁴ *LaGrand (Germany v. US)*, ICJ Reports 2001, pg. 466, at 515-16.

¹¹⁵ BGH, Beschluss v. 7.11.2001 (Decision of 7 November 2001), 5 StR 116/01, (2003) *Strafverteidiger* 57 (with comment Paulus), (2002) *Neue Zeitschrift für Strafrecht* 168.

¹¹⁶ BVerfG, 2 BvR 2115/01 of 19 Sept 2006, *supra* note 24. For a comparison of this decision with the Supreme Court's decision in *Sanchez-Llamas*, *supra* note 17, see J. Gogolin, "Avena and Sanchez-Llamas

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international law' enshrined in the German constitution, and the judiciary's obligation to respect 'law and justice' (Gesetz and Recht) pursuant to Article 20, para. 3 of the German Basic Law, require domestic courts to 'take into account' decisions of the International Court of Justice that are binding on Germany.¹¹⁷ In line with the *Görgülü* decisions, however, 'taking into account' means "taking notice of the Convention provision as interpreted by [the international court] and applying it to the case, provided the application does not violate higher-ranking law, in particular constitutional law."¹¹⁸ But even when ICJ decisions are not technically binding, the decision accords them a "function as normative guideline" ('normative Leitfunktion') for the parties that German courts must respect and apply when interpreting an international treaty.¹¹⁹ In addition, in a remarkable display of comparativism, the Constitutional Court analysed the U.S. Supreme Court judgment in *Sanchez-Llamas* and agreed with the dissenters, rather than the Supreme Court majority.¹²⁰ Due to the failure of the Federal Supreme Court to properly consider the ICJ decisions, the Chamber of the Constitutional Court quashed two of the three decisions in question and referred them back to the Federal Supreme Court. At the time of writing in May 2008, the implementing decisions of the Federal Supreme Court¹²¹ that were rather reluctant to implement the Constitutional Court ruling are pending at the Federal Constitutional Court.

Come to Germany – The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations," 8 *German Law Journal* 261 (2007); 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," 18 *European Journal of International Law* 317 (2007).

¹¹⁷ BVerfG, 2 BvR 2115/01 of 19 Sept 2006, para. 58.

¹¹⁸ See *supra* note 110 and accompanying text.

¹¹⁹ BVerfG, 2 BvR 2115/01 of 19 Sept 2006, para. 62; see also *Görgülü*, BVerfGE 111, 102 at 128; BVerwGE [Decisions of the Federal Administrative Court] 110, 203 at 210.

¹²⁰ BVerfG, 2 BvR 2115/01 of 19 Sept 2006, para. 61.

¹²¹ BGH, *Neue Juristische Wochenschrift*, 2008, pp. 307 ff.

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The German Court's decision does not follow a path of complete subservience to international courts and tribunals. It preserves the supremacy of the German constitution, but it emphasizes that international integration is also a constitutional value and may thus require a considerable measure of respect and accommodation towards competent international courts. In an ideal case, this procedure will result in a meaningful dialogue between international and domestic courts.¹²²

IV. Democracy and the implementation of international law by domestic courts

The ideal of dialogue does not deny the possibility of clashes between the domestic legal order and international treaties or judgments interpreting and applying those treaties. German courts tend to interpret constitutional provisions in harmony with treaties and international court decisions, rather than risking a conflict. Clear conflicts of wording will be extremely rare, in particular with regard to treaties that have passed parliamentary approval procedures. However, one might ask whether such a non-conflictual view accommodates too much. In other words, how do German courts square their practice with democracy? Some U.S. writers maintain that domestic democracy should always take precedence over international legal strictures.¹²³

This section analyzes the Maastricht decision, with particular emphasis on the question of democracy. In addition, it briefly touches upon a recent case that raises the question whether direct democracy at the local level can override international agreements. The analysis sheds light on the attitude of German courts toward the relationship among democracy, federalism and international integration.

¹²² See Mückl, "Kooperation oder Konfrontation," *supra* note __, at 418-19.

¹²³ J.L. Goldsmith and E.A. Posner, *Limits of International Law* (Oxford UP, Oxford 2005) at 205 ff.

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A. Maastricht and the consequences: Limits to international legal integration

The decision of the Bundesverfassungsgericht in the *Maastricht* case remains the most important yardstick for a discussion of German views about the relationship between democracy and international integration by treaty. European integration is by far the most ambitious project of integration by treaty. Although the project of a 'constitutional treaty' has failed, the European Court of Justice used the term 'constitution' in its early case law to describe the huge impact of the founding treaties of the European Union.¹²⁴ Indeed, given the supranational character of the Treaty on the European Community (TEC), the term "constitutional treaty" provides an apt description, especially because the TEC is directly applicable in the domestic legal order and enjoys supremacy over domestic law.¹²⁵ The Lisbon Treaty that is expected to replace the failed constitutional treaty will, if ratified, further strengthen the quasi-constitutional features of the EU legal order, regardless of the changed name.¹²⁶

'Democracy' is enshrined in Article 20 and Article 79, para. 3, GG as one of the central tenets of the German constitutional order that cannot be removed by means of a constitutional amendment, let alone by an international treaty. Article 23, para. 1 lists respect for democratic principles and human rights among the conditions for German participation in the development of the European Union.¹²⁷ Its second sentence also makes clear that the transfer of powers to the Union is conditioned on respect for these basic principles. Nevertheless, in the absence of a democratic world

¹²⁴ See *supra* note 71.

¹²⁵ See the famous ECJ judgments in *van Gend & Loos* and *Costa/E.N.E.L.*, *supra* note 5.

¹²⁶ See *supra* note 75.

¹²⁷ Art. 23, para. 1, sections 1 and 2 state: "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. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat."

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state, the 'democratic deficit' is an inherent feature of any international organization, in particular the European Union, with its broad powers and its institutionalized intervention in the previously sovereign affairs of its member States.¹²⁸ In a special legal order that claims, unlike most other international law, direct effect and supremacy, the question arises as to how these immediately legally binding and effective decisions are legitimated.

Faced with this problem, the Bundesverfassungsgericht emphasized that it was willing to supervise the democratic legitimacy of the European institutions. First, it transformed the objective principle of democracy into an individual right of citizens by reinterpreting the principles of a free and fair elections in Article 38 of the constitution¹²⁹ to provide for an individual right to democracy.¹³⁰ Second, the Court maintained that the democratic legitimacy of the European Union depended primarily on national democratic processes, reducing the European Parliament to a 'supporting function'.¹³¹ Third, it emphasized that the national legislatures needed to maintain competences of substantial weight to fulfil the requirements of the principle of democracy.¹³²

If the peoples of the individual States provide democratic legitimation through the agency of their national parliaments (as at present) limits are then set by virtue of the democratic principle to the extension of the European Communities' functions and powers. ... The States need sufficiently important spheres of activity of their own in which the people of each can develop and articulate itself in a process of political will-

¹²⁸ See, e.g., Calliess, "Auswärtige Gewalt," *supra* note __, at 616-17. On the 'democratic deficit' of the European Union, see Weiler, *supra* note __, 264 ff. with further references.

¹²⁹ Article 38 provides that "(1) Members of the German Bundestag shall be elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience. (2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected. (3) Details shall be regulated by a federal law."

¹³⁰ *Brunner v European Union Treaty* BVerfGE 89, 155 at 187; [1994] 1 CMLR 76, para. 3 ff.

¹³¹ BVerfGE 89, 155 at 189; [1994] 1 CMLR 87.

¹³² BVerfGE 89, 155 at 190; [1994] 1 CMLR 88.

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formation which it legitimates and controls, in order thus to give legal expression to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically. ... From all that it follows that functions of substantial importance must remain for the German Bundestag [federal parliament].¹³³

Finally, the BVerfG deduced from these holdings a requirement of determinacy for the delegation of powers to the European Union:

There is accordingly a breach of Article 38 of the Constitution if an Act that opens up the German legal system to the direct validity and application of the law of the (supra-national) European Communities does not establish with sufficient certainty the powers that are transferred and the intended programme of integration.¹³⁴

Accordingly, if the European Union oversteps the limits contained in the treaty transferring sovereign powers to it, such an action by the EU would not be legally binding within the domestic legal sphere.¹³⁵ With this line of argument, the German Court derived from the principle of democracy the requirement of determinacy and the principle that German court(s) exercise supervisory powers. With these qualifications, the Court decided that the Act ratifying the Maastricht Treaty passed constitutional scrutiny.

However, this argument may prove too much. The very purpose of international and regional integration is to solve problems that cannot be tackled efficiently or effectively at the domestic level. A failure to solve these problems would not contribute to domestic democracy. Thus, the Court took into account the benefits that accrue from the 'pooling' of sovereignty.

The conferring of sovereign powers has the consequence that their exercise no longer depends solely on the will of one member-State all the time. To see that as a breach of the constitutional principle of democracy

¹³³ BVerfGE 89, 155 at 207, [1994] 1 CMLR 88. For criticism regarding the citation to the homogeneity argument, see Weiler, *supra* note __, at 1655 ff.

¹³⁴ *Brunner v European Union Treaty* BVerfGE 89, 155 at 187, [1994] 1 CMLR 88-89.

¹³⁵ *Id.*, BVerfGE 89, 155 at 188, [1994] 1 CMLR 89.

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would not only contradict the openness of the Constitution to integration ...; it would also entail a conception of democracy that would make every democratic state incapable of any integration going beyond the principle of unanimity. Unanimity as a universal requirement would inevitably set the wills of the particular States above that of the community of States itself and would put the very structure of such a community in doubt. The wording and sense of Articles 23 and 24 show that such a result is not intended.¹³⁶

What is required, then, is the striking of a balance between domestic democracy and international integration. National parliaments protect democracy by approving the legal basis of any act of integration. After parliamentary approval, though, it is the task of domestic courts to ensure that international institutions remain within the confines of the powers delegated to them.

In theory, therefore, the conflict between national courts and international courts is unavoidable:¹³⁷ whereas the latter must determine the extent of the competences delegated to an international organization in the process of interpreting and applying the constituent treaty of that organization,¹³⁸ national courts claim a right to form an independent judgment to ensure that international institutions and their courts remain within the bounds of powers delegated to them.¹³⁹ Whereas, at times, the cooperation between international and domestic courts may become strained, confrontation is hardly unavoidable. Rather, reciprocal respect and accommodation are preferable. Indeed, while neither the ECJ nor the BVerfG has compromised on their respective claims of exclusivity, there has not been a single case of direct

¹³⁶ *Id.*, BVerfGE 89, 155 at 183, [1994] CMLR 85-86.

¹³⁷ On this point, see the two rapporteurs of the German Association of Constitutional Lawyers on this topic in 2006. F. Merli, "Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte," 66 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (2007) 392 ff.; S. Oeter, "Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte," 66 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (2006) 361.

¹³⁸ See, e.g., Art 220 of the TEC, *supra* note 6. For the equivalent provision regarding the European Court of Human Rights, see Article 19 ECHR, *supra* note 87.

¹³⁹ For an extensive analysis, see Mayer, in von Bogdandy and Bast (eds.), *Principles of European Constitutional Law*, *supra* note 73, at 281 ff.

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confrontation between these two courts, and to date only one such case has occurred before a lower court.¹⁴⁰ Although the potential for conflict remains, it is up to the courts involved to avoid such a situation by applying generally accepted principles of legal interpretation to guide their decisions.

B Democracy versus international treaties? Some remarks on the Waldschlösschen case

The recent *Waldschlösschen* case has shown, however, that the potential for conflict between treaty law and democracy is not limited to treaties of integration. Rather, the exercise of regional democracy may lead to violations of international treaties because of a discrepancy between the obligations assumed internationally and the status of treaties in domestic law.

The people of the German city of Dresden decided by popular referendum to build a bridge in the Elbe valley, the so-called Waldschlösschenbrücke, in spite of the valley's status as a world cultural heritage site. After this decision, the "World Heritage Committee," an inter-governmental committee established under the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage,¹⁴¹ added the Elbe valley to the "List of World Heritage in Danger," pursuant to Article 11, para. 4, of the Convention. The Committee determined that the Elbe valley would lose its status as a world heritage site if the bridge was built.¹⁴² Despite an apparent shift of public opinion after the Committee's decision, the referendum was legally

¹⁴⁰ Finanzgericht Rheinland-Pfalz, Entscheidungen des Finanzgerichte [Decisions of Financial Courts] 378 (1995). The next instance, the Federal Court of Finance, did base its identical result in the case on other grounds. *See* Entscheidungen des Bundesfinanzhofs [Decisions of the Federal Court of Finance] 180, 231 at 236. For details, *see* Mayer, in von Bogdandy and Bast (eds.), *Principles of European Constitutional Law*, *supra* note 73, at 299 (with further references).

¹⁴¹ Convention concerning the Protection of the World Cultural and Natural Heritage of 16 Nov 1972, 1037 UNTS 153.

¹⁴² UNESCO, World Heritage Committee, 30th Session, 13 July 2006. *See* SächsOVG, decision of 9 March 2007, Az.: 4 BS 216/06, p. 10, no. 8.

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binding for three years,¹⁴³ and a new referendum within this period would have required a two-thirds majority in the city Council. That majority did not exist.

Germany had ratified the UNESCO Convention under Article 59, para. 2 of the GG without the approval of parliament because the federal government at that time had determined that the Convention was neither of a political character nor did it contradict existing domestic law. The federal states were apparently involved in the ratification decision, but the Convention contains a 'federal clause' in Article 34(b) that exempts regional authorities from the duty to enact legislation.

The Higher Administrative Court decided that it was not relevant whether the Convention contained concrete obligations that were directly applicable. Rather, in the absence of federal ratification legislation, and in the absence of a clear international obligation to protect the Elbe valley, specifically, popular sovereignty trumped the more general duty to protect world heritage sites.¹⁴⁴ A chamber of the Federal Constitutional Court rejected a complaint filed by city authorities who were opposed to building the bridge. On the one hand, the chamber pointed out that the Convention was not self-executing. On the other hand, it agreed that

[i]n consequence of this international legal framework it is possible that, pursuant to constitutional law, the will of the citizens in a formal vote, as an authentic expression of democracy, prevails in a conflict over the development of a cultural landscape. ... As a consequence, the possible detriments of such a decision – for example the loss of the status as a world heritage site and of the reputation attached to it – must be tolerated.¹⁴⁵

Two aspects of this decision help explain the attitude of German courts towards the enforcement of international treaties. First, both courts avoided a clear break with the

¹⁴³ § 24 Abs. 4 Saxonian Local Government Ordinance.

¹⁴⁴ SächsOVG, *supra* note 142, at 19.

¹⁴⁵ BVerfG (Federal Constitutional Court), 2 BvR 695/07 of 29 May 2007, para. 35, *available at* http://www.bverfg.de/entscheidungen/rk20070529_2bvr069507.html (accessed 6 Aug 2007) (our transl).

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Convention. Rather, the courts argued that the clash between the Convention and the local vote was more apparent than real, because the Convention defined the obligations of Germany very broadly, their bindingness on the local government was doubtful, and the application of the Convention by the World Heritage Committee was neither persuasive nor binding on the city of Dresden. This enabled the Courts to avoid the charge of violating Germany's international legal obligations. Second, it is remarkable that both courts took the Convention extremely seriously: they did not simply hold the Convention to be non self-executing and therefore irrelevant, and they did not claim the precedence of local democracy over international treaties. Rather, they attempted to strike a balance between the degree of international obligation and the constitutional value of democracy.

One may certainly reach a different conclusion as to the balance finally struck. For example, the German courts did not weigh the interests of other German world heritage sites in the balance. Regardless, one cannot charge the courts with neglecting international obligations, even when they are of a rather soft character. It is also remarkable that in both the *Maastricht* and the *Waldschlösschen* cases German courts regarded international integration and international treaties as a value that deserves weight, even when measured against a foundational principle, such as democracy. This is possible only because the constitution explicitly hails international integration as a constitutional value. Thus, international integration is not antithetical to democracy because integration itself is considered to be the will of the people.

V. Conclusion: Towards Pluralism?

The German Constitutional Court does not recognize any inherent hierarchical authority of international courts, but usually regards its relationship with

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international courts, such as the European Court of Justice, as 'cooperative'.¹⁴⁶ It will thus integrate international legal pronouncements into German domestic law, not as a matter of hierarchy, but because integration into the international community is a value enshrined in the German constitution. However, in practice, integration may entail some derogation from international standards. In the consular information cases, the Constitutional Court overruled the Federal Supreme Court, which had paid lip service to the international decision without actually following it. In the *Görgülü* case, the local authorities were deaf both to the ECtHR and their own Constitutional Court, and the Constitutional Court, before ordering compliance with the ECtHR's decision, considered whether domestic legislation might be a bar to implementation of that decision. Nevertheless, the general practice is one of compliance with international decisions.

Thus, the role of German courts in the implementation of international treaties is two-fold. On the one hand, they have a constitutional obligation to implement international treaties – especially treaties ratified with parliamentary consent, which are equivalent in rank to a domestic statute – provided the treaty is self-executing in character. With regard to European Union law, Article 234 of the TEC requires domestic courts to refer cases to the ECJ when unsettled questions of European law are involved in the decision. Also, with regard to international law, the Constitutional Court has emphasized the duty of domestic courts to implement international law, a role that German courts have regularly undertaken. Courts may have to recognize a certain executive prerogative, but this may also cut both ways: either by giving the executive branch the option of not fulfilling non self-executing obligations, or by

¹⁴⁶ This was famously the description of the relationship between BVerfG and ECJ in the *Maastricht* decision, *Brunner v European Union Treaty* BVerfGE 89, 155 at 175, [1994] 1 CMLR 79 ("Kooperationsverhältnis" – relationship of co-operation between ECJ and BVerfG regarding the protection of human rights).

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allowing the executive branch to bring domestic law into compliance with international rights and obligations.

On the other hand, domestic courts may also, in rare cases, have to fulfil a 'gate-keeping'¹⁴⁷ role in order to safeguard constitutional values against encroachments by international institutions that may interfere with vested rights of Germany and her citizens. But this is a role of last resort. Since the drafting of the German Constitution in the aftermath of WW II, international integration has been one of Germany's central goals, not only because of the dreadful Nazi past, but also in recognition of the fact that a medium-sized power needs friends, and because Germany benefits from the pooling of resources in a globalized world. It is likely that these basic characteristics of the attitude of German courts will continue for the foreseeable future.

¹⁴⁷ See Kirchhof, *supra* note 22.