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by Niels Petersen *

Abstract

This contribution seeks to shed new light onto the classification of legal orders with respect to the domestic effect of international law. Traditional theory distinguishes between monist and dualist systems, those that accept the primacy of international law over domestic law, and those that do not attribute direct effect to international law in the domestic legal order. We will examine three different lines of constitutional jurisprudence on the effect of decisions of international authorities in the domestic order. It is maintained that all courts dealing with the domestic effect of international secondary law ultimately face questions of legitimacy of the external decision-making procedure. We will identify three strategies to cope with this challenge and argue that it is more appropriate to consider the relationship of a national legal order to international law through the prism of how its constitutional court approaches the governance issue than to refer to the traditional monism-dualism-dichotomy.

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Introduction

One of the big debates of international law scholarship of the last century centered on the relationship between international law and domestic law.¹ Today, there seems to be agreement that it is not possible to give one abstract, universal answer to the question. The effect of international law rather depends on how the conflict is solved by each domestic legal order.² However, the question has regained attention. Two recent decisions of constitutional courts have caused a great stir in legal scholarship. In its *Medellín* decision, the U.S. Supreme Court had to deal with the effect of decisions of the International Court of Justice in the U.S. legal order.³ Equally, the European Court of Justice had to decide in the *Kadi* judgment on whether Resolutions of the U.N. Security Council are absolutely binding for the European legislator.⁴ Both courts came to the same result, rejecting the unconditional supremacy of international law.

Although similar in their result, the courts followed, as we will see, different rationales in *Medellín* and *Kadi*, which cannot be captured by the traditional distinction. The reason is that there is a new dimension to the debate. Traditionally, the question of domestic effect of international law referred to the application of customary international law or treaties to which the concerned state was a party. The political institutions of the respective state thus had a direct influence on the creation of the norm that was later to be applied in its domestic courts. There have recently, however, been developments that blur this traditional picture. Increasingly, new institutions are evolving on the international plane, which take decisions without many of the affected states being involved in the decision-making process.⁵ They exercise public authority unilaterally.⁶ This not only concerns administrative and legislative bodies, but also international courts and tribunals, which often play a pivotal role in deepening international integration. These forms of governance pose questions of legitimacy and thus represent new challenges to domestic courts that have to implement such international secondary law in the domestic legal order.⁷

¹ See the groundbreaking contributions of HEINRICH TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* (1899) (taking a dualistic position, according to which international law and domestic law are separate legal orders) and HANS Kelsen, *DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS* (1920) (according to whom international law and domestic law are part of a single monistic legal order).

² Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 RDC 303, 317 (1992).

³ *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

⁴ Joint Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission* (European Court of Justice, 3 Sept. 2008).

⁵ See Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15-61 (2005).

⁶ Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN L. J. 1375, 1381 (2008).

⁷ The described developments are, of course, of a gradual, not a dichotomous, nature. It may thus be more appropriate to talk of thinner or thicker stratospheric layers than of distinct eras. See Joseph H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 HEIDELBERG J. INT'L L. 547, 551 (2004).

The traditional monism/pluralism-divide assumes a hierarchy between competing legal orders.⁸ Under monism, the international order always trumps domestic norms, while, under dualism, the domestic order determines the rank of international law in the domestic setting. This description may be accurate if we have static legal orders, but it is inappropriate for dynamic régimes, which are shaped by decisions of courts and international institutions. Therefore, while conceptualizing the relationship of courts with competing jurisdiction, some scholars have recently departed from the hierarchical description of legal systems. They perceive the relation of different courts rather as one of cooperation⁹ or observe the emergence of a pluralistic order of jurisdictions.¹⁰

In two prominent contributions, Eyal Benvenisti has recently argued that courts act strategically in the application of international law in the domestic order.¹¹ On the one hand, they try to shield domestic political branches from external pressure, on the other hand they want to ensure their own independence. In order to attain these goals, they often seek the cooperation with domestic courts from other legal systems and international tribunals. According to this reasoning, national courts thus often adhere to international decisions in order to establish “a united, coordinated judicial front.”¹² Benvenisti welcomes this development and argues that the cooperation of domestic courts in order to reduce the external pressures of globalization strengthens domestic democracy and increases the accountability of international regulatory institutions.¹³

This contribution agrees with Benvenisti’s approach that legitimacy concerns play a crucial role in the decisions of domestic courts on the implementation of international decisions. Instead of applying a rational choice framework, we will, however, choose a constructivist perspective. Constructivists argue that the preferences of actors can be shaped by normative concepts and ideals.¹⁴ According to our analysis, constitutional courts take different approaches in dealing with the implementation of international decisions. These differences cannot be explained by purely strategic considerations. It will rather be argued that the readiness to accept the direct ef-

⁸ Cf. Armin von Bogdandy, *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law*, 6 I.CON 397, 397-98 (2008) (describing monism as pyramid).

⁹ See Franz C. Mayer, *The European Constitution and the Courts*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 281-333 (Armin von Bogdandy & Jürgen Bast eds., 2006); Lech Garlicki, *Cooperation of Courts: The Role of supranational jurisdictions in Europe*, 6 I.CON 509-30 (2008). See also HEIKO SAUER, JURISDIKTIONSKONFLIKTE IN MEHREBENENSYSTEMEN (2008) (proposing a system of mutual loyalty obligations as solution to conflicts of jurisdiction); Nikolaos Lavranos, *Towards a Solange-Method between International Courts and Tribunals?*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW – CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 217-35 (Tomer Broude & Yuval Shany eds., 2008) (interpreting the *Solange*-jurisprudence as means of cooperation between courts).

¹⁰ See Janne Nijman & André Nollkaemper, *Beyond the Divide*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 341, 359-60 (Janne Nijman & André Nollkaemper eds., 2007), Michael Rosenfeld, *Rethinking constitutional ordering in an era of legal and ideological pluralism*, 6 I.CON 415-55 (2008); von Bogdandy, *supra* note 8; Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MODERN L. REV. 183-216 (2008).

¹¹ Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241-274 (2008); Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT’L L. 59-72 (2009).

¹² Benvenisti, *supra* note 11, at 249.

¹³ *Id.*, at 272-73; Eyal Benvenisti & George W. Downs, *Court Cooperation, Executive Accountability and Global Governance*, 41 NYU J. INT’L L. & POL. (forthcoming 2009).

¹⁴ Jennifer L. Hochschild, *How Ideas Affect Actions*, in THE OXFORD HANDBOOK OF CONTEXTUAL POLITICAL ANALYSIS 284, 290 (Robert E. Goodin & Charles Tilly eds., 2006).

fect of international decisions depends on the perceived legitimacy of the international authority. Constitutional courts apply three different concepts of legitimacy when dealing with the implementation of decisions of international authorities in the domestic legal system.

In the following, we will first sketch the theoretical framework, highlighting that there are different standards for evaluating legitimacy (A.). In order to exemplify the theoretical model, we will analyze three different lines of constitutional jurisprudence, each applying a different strategy for judging legitimacy. We will compare the jurisprudences of the U.S. Supreme Court, the European Court of Justice and the German *Bundesverfassungsgericht* (B.). This analysis will show that the traditional accounts do not offer suitable explanations for these developments in constitutional jurisprudence. Therefore, a legitimacy-based categorization will be proposed, which should be more accurate in its explanations (C.)

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

The question of legitimacy is none that greatly concerns legal scholars in the domestic context. In democratic societies, we find an institutional setting that guarantees – through parliamentary legislation and judicial control – that the exercise of public authority is, in general, legitimate. Legality can thus be considered as a presumption for legitimacy.¹⁵ This presumption has a rationalizing function: Courts are relieved of the need to control every sovereign act on its legitimacy. Because the system is assumed to be legitimate as a whole, they can concentrate on the formal control of legality.¹⁶ However, such a presumption cannot be made at the international level, where legal standards regarding legitimacy and the rule of law are not yet sufficiently developed.¹⁷ Jurisprudence and legal scholarship thus cannot confine themselves to a formal control of the legality of international public authority.¹⁸ They rather have to take considerations of legitimacy into account.

However, legitimacy is a contested concept that is subject to many prominent debates in legal and political science scholarship. There are basically three strategies to cope with the challenge of legitimizing public authority in the international arena.¹⁹ The first strategy – we will call it the sovereignty paradigm – is to deny the legitimacy of international institutions at all.²⁰ According

¹⁵ UTZ SCHLIESKY, *SOVERÄNITÄT UND LEGITIMITÄT VON HERRSCHAFTSGEWALT* 167 (2004).

¹⁶ Matthias Goldmann, *Der Widerspenstigen Zähmung, oder: Netzwerke dogmatisch gedacht*, in NETZWERKE 225, 234 (Sigrid Boysen et al. eds., 2007).

¹⁷ See Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in *The Migration of Constitutional Ideas* 256, 261-62 (Sujit Choudhry ed., 2007) (emphasizing that the presumption in favor of compliance with international law can be rebutted if international law violates jurisdictional, procedural or outcome-related principles).

¹⁸ Bogdandy, Dann & Goldmann, *supra* note 6, at 1389.

¹⁹ This classification is inspired by the account of Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUR. J. INT'L L. 885, 895-904 (2004).

²⁰ See, e.g., Prosper Weil, *Vers une normativité relative en droit international?*, 86 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5-47 (1982); Josef Isensee, *Abschied der Demokratie vom Demos - Ausländerwahlrecht als Identitätsfrage für Volk, Demokratie und Verfassung*, in STAAT, KIRCHE, WISSENSCHAFT IN EINER

to this position, legitimacy is inextricably linked to democracy, and democracy can only be exercised within the nation state because it presupposes the existence of a *demos*. State sovereignty is thus an important building block of the international legal order. Every development transgressing an international order of mere coordination would consequently be illegitimate.

The opposite strategy is the internationalist paradigm. The internationalists do not focus on the nation state. Rather, they examine the legitimacy of the international decision-making procedures on the basis of their proper architecture. The exercise of authority is not legitimate or illegitimate merely because of having been exercised by an international institution. However, the relevant standards of legitimacy are still subject to a controversial debate. There seems to be consensus today that the establishment of a global democracy will remain a pipe dream for the foreseeable future. Thus, an important scholarly strand focuses on strengthening the rule of law rather than democracy. Commonly discussed factors enhancing legitimacy are accountability, transparency, procedural participation and judicial review.²¹

Somewhere in between these two positions, we find the cooperation paradigm.²² According to this position, the nation states remain the central building blocks of the international legal order. But the emergence of authority beyond the nation state is not excluded *per se*. The evaluation of these developments does not depend so much on the concrete design of the relevant supranational decision-making procedures. The crucial aspect is rather that the exercise of authority can be traced back to the national citizenry by formal chains of attribution. Legitimacy can thus be derived from an effective parliamentary control of the acts that delegate sovereign authority or by the participation of legitimate representatives of the state in the international decision-making procedures.

B. The Solution Concepts

In this section, we will try to evaluate three lines of constitutional jurisprudence according to our theoretical classification. While the U.S. Supreme Court insists on the positive implementation of international decisions by the national legislature (1.), the European Court of Justice exercises a mere procedural control of the resolutions issued by the Security Council (2.). The position of

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- PLURALISTISCHEN GESELLSCHAFT. FESTSCHRIFT FÜR PAUL MIKAT ZUM 65. GEBURTSTAG 705-40 (Dieter Schwab, Dieter Giesen & Joseph Listl eds., 1989); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319-369 (1997); Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237-256 (2000); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57-69 (2004).
- ²¹ See Kingsbury, Krisch & Stewart, *supra* note 5, at 37-42; Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SC. REV. 29-43 (2005); Erika de Wet, *Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review*, 9 GERMAN L. J. 1987-2011 (2008).
- ²² See Christian Walter, *Constitutionalizing (Inter)national Governance*, 44 GERMAN Y.B. INT'L L. 170-201 (2001); Rüdiger Wolfrum, *Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations*, in LEGITIMACY IN INTERNATIONAL LAW 1-24 (Rüdiger Wolfrum & Volker Röben eds., 2008); Stefan Kadelbach, *Demokratische Legitimation als Prinzip zwischenstaatlichen Handelns*, in LEGITIMATION ETHISCHER ENTSCHEIDUNGEN IM RECHT - INTERDISZIPLINÄRE UNTERSUCHEN 147-172 (Silja Vöneky, Cornelia Hagedorn, Miriam Clados & Jelena von Achenbach eds., 2009).

the German *Bundesverfassungsgericht* is in between these two perspectives. Although still performing a substantive examination of the exercise of international public authority, the Constitutional Court does not necessarily require such decisions to be implemented by the German legislature (3.).

1. The State Sovereignty Paradigm – The U.S. Supreme Court and its judgments in *Medellín* and *Sanchez-Llamas*

In two recent decisions, the Supreme Court had to decide on the effect of judgments of the International Court of Justice in U.S. domestic law. While, in *Sanchez-Llamas v. Oregon*, the Supreme Court had to deal with the authoritative effect of ICJ judgments when interpreting international legal norms,²³ the decision in *Medellín v. Texas*²⁴ was even more far-reaching. For the first time, the Court had to decide on the direct effect of an ICJ judgment to which the United States had been party and which was therefore legally binding for the U.S. In principle, the American Constitution establishes a monist concept with respect to international treaty norms in the domestic legal order. According to Art. VI para. 2,

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

However, the principle of direct effect has been narrowed early by the U.S. Supreme Court. In *Foster & Elam v. Neilson*, the Court made a distinction between self-executing treaties having a direct effect in domestic law and non-self-executing treaties that are addressed to the political, not the judicial, institutions.²⁵ The latter type has to be transformed into domestic law before they can be applied by the courts.

Subject of the both decisions was a violation of Art. 36 of the Vienna Convention on Consular Relations.²⁶ According to Art. 36 (1) lit. b of the Convention, arrested foreign nationals have to be informed that they have the right to notify the consular representation of their country of their arrest. In the course of this decade the United States had been convicted twice because of violations of this provision by the ICJ.²⁷ In *Sanchez-Llamas*, one of the applicants relied on the interpretation of Art. 36 (1) of the Vienna Convention in the two ICJ judgments in order to make a claim regarding U.S. domestic law. In *Medellín*, the applicant was one of the individuals for whom Mexico had exercised diplomatic protection in the *Avena* case so that the ICJ judgment was directly legally binding for the U.S.

²³ *Sanchez-Llamas v. Oregon*, 548 US 331 (2006).

²⁴ *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

²⁵ *Foster & Elam v. Neilson*, 27 US 253, 314 (1829).

²⁶ Vienna Convention on Consular Relations (Apr. 24, 1963), 596 UNTS 262.

²⁷ *LaGrand (Germany v. U.S.)*, 2001 ICJ Rep 466 (June 27); *Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 ICJ Rep 12 (March 31).

a. *The decision in Sanchez-Llamas*

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

Applying to the U.S. Supreme Court, Bustillo argued that the application of this procedural default rule by the Virginia courts violated Art. 36 VCCR. In an earlier judgment, *Breard v. Greene*, the U.S. Supreme Court had already decided that a violation of Art. 36 VCCR did not bar the application of the procedural default rule.²⁸ If the claim had not been raised in the state court proceedings, Art. 36 VCCR did not require states to modify their criminal procedure law.²⁹ Bustillo argued that *Breard* was not applicable to his case because there had been two judgments of the International Court of Justice in the meantime,³⁰ according to which the cure of a violation of the Vienna Convention must not be rendered impossible by procedural default rules.

The U.S. Supreme Court, however, rejected this argumentation. The interpretation of American domestic law is a task of American courts. Determining the domestic effect of an international treaty, is a matter of domestic law.³¹ Thus, the judgments of the ICJ have no directly binding force. They deserve, at best, "respectful consideration".³² However, the ICJ judgments do not take into account the importance of procedural default rules in an adversary system. While, in inquisitorial systems, mistakes are attributed to the judges, they fall into the responsibility of the parties in adversary systems. If Art. 36 VCCR was interpreted in a way that the application of the procedural default rule was excluded, this interpretation

"reads the 'full effect' proviso in a way that leaves little room for Article 36's clear instruction that Art. 36 rights 'shall be exercised in conformity with the laws and regulations of the receiving state.'"³³

Therefore, the interpretation of the ICJ could not be taken into account in the case of Mario Bustillo.

²⁸ *Breard v. Greene*, 523 US 371 (1998) (*per curiam*).

²⁹ *Id.*, at 375.

³⁰ The judgments in the cases *LaGrand* and *Avena*, *supra* note 27.

³¹ *Sanchez-Llamas*, *supra* note 23, at 353-54.

³² *Id.*, at 355.

³³ *Id.*, at 357.

b. The Medellín decision

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

“[to] provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention.”³⁴

As Medellín was among the beneficiaries of Mexico’s application, the judgment was binding for his proceedings in terms of international law. After the rendition of the judgment, President George W. Bush issued an executive order in which he asked the American courts to give effect to the ICJ decision:

“I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.”³⁵

Despite the ICJ judgment and the memorandum of George Bush, the Fifth Circuit rejected the habeas application of Medellín.³⁶ In his proceedings before the Supreme Court, the applicant hence claimed that the Fifth Circuit had violated the Supremacy Clause of the American Constitution. In its decision the Court had therefore to decide whether judgments of the International Court of Justice have direct domestic effect. The central international norm in this respect is Art. 94 (1) of the U.N. Charter³⁷ according to which

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

On the face, the Supreme Court based his decision on the text of the U.N. Charter. The terms “undertakes to comply” emphasizes, in the opinion of the Court, that a state only enters into an obligation to react on a judgment by political means.³⁸ This interpretation is supposed to be supported by the context of the norm. Art. 94 (2) of the U.N. Charter provides a political and no le-

³⁴ *Id.*, at para 153.

³⁵ Memorandum of President George W. Bush, 28 Feb. 2006, App. to Pet. for Cert. 187a.

³⁶ *Medellín v. Dretke*, 371 F.3d 270 (2004).

³⁷ Charter of the United Nations of July 26, 1945, T.S. 993.

³⁸ *Medellín*, *supra* note 3, 128 S. Ct. 1346, 1358.

gal remedy: If states do not comply with an ICJ judgment, they have to refer to the U.N. Security Council.³⁹

In substance however, the judgment is motivated by considerations stemming from constitutional theory, or, more precisely, the doctrine of the division of powers. As the field of external relations is very sensitive, decisions on the implementation of international law should be left to the political, not the judicial, organs.⁴⁰ The Court underlines that “it is not for the federal courts to impose one [particular remedy] on the States through *lawmaking of their own*.”⁴¹ This judicial self-restraint can be interpreted in a twofold way. One might be inclined to read the reasoning of the court from an *ex ante* perspective according to which it is the function of the courts to abide by the law. The courts have to implement the intent of the political bodies, and this approach can best be implemented by a close adherence to the text of the norm created by the political institutions.

However, such an approach has several flaws. Linguistic expressions do not have only one single meaning. Their interpretation always depends on the interpreter and his cultural and social imprint.⁴² This is highlighted by Justice Breyer’s dissenting opinion in *Medellín* that consults dictionary definitions and refers to the Spanish version of the U.N. Charter in order to show that the terms “undertakes to comply” employed by Art. 94 can also express an immediate legal obligation.⁴³ Furthermore, it is particularly unrealistic in the realm of international treaties to expect the text to say anything about the domestic effect of the treaty.⁴⁴ The implementation of international norms differs from state to state. The differentiation between self-executing and non-self-executing is only significant from the view-point of the domestic legal order, but not from the angle of international law, as the latter demands unconditional compliance anyway.⁴⁵

Medellín has thus to be read as a proposition of an *ex post* control model. According to this model, decisions of international institutions with domestic effect are subject to political control. The Supreme Court emphasizes that it is not the task of the judiciary to exercise such control.⁴⁶ Furthermore, the Court holds that the president did not have the power to order an implementation of the judgment by means of an executive memorandum.⁴⁷ The implementation of the decision of an international tribunal thus requires a positive act of the U.S. Congress or state legisla-

³⁹ *Id.*, at 1359.

⁴⁰ *Id.*, at 1364.

⁴¹ *Id.*, at 1361 (emphasis added).

⁴² See HANS-GEORG GADAMER, WAHRHEIT UND METHODE. GRUNDZÜGE EINER PHILOSOPHISCHEN HERMENEUTIK 270-312 (6th ed. 1990).

⁴³ *Medellín*, *supra* note 3, 128 S. Ct. 1346, 1384 (Breyer J. dissenting).

⁴⁴ *Id.*, at 1363-64.

⁴⁵ Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 634 (2008); Karen Kaiser, *Treaties, Direct Applicability*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2008), at para. 6.

⁴⁶ *Medellín*, *supra* note 3, 128 S. Ct. 1346, 1364 (“it is hardly that the judiciary should decide which judgments are politically sensitive and which are not”).

⁴⁷ *Id.*, at 1368-72. But see Carlos Manuel Vázquez, *Less Than Zero?* 102 AM. J. INT’L L. 563-572 (2008) (thoughtfully criticizing the reasoning of the Supreme Court).

ture who have full political control over how to implement the decision in question.⁴⁸ The U.S. Supreme Court therefore implicitly adheres to the state sovereignty paradigm as an international decision only has effect within the domestic legal order if it has been positively embraced by the legislature.

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

The opposite approach is represented by the jurisprudence of the European Court of Justice. Even without having a formal constitutional document, the legal order of the European Union has developed into a constitutional order, showcasing all relevant characteristics of such a system.⁴⁹ It is thus not surprising that the ECJ had to decide on the status of international law and, in particular, the status of decisions of international institutions in the community legal order. In the following, we will focus on three different strands on the ECJ jurisprudence. First, there is a considerable amount of judgments dealing with the importance of decisions of the European Court of Human Rights for the interpretation of human rights within the EU legal system (a.). Second, the ECJ has, over a series of decisions, developed a standpoint on the direct effect of decisions of the WTO dispute settlement system within the EU order (b.). Finally, the recent *Kadi* decision⁵⁰ of the ECJ had to answer the question, whether it is possible to review acts transforming resolutions of the UN Security Council with regard to principles forming part of the European constitutional order (c.).

a. Interpretation of Human Rights and the Strasbourg Jurisprudence

The relationship of the ECJ to human rights has not always been an easy one. In first years of the European integration, the ECJ did not refer to human rights at all. There seemed to be no need in this respect, as the founding treaties of the European Communities did not contain an explicit human rights catalogue. However, the Court quickly realized that it had to take into account the individual rights dimension of the cases brought before it, if it wanted to ensure the acceptance of its jurisprudence by the courts of the Member States.⁵¹ It thus started to develop a human rights jurisprudence, which has been acknowledged by Art. 6 (2) of the EU Treaty⁵², which re-

⁴⁸ The consistency of this reasoning has been criticized by some scholars as it limits the *ex ante* autonomy to enter into treaties in the name of the *ex post* autonomy to be independent of treaties. See Steve Charnovitz, *Revitalizing the U.S. Compliance Power*, 102 AM. J. INT'L L. 551, 557 (2008) (“The Court seems to have overlooked the compelling U.S. interest of assuring uniformity in U.S. foreign policy”).

⁴⁹ Case 294/83, *Les Verts v. European Parliament* [1986] ECR 1357, at para. 23, and Opinion 1/91, *EEA* [1991] ECR I-6099, at para. 21. For a detailed discussion of this issue see Niels Petersen, *Europäische Verfassung und europäische Legitimität – ein Beitrag zum kontraktualistischen Argument in der Verfassungstheorie*, 64 HEIDELBERG J. INT'L L. 429-66 (2004).

⁵⁰ See *supra* note 4.

⁵¹ Cf. Case BvL 52/71, *Solange I* [1974] 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 271 (Federal Constitutional Court, May 29, 1974); *Frontini v. Ministero delle Finanze* [1974] 14.2 COM. MKT. L. REP. 372 (Corte costituzionale. Dec. 27, 1973).

⁵² Treaty on European Union, consolidated version: OJ C 321E (29 Dec. 2006) [hereinafter: TEU].

quires the EU institutions to respect fundamental rights as guaranteed by the ECHR and as they result from the common traditions of the Member States. However, as the European Union still does not have a legally binding human rights catalogue, the ECJ always had to ‘import’ human rights from other legal systems. In practice, the ECJ principally refers to the provisions of the European Convention on Human Rights⁵³ as expressions of the common traditions of the EU Member States.

The institution mandated with the coherent interpretation of the Convention is the European Court of Human Rights, though, not the ECJ. Therefore, there has been much debate on whether the ECJ has to take the jurisprudence of the ECtHR into account when applying the rights of the Convention in the context of the EU.⁵⁴ Although the European Union is not formally bound by the Convention, there would be potential for serious conflict if the ECJ interpreted its guarantees in a different way than the ECtHR.

The ECJ has never expressly clarified its relationship to the ECtHR and whether it feels bound by the latter’s jurisprudence.⁵⁵ However, it has implicitly recognized the Strasbourg jurisprudence as authoritative. When interpreting provisions of the ECHR, the Luxembourg Court frequently refers to and cites judgments of the ECtHR.⁵⁶ In *Schmidberger*, e.g., the ECJ cites the ECtHR for the statement that the freedom of expression and the freedom of assembly are no absolute guarantees under the ECHR, but that they may be subject to restrictions.⁵⁷ In *RTL Television*, the Court referred to the margin of appreciation doctrine of the ECtHR in order to justify a restriction of Art. 10 ECHR.⁵⁸

There are no examples in which the ECJ openly opposed a decision from Strasbourg. Even if Luxembourg did not follow Strasbourg, it was rather because it had probably overlooked that there is Strasbourg case law in this respect than because of disagreement.⁵⁹ The ECJ has even changed its own jurisprudence in several occasions if the ECtHR took a different position on

⁵³ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (Nov. 4, 1950).

⁵⁴ See, e.g., Marco Bronckers, *The Relationship of the EC Courts with other International Tribunals: Non-Committal, Respectful or Submissive?* 44 COM. MKT. L. REV. 601-27 (2007); Guy Harpaz, *The European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy*, 46 COM. MKT. L. REV. 105, 115-41 (2009).

⁵⁵ *Id.*, at 109-10.

⁵⁶ Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg, and the Growing European Rights Acquis*, 43 COM. MKT. L. REV. 629, 644-52 (2006); Philip Alston & Joseph H.H. Weiler, *An ‘Ever Closer Union’ in Need of a Human Rights Policy*, 9 EUR. J. INT’L L. 658, 686 (1998); Matthias Ruffert, *Die künftige Rolle des EuGH im europäischen Grundrechtsschutzsystem*, 31 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 466, 471 (2004). For an, albeit not comprehensive, overview of cases, in which the ECJ has cited the ECtHR see Douglas-Scott, *id.*, at 644-45 (footnote 68).

⁵⁷ Case C-112/00, *Schmidberger v. Austria* [2003] ECR I-5659, at para. 79.

⁵⁸ Case C-245/01, *RTL Television GmbH* [2003] ECR I-12489, at para. 73.

⁵⁹ See Dean Spielmann, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities*, in THE EU AND HUMAN RIGHTS 757, 770 (Philip Alston ed., 1999) (referring to two cases, in which the ECJ did not respect the precedents of the ECtHR, but “took for granted that there is no case-law of the European Court of Human Rights on the subject”).

issues that had already been decided by the ECJ.⁶⁰ In *Hoechst*, e.g., the ECJ found that there was no case law of the ECtHR on the inviolability of business premises and held that the right to privacy established by Art. 8 ECHR did not apply to businesses.⁶¹ When the ECtHR extended the protection of Art. 8 ECHR to businesses in a later judgment,⁶² the ECJ changed its jurisprudence in *Roquette Frères* and acknowledged that business premises could also be protected under Art. 8 ECHR.⁶³

This strategy of the ECJ vis-à-vis the jurisprudence of the ECtHR can best be described by the internationalist paradigm. The ECJ does not expressly accept the supremacy of the ECtHR. As there are currently no major substantive differences in interpreting human rights, though, the ECJ avoids any conflict with Strasbourg by accepting the latter's interpretation of provisions of the ECHR. Nevertheless, it formally reserves itself the right to deviate if circumstances should change and major disagreements arise. This is, however, not a very likely prospect at the moment.

b. WTO Dispute Settlement and the Lacking Constitutional Order

The direct effect of World Trade law in the EU legal order has been subject to much debate in legal scholarship. Many authors have seen parallels to the integration process within the European Communities and thus claimed that the ECJ should give direct effect to World Trade law as it requires the EU member states to give direct effect to legal norms of the EU order.⁶⁴ The ECJ has, however, been reluctant in this respect. Even before the establishment of the WTO, it held that provisions of the General Agreement on Tariffs and Trade⁶⁵ do not have direct effect in the community legal order.⁶⁶ It affirmed this line of jurisprudence also for the context of the WTO,⁶⁷ and extended this rationale to decisions of the WTO dispute settlement system.

In *Biret International*,⁶⁸ the ECJ had to decide whether a French company could claim compensation for damages from the Community for violating the SPS Agreement⁶⁹. In 1988 and 1996, the Council adopted directives 88/146/EEC⁷⁰ and 96/22/EC⁷¹ prohibiting the importation of meat

⁶⁰ Douglas-Scott, *supra* note 56, at 649; Robin C.A. White, *The Strasbourg Perspective and its Effect on the Court of Justice: Is Mutual Respect Enough?*, in CONTINUITY AND CHANGE IN EU LAW. ESSAYS IN HONOUR OF SIR FRANCIS JACOBS 139, 142 (Anthony Arnall, Piet Eeckhout & Takis Tridimas eds., 2008).

⁶¹ Joined Cases 46/87 and 227/88, *Hoechst AG v. Commission* [1989] ECR 2859.

⁶² *Niemitz v. Germany* Series A No. 251-B [1992] 16 EHRR 97.

⁶³ Case C-94/00, *Roquette Frères SA v. Commission* [2002] ECR I-9011, at para. 29.

⁶⁴ See Ernst-Ulrich Petersmann, *Application of GATT by the Court of Justice of the European Communities*, 20 COM. MKT. L. REV. 397-437 (1983); Stefan Griller, *Judicial Enforceability of WTO Law in the European Union*, 3 J. Int'l Econ. L. 441, 450-54 (2000). See also Piet Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 COM. MKT. L. REV. 11, 53 (1997) (emphasizing that WTO obligations should have a direct effect in the community legal order of the violation of WTO law is established by the DSB).

⁶⁵ General Agreement on Tariffs and Trade, 55 U.N.T.S. 194 (Oct. 30, 1947).

⁶⁶ Case 21-24/73, *International Fruit Company* [1972] ECR 1219.

⁶⁷ Case C-149/96, *Portugal v. Council* [1999] ECR I-8395.

⁶⁸ Case C-94/02 P, *Biret International v. Commission* [2003] ECR I-10497.

⁶⁹ WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493 (Apr. 15, 1994).

⁷⁰ O.J. 1988 L 70, p. 16.

of animals treated with certain hormones. In January 1998, the Appellate body of the WTO found that these directives were in breach of the SPS Agreement.⁷² The plaintiff, Biret International, thus claimed that the European Community was liable under the EC treaty because it had violated WTO law. However, the ECJ left open, whether the Appellate body decision has a direct effect in the Community legal order. As the Community had a certain time frame in which to implement the Appellate body decision, the ECJ held that a claim for damages could not arise before the expiration of this period.⁷³ However, damages for the time after the expiration of the implementation period had not been asserted by the plaintiff.⁷⁴

In the *Van Parys* judgment, the ECJ went one step further and held that decisions of the WTO dispute settlement system did not have a direct effect in the EU legal order.⁷⁵ The case refers to the banana import system established by the EC, which differentiates between bananas imported from ACP States and those imported from non-ACP third states. In 1997, the WTO Appellate Body found that this system was incompatible with certain provisions of the GATT.⁷⁶ In 1998 and 1999, the plaintiff applied for import licences for bananas from Ecuador. The Belgian authorities, due to respective EC regulations, only granted a certain quota of the applied quantities. Van Parys took legal actions against these decisions, and claimed that they should not be based on the EC regulations, as the latter were incompatible with WTO law.

In its decision, the ECJ refers to its established jurisprudence that World Trade law has no direct effect in the EU legal order, and that DSB decisions could therefore not have such an effect either.⁷⁷ The Court principally puts forward two arguments: first, it underlines that the WTO dispute settlement system is not a fully developed judicial system, but that it accords considerable importance to negotiation between the parties – even after a DSB decision has been issued.⁷⁸ If DSB decisions had direct effect, this would deprive the political organs of the EU of their room for negotiation afforded by the procedural provisions of the DSB.⁷⁹ Second, the WTO system is built upon the principle of reciprocity. There are some member states of the WTO which deny World Trade law direct effect within their domestic legal order so that it would again deprive the political organs of the EU of considerable room for maneuver.⁸⁰

In *IKEA*, the plaintiff relied on a decision of the WTO Appellate Body⁸¹ in order to claim that regulation 2398/97⁸² was invalid because it violated the Anti-Dumping Agreement⁸³ of the

⁷¹ O.J. 1996 L 125, p. 3.

⁷² Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

⁷³ *Biret*, *supra* note 68, para. 65.

⁷⁴ *Id.*, para. 67.

⁷⁵ Case C-377/02, *Van Parys* [2005] ECR I-1465.

⁷⁶ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

⁷⁷ *Van Parys*, *supra* note 75, para. 41.

⁷⁸ *Id.*, para. 42.

⁷⁹ *Id.*, para. 48.

⁸⁰ *Id.*, para. 53.

⁸¹ Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (March 1, 2001).

⁸² Council Regulation (EC) 2398/97 (28 Nov. 1997).

WTO.⁸⁴ IKEA thus requested the competent British customs authority to reimburse the anti-dumping duties that it had paid under the contested regulation. The ECJ, however, rejected the request. It argued that WTO dispute settlement decisions had only prospective and no retroactive effect. Furthermore, the Community had made it clear by the regulations subsequent to regulation 2398/97 that it intended to exclude repayments. Because of a political will to the contrary, the ECJ could thus not grant repayments to IKEA despite the illegality of regulation 2398/97 under World Trade law.

Considered in isolation, the ECJ jurisprudence vis-à-vis the effect of WTO in the community legal order resembles in certain respects the discussed judgments of the U.S. Supreme Court. The ECJ equally relies on the will of the political institutions and thus denies any direct effect of decisions of the WTO dispute settlement system. However, there are decisive differences. While the U.S. Supreme Court is reluctant to the direct effect of decisions of international institutions in general, the ECJ always stresses the particularity of the WTO dispute settlement.⁸⁵ These concern especially the political nature of the World Trade system and the resulting importance of the principle of reciprocity.

These remarks can be seen as doubts with regard to the legitimacy of the WTO dispute settlement system. Contrary to the European Union itself, the WTO has not yet developed into a constitutional order. Although there are some voices observing the constitutionalization of the WTO,⁸⁶ at least one important element is missing in this respect. The WTO still focuses on one singular issue, the enhancement of global trade. Other policy concerns are only considered incoherently – just as far as they are included in one of the exceptions clauses of the specific trade agreements.⁸⁷ There is no political process to counterweigh negative integration through economic freedom.⁸⁸ Furthermore, as judges of the dispute settlement system are, in general, experts in trade issues, there may be a bias towards trade in the jurisprudence. These aspects lead to an implicit hierarchization, which gives trade issues priority vis-à-vis other policy concerns.⁸⁹ Given these shortcomings of the World Trade dispute settlement system, there is reason to deem the denial of direct effect of DSB decisions to be justified under a legitimacy perspective.

⁸³ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping), 1868 U.N.T.S. 201 (Apr. 15, 1994).

⁸⁴ Case C-351/04, *IKEA Wholesale Ltd.* [2007] ECR I-7723.

⁸⁵ See Robert Uerpmann-Witzack, *The Constitutional Role of Multilateral Treaty Systems*, in: EUROPEAN CONSTITUTIONAL LAW, *supra* note 9, at 145, 158 (emphasizing that the ECJ uses procedural arguments for rejecting direct applicability of WTO law).

⁸⁶ See DEBORAH CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM (2005) (with further references).

⁸⁷ Robert Howse & Kalypso Nicolaïdis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*, in EFFICIENCY, EQUITY, AND LEGITIMACY. THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227, 245 (Roger B. Porter *et al.* eds., 2001); von Bogdandy, *supra* note 8, at 410.

⁸⁸ Armin von Bogdandy, *Legal Equality, Legal Certainty and Subsidiarity in Transnational Economic Law – Decentralized Application of Art. 81.3 EC and WTO Law: Why and Why Not*, in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION. STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUDIUS DIETER EHLERMANN 13, 29 (Armin von Bogdandy, Petros C. Mavroidis & Yves Mény eds., 2002).

⁸⁹ See NIELS PETERSEN, DEMOKRATIE ALS TELEOLOGISCHES PRINZIP – ZUR LEGITIMITÄT VON STAATSGEWALT IM VÖLKERRECHT 189 (2009).

c. *The U.N. Security Council and the Kadi decision*

In a very recent decision, *Kadi v. Council and Commission*, the ECJ had to decide about the effect of resolutions of the UN Security Council in the EU legal order. The constellation in *Kadi* is slightly different than the ones discussed before. While the ECJ usually has to decide whether decisions of an international authority have an immediate effect in domestic law without any further implementation by the legislature, the ECJ already faced a positive act of the European legislature. The European Union had issued a Council regulation in order to implement a resolution of the U.N. Security Council within the European Union. However, in order to decide whether EU law that is predetermined by international obligations can be subject to judicial review, the ECJ still had to determine the effect of international law within the Community legal order. Namely, it had to judge whether the Security Council decision was superior to EU primary law.

The starting point of the case was a resolution of the U.N. Security Council directed against terrorism and specifically against Al-Qaida. After the attack on the U.S. embassies in Nairobi and Dar es Salaam in 1998, the Security Council issued Resolution 1267 requesting all states to freeze all funds and other financial resources directly belonging or otherwise related to the Taliban.⁹⁰ The resolution also established a Sanctions Committee in order to manage these sanctions. One year later, Resolution 1333 authorized the Sanctions Committee to maintain an updated list of individuals and organizations designated as associated with the Taliban.⁹¹ In order to implement these resolutions into EU law, the Council issued Regulation 881/2002, which ordered the freezing of the funds of all persons contained on the list of the U.N. Sanctions Committee.⁹² The listed individuals did not have an opportunity for an independent review of their status.

The applicants, who were contained in the mentioned list, brought an action of annulment of the EC regulation to the European Court of First Instance (CFI). They argued, in particular, that the regulation violated their fundamental rights. The CFI, however, dismissed the actions.⁹³ It held that United Nations law had supremacy over EU law and that Security Council resolutions could thus not be reviewed under European constitutional law. The only legal standard for the control of Security Council resolutions was international *ius cogens*. The Court found, though, that the fundamental rights whose violation was claimed did not form part of *ius cogens*.

In the appeal procedure, the ECJ rejects this argumentation. It holds that even those legislative acts of the European Union that are predetermined by international law have to be subject to review under the constitutional principles of the EU. The Court establishes that the values en-

⁹⁰ U.N. Doc. S/RES/1267 (Oct. 15, 1999).

⁹¹ U.N. Doc. S/RES/1333 (Dec. 19, 2000).

⁹² Council Regulation (EC) 881/2002 (May 27, 2002).

⁹³ Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, 2005 ECR II-3649 and Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, 2005 ECR II-3533. For a thoughtful comment on these decisions see Christina Eckes, *Judicial Review of European Anti-Terrorism Measures - The Yusuf and Kadi Judgments of the Court of First Instance*, 14 EUR. L.J. 74-92 (2008).

shrined in Art. 6 (1) TEU⁹⁴ – liberty, democracy and the respect for human rights and fundamental freedoms – are the foundation of the European Union, from which no derogation is possible.⁹⁵ United Nations law can thus only have primacy over secondary Community law, but that primacy cannot extend to the constitutional provisions, in particular the fundamental rights guaranteed by the Union.⁹⁶

The ECJ continues to examine whether the listing procedure of the U.N. Sanctions Committee had violated fundamental rights, in particular the right to defense, the right to an effective judicial review and the right to property. The rights to defense and judicial review contain, in particular, a right to be informed about the reasons for the imposition of the measure in question.⁹⁷ As the applicants had not been informed about the reasons for their inclusion in the list of the U.N. Sanctions Committee, these guarantees were violated.⁹⁸ With regard to the right to property, the Court holds that the freezing of funds and other economic resources could not be regarded as inappropriate *per se* in order to fight against persons connected to terrorism.⁹⁹ However, the confiscation of property has to include certain procedural guarantees. As the contested regulation did not furnish any guarantee enabling the applicants to put their case to the competent authorities, the ECJ considered the right to property to be violated.¹⁰⁰

In the *Kadi* decision, the ECJ adopts an internationalist perspective.¹⁰¹ Although it performs a material control of certain fundamental rights, it does not challenge the substantive considerations of the U.N. Security Council to establish a sanctioning system in order to counter terrorist activities. The EC regulation was annulled solely on procedural grounds. The ECJ finds that the rule of law is not considerably respected by the U.N. Sanctions Committee and deems the decisions of the latter thus illegitimate.¹⁰² However, the Court does not exclude to reduce the extent of its own judicial review if an appropriate review mechanism were installed in the international realm.¹⁰³ In the proceedings, the Commission had argued that the ECJ must not exercise judicial review as long as the individuals concerned have an acceptable opportunity of independent review forming part of the United Nations system. The Court does not reject this argument in prin-

⁹⁴ *Supra* note 52.

⁹⁵ *Kadi*, *supra* note 4, para. 303.

⁹⁶ *Id.*, paras. 307-8.

⁹⁷ *Id.*, para. 336.

⁹⁸ *Id.*, para. 353.

⁹⁹ *Id.*, para. 363.

¹⁰⁰ *Id.*, paras. 368-69.

¹⁰¹ This evaluation runs counter to some commentaries that lauded the decision of the Court of First Instance for its respect of international law and would thus be critical of the ECJ judgment. See, e.g., Andreas von Arnould, *UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz*, 44 ARCHIV DES VÖLKERRECHTS 201-216 (2006); Christian Tomuschat, *Case Comment*, 43 COM. MKT. L. REV. 537-551 (2006). However, this difference is due to the different standards of evaluation, as this contribution does not focus on legality, but rather on legitimacy.

¹⁰² See also Kumm, *supra* note 17, at 289, who claims that the resolutions should not be implemented in the EU legal order because they violate the principle of procedural accuracy.

¹⁰³ Accord Mehrdad Payandeh & Heiko Sauer, *European Union: UN sanctions and EU fundamental rights*, 7 I.CON 306, 314 (2009). But cf. Gráinne de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet Working Paper 01/09, pp. 33-37 (claiming that the ECJ adopts a dualist approach in order to isolate the EU order from the international legal order).

ciple, but only on factual grounds, as the present re-examination procedure does not offer the guarantees of judicial protection.¹⁰⁴

d. Evaluation

The case law of the ECJ on the effect of decisions of international authority within the EU legal system is not entirely homogenous. While the Court basically accepts the jurisprudence of the ECtHR when interpreting the guarantees of the European Convention of Human Rights, it does not concede direct effect to decisions of the WTO dispute settlement body as well as to resolutions of the UN Security Council. Contrary to the jurisprudence of the U.S. Supreme Court, this is, however, not a rejection of a direct effect of international ‘secondary’ law *per se*. The Court attributes the reason for not granting direct effect to the character of the specific régime. In *Kadi*, the Court is clearly driven by legitimacy concerns when it makes the resolution of the Security Council subject to judicial review under EU primary law. The WTO decisions are, in principle, motivated by political considerations. However, they can also be read in a legitimacy-related way. The ECJ does not consider the WTO to be an integrated constitutional order, but rather as a system facilitating intergovernmental negotiations. Decisions of the DSB thus lack the legitimacy to deserve an unconditional reception by the community legal order. In general, the Court thus adopts an internationalist perspective. It neither accepts unconditional direct effect of international decisions, nor does it reject direct effect *per se*. The effect of decisions of an international authority rather depends on the concrete design of the respective institution.

3. The Cooperation Paradigm – The Jurisprudence of the German *Bundesverfassungsgericht*

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

¹⁰⁴ *Id.*, paras. 319-22.

a. *The Jurisprudence in the context of the European Union*

The relationship between the European Court of Justice and the German Federal Constitutional Court has never been free of tension. While the ECJ has always claimed that all community law should have direct effect in national legal orders,¹⁰⁵ the Federal Constitutional Court has never accepted the unconditional supremacy of EU law. However, after reserving itself the right to full constitutional review of acts of community organs in the beginning,¹⁰⁶ the German Court has developed an equal protection doctrine, according to which it only guards the legitimacy of the system as a whole, but does not control for the constitutionality of each individual act.

This conditional supremacy of community law has two dimensions. In principle, the *Bundesverfassungsgericht* accepts that political decisions of the EU institutions, in particular EU secondary legislation, are superior to domestic law. In its *Maastricht* decision, the Court pointed out that delegating ultimate decision-making authority to the European Union did not infringe upon the democracy principle contained in the German constitution.¹⁰⁷ In its reasoning the Court followed the cooperation paradigm. It did not examine whether the institutional design of the European Union was legitimate *per se*. It rather derived the legitimacy via a formal chain of legitimation retraceable to the German ‘people’.¹⁰⁸ The EU was considered legitimate because the German citizens could indirectly influence the EU decision-making process through two channels. On the one hand, they were able to elect a significant number of the members of the European Parliament, and, on the other hand, they could elect the German Government, which takes part in the decision-making process in the Council.¹⁰⁹

This jurisprudence has been confirmed in the recent *Lisbon* judgment of the Constitutional Court.¹¹⁰ In this decision, the Court had to decide whether ratifying the Treaty of Lisbon¹¹¹ amending the founding treaties of the European Union and the European Community was constitutional with regard to the German *Grundgesetz*. It held that it was basically possible to transfer sovereign power to the EU even if the supranational institutions have the competency to shape politics within certain limits,¹¹² and to accept the albeit conditional¹¹³ supremacy of community law.¹¹⁴ However, the Court demanded to increase the legitimacy of EU law-making by strength-

¹⁰⁵ Case 26/62, *Van Gend & Loos* [1963] ECR 1.

¹⁰⁶ *Solange I*, *supra* note 51.

¹⁰⁷ Cases 2 BvR 2134/92 and 2159/92, *Maastricht Treaty*, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 155 (Federal Constitutional Court, Oct. 12, 1994).

¹⁰⁸ *Id.*, 183-86.

¹⁰⁹ For a critique of this reasoning, which focuses on the retraceability of decisions to the German citizenry and not on the soundness of the decision-making process as such, see Brun-Otto Bryde, *Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie*, 5 STAATSWISSENSCHAFTEN & STAATSPRAXIS 305-30 (1994); Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219-58 (1995).

¹¹⁰ Case 2 BvE 2/08, *Lisbon Treaty*, n.y.r. (Federal Constitutional Court, June 30, 2009). English translation at <http://www.bundesverfassungsgericht.de>.

¹¹¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, O.J. 2007/C 306/01 (Dec. 13, 2007).

¹¹² *Lisbon Treaty*, *supra* note 110, at para. 237.

¹¹³ Cf. *id.*, at para. 240 (stating that the limits of supremacy were *ultra-vires*-acts of EU institutions and such acts that infringe upon the unalterable core guarantees of the German constitution).

¹¹⁴ *Id.*, at para. 331.

ening the position of the German parliament in the decision-making process. In certain areas, which are supposed to belong to the core competencies of German statehood, the German representative in the Council, the principal legislative organ of the EU, is only allowed to act if he is backed by a formal authorization of the German parliament.¹¹⁵

The second dimension concerns the constitutional review of community legislation. The ECJ argues that European primary law is the exclusive standard of review for community acts.¹¹⁶ The Federal Constitutional Court has generally accepted this stipulation, as long as the ECJ guarantees by its jurisprudence that the effectiveness of the human rights protection under the EU treaty is comparable to that under the German constitution.¹¹⁷ The Court has confirmed this position in later judgments, where it held that two applications for constitutional review were inadmissible because the applicant had failed to show that the human rights protection by the ECJ lacked effectiveness.¹¹⁸

Contrary to the Maastricht decision, the Federal Constitutional Court does not try to derive the legitimacy of the ECJ decisions from domestic concepts and institutions, but concentrates on the supranational institution itself. In this context, the jurisprudence of the Court is thus close to the internationalist paradigm. Instead of focusing on procedural aspects, though, the Court adopts a substantive standard of legitimacy. The decisive yardstick is the effectiveness of the human rights protection by the ECJ. The formal supremacy of the ECJ seems to be acceptable to the German Court because there is a considerable amount of material convergence in the human rights understanding of both courts so that fundamental conflicts are unlikely.¹¹⁹

While these judgments all refer to community law, in the European arrest warrant case, the Constitutional Court had to decide on the effect of framework decisions issued under the third pillar on Police and Judicial Cooperation in Criminal Matters.¹²⁰ In this case, the German parliament had issued a European Arrest Warrant Act, implementing a framework decision of the European Union establishing the European Arrest Warrant¹²¹. The Constitutional Court held that the German statute violated two fundamental rights of the German Constitution – the right of German citizens not to be extradited and the right to judicial review.

However, at first glance, the Court did not challenge the supremacy of EU law. It only critiqued that the German legislature did not utilize the range of implementation attributed by the Euro-

¹¹⁵ *Id.*, at paras. 319, 365-66, 369, 388, 400, 413.

¹¹⁶ Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹¹⁷ Case 2 BvR 197/83, *Solange II* [1986] 73 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 339 (Federal Constitutional Court, Oct. 22, 1986).

¹¹⁸ Cases 2 BvR 1210/98, *Alcan* [2000] NEUE JURISTISCHE WOCHENSCHRIFT 2015 (Federal Constitutional Court, Feb. 17, 2000) and 2 BvL 1/97, *EC Regulation on Bananas* [2000] 102 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 147 (Federal Constitutional Court, June 7, 2000). English translation at <http://www.bundesverfassungsgericht.de>.

¹¹⁹ See Rosenfeld, *supra* note 10, at 424.

¹²⁰ Case 2 BvR 2236/04, *European Arrest Warrant* [2005] 113 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 273 (Federal Constitutional Court, July 18, 2005). English translation at <http://www.bundesverfassungsgericht.de>.

¹²¹ Council Framework Decision 2002/584/JHA (June 13, 2002).

pean decision.¹²² If it had done so, there would have been no violation of fundamental rights.¹²³ This reasoning implicitly respects the primacy of the framework decision because otherwise it would not have been necessary for the court to examine whether there is a range of implementation. It could have fully reviewed the German statute without considering the range of determination by the European decision.

However, upon close reading, we find an unharmonious undertone in an *obiter dictum* of the decision. The Constitutional Court detects a democracy deficit in the third pillar because the European Parliament is not actively involved in the legislative process of the Police and Judicial Cooperation in Criminal Matters.¹²⁴ The Court resolves this deficit by attributing a right to politically redesign the framework decision in the implementation process to the national parliaments.¹²⁵ According to the Court, they are allowed fully to deny implementation, although such a right to denial cannot be found in the text of the treaty.

This position could be aligned with an internationalist reading, as the Court seems to be concerned with the legitimacy of the EU legislative process. However, the *Bundesverfassungsgericht* does not engage in a thorough examination of the latter – it only makes a brief statement. What really seems to be important to the Court is that the national parliament keeps its ability for political structuring in the absence of a significant German influence in the supranational decision-making process.

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

b. The position vis-à-vis international courts outside the European Union

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

In general, the status of international treaties and the effect of decisions of international tribunals thereon are not explicitly stated in the German basic law. The Constitutional law doctrine in Germany opines that international treaties have no direct effect, but need to be transformed into do-

¹²² *European Arrest Warrant*, *supra* note 120, paras. 80, 94 & 96.

¹²³ See Nicolas Nohlen, *Germany: The European Arrest Warrant Case*, 6 I.CON 153, 158 (2008).

¹²⁴ *European Arrest Warrant*, *supra* note 120, paras. 81.

¹²⁵ *Id.*

mestic law.¹²⁶ However, it is assumed that this transformation is performed by the act that empowers the executive to ratify the treaty.¹²⁷ If a treaty thus requires parliamentary ratification, then the approval of the treaty by the German parliament is considered to be the statute that transforms the treaty into German domestic law. The treaty then has the same status in domestic law as the transformatory act, hence usually that of a normal statute. It does thus not automatically trump contradicting statutes or even constitutional provisions. Rather, any conflict has to be solved according to the general rules on norm conflicts, like *lex specialis* or *lex posterior*. However, the German constitutional court has developed a principle that every statute has to be interpreted in accordance with international law as long as there is room for interpretation (*Völkerrechtsfreundliche Auslegung*).¹²⁸

In the *Görgülü* decision, the Federal Constitutional Court held that decisions of the ECtHR were binding on domestic courts, but that this binding effect was not unconditional.¹²⁹ The applicant in this case was a father, whose son was living with foster parents and who had been denied to see his child on a regular basis by the competent Regional Court of Appeal. Upon complaint, the ECtHR decided that the decision of the German court was contrary to the provisions of the ECHR.¹³⁰ However, the Regional Court of Appeal upheld its decision and argued that the judgment of the ECtHR had no direct effect in the domestic legal order and was thus not binding for the individual courts.¹³¹

In the constitutional complaint procedure, the Federal Constitutional Court held that domestic courts were not bound to apply judgments of the ECtHR unconditionally. It argued that domestic courts had to deal with multipolar fundamental rights situation and that they were obliged to find a sensitive balance between the competing rights and interests. As not all parties to the domestic proceedings were also represented before the ECtHR, the judgment of the latter could not be transplanted into the German legal order without potential modifications.¹³²

However, this does not mean that judgments of the ECtHR are not binding for the German courts. Rather, they have to take judgments, which establish a violation of the ECHR by Germany, into due consideration.¹³³ If they want to deviate, they have to justify understandably why they do not follow the precedent of the ECtHR. In the case at hand, the Constitutional Court

¹²⁶ CHRISTOPH ENGEL, VÖLKERRECHTS ALS TATBESTANDSMERKMAL DEUTSCHER NORMEN 25 (1989); Ondolf Rojahn, *Art. 59*, in GRUNDGESETZ-KOMMENTAR (Ingo von Münch & Philip Kunig eds., 5th ed. 2001), para. 37.

¹²⁷ Ingolf Pernice, *Art. 59*, in GRUNDGESETZ (Horst Dreier ed., 2nd ed. 2006), paras. 46-47.

¹²⁸ Case 2 BvR 589/79 *Unschuldsvermutung* [1987] 74 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 358, 370 (Federal Constitutional Court, 26 March 1987).

¹²⁹ Case 2 BvR 1481/04, *Görgülü* [2004] 111 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 307 (Federal Constitutional Court, 14 Oct. 2004). An English translation is available at <http://www.bverfg.de>.

¹³⁰ Case 74969/01, *Görgülü v. Germany* [2004] 31 EUROPÄISCHE GRUNDRICHTE ZEITSCHRIFT 700 (ECtHR, 26 Feb 2004).

¹³¹ Case 14 WF 64/04 [2004] FAMRZ 510 (Regional Court of Appeal Naumburg, June 30, 2004).

¹³² *Görgülü*, *supra* note 129, para. 50.

¹³³ *Id.*

found that the Regional Court of Appeal had not taken the argumentation of the ECtHR into account and thus violated the rule of law principle of the German Constitution.¹³⁴

In the second decision¹³⁵, the effect of the interpretation of treaty provisions by the ICJ was at stake. The occasion of the procedure was a decision of the German Federal Court of Justice (*Bundesgerichtshof*),¹³⁶ in which the Court had interpreted Art. 36 of the Vienna Convention of Consular Relations in a different way than the ICJ in its *LaGrand* decision¹³⁷. The applicant in the case before the German constitutional court was a Turkish national who had been arrested without having been informed of his right to notify the Turkish consular representation about his arrest stemming from Art. 36 (1) lit. b of the Vienna Convention on Consular Relations.¹³⁸ He was later convicted because of the allegations that he had made to the police officer that interviewed him after his arrest. He asked for a review of his decision, but the Federal Court of Criminal Justice denied relief because the protection of a foreign national was, in his view, sufficiently guaranteed by his right to consult an attorney. Against this judgment the applicant filed an application to the Constitutional Court, which finally overturned the decision.

The Court finds that the decision of the Supreme Court had violated the right to a fair procedure guaranteed by the German constitution. Because of the principle of international law-friendly interpretation, the right to a fair procedure has to be interpreted in light of Art. 36 of the Vienna Convention of Consular Relations.¹³⁹ In order to avoid future determinations by an international tribunal that the Convention has been violated, international treaty norms have to be interpreted in accordance with the jurisprudence of the competent court even if the judgments are not directly binding for the Federal Republic of Germany.¹⁴⁰ As the Supreme Court had not respected the argumentation of the International Court of Justice in the *LaGrand* Case, it had thus violated the right to a fair procedure.¹⁴¹

However, the Constitutional Court again did not establish an unconditional obligation to comply with judgments of international tribunals. Remanding the case to the Federal Court of Criminal Justice, it did not order the latter to apply Art. 36 of the Vienna Convention without exception. Rather, it demanded to balance the guarantee set forth by the Convention against competing principles within the rule of law, such as procedural efficiency.¹⁴² The Constitutional Court thus confirms its *Görgülü* decision by leaving the opportunity to deviate from judgments of international courts, in particular if there are competing constitutional principles.

¹³⁴ *Id.*, para. 67.

¹³⁵ Case 2 BvR 2115/01, [2007] JURISTENZEITUNG 887 (German Constitutional Court, 19 Sept. 2006).

¹³⁶ Case 5 StR 116/01 [2002] NEUE ZEITSCHRIFT FÜR STRAFRECHT 168 (Federal Court of Justice, 7 Nov. 2001).

¹³⁷ See *supra* note 27.

¹³⁸ *Supra* note 26.

¹³⁹ Case 2 BvR 2115/01, *supra* note 135, at 888.

¹⁴⁰ *Id.*, at 889.

¹⁴¹ *Id.*, at 890.

¹⁴² *Id.*

With this reasoning, the German *Bundesverfassungsgericht* follows the cooperation paradigm.¹⁴³ On the one hand, it acknowledges that decisions of international institutions may have a direct effect in the domestic legal order. However, this effect is not unconditional. The Court rather reserves a right to control every individual decision on its compatibility with the German constitutional order.¹⁴⁴ This control is, on the other hand, a substantive, not a procedural one. The German Court thus wants to remain, at least on the face, in full substantive control of the implementation of international decisions into the domestic legal order.

c. *Evaluation*

Although not being entirely homogenous, the jurisprudence of the *Bundesverfassungsgericht* basically follows the cooperation paradigm. This is most obvious with regard to the implementation of judgments of international tribunals, like the ECtHR or the ICJ. Here, the Constitutional Court acknowledges that such decisions may have a direct effect in the domestic order. However, they stand under the proviso of a substantive control by the German Court. In the context of the European Union, the Court meanders at times between the internationalist and the cooperation paradigm. In particular with regard to fundamental rights, it basically accepts the jurisprudence of the ECJ, refraining from further substantive control. However, this internationalist approach is probably due to the special nature of the European Union. Not having accepted the – albeit conditional – supremacy the ECJ jurisprudence would have provoked major conflicts and endangered the whole integration process.¹⁴⁵ Furthermore, judgments like the *Maastricht* decision reveal the rather cooperationist mind-set of the German Court because the reason for accepting the supremacy of EU law is not the legitimacy of the institutional design of the EU as such, but is derived from the indirect participation of the German people in the legislative process.

C. New Perspectives on the Monism-Dualism-Dichotomy

The coordination of different legal systems has become a complex issue that cannot easily be integrated into the old monism-dualism-dichotomy.¹⁴⁶ The international legal order has moved away from being one monolithic system. Rather, we observe the emergence of a certain heteronomy of international tribunals and institutions varying in the extent of their competences and the design of their decision-making procedures. The reception of decisions of these institutions by national legal orders cannot be subject to a one-fits-all approach. Rather, the task of domestic constitutional judges has become more complex. When determining the status of international secondary law, judges cannot solely rely on formal legal norms, but also have to take political considerations, par-

¹⁴³ Cf. also Andreas L. Paulus, *The Emergence of the International Community and the Divide between International and Domestic Law*, in *THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW*, *supra* note 10, at 216, 243-45 (describing the relationship of the German Constitutional Court and the international tribunals, such as the ECtHR and the ICJ, as a cooperational relationship).

¹⁴⁴ Cf. Krisch, *supra* note 10, at 197 (noting that this control strategy is common among European constitutional courts).

¹⁴⁵ FRANK SCHORKOPF, *GRUNDGESETZ UND ÜBERSTAATLICHKEIT* 150 (2007).

¹⁴⁶ Accord Nijman & Nollkaemper, *supra* note 10, at 341; Paulus, *supra* note 143, at 217.

ticularly the legitimacy of the external legal order, into account. Instead of distinguishing monist from dualist legal orders, we should thus rather focus on the strategy a constitutional court chooses in order to cope with this challenge. This contribution has identified three different approaches – a state sovereignty centered, a cooperationist, and an internationalist perspective.

How do we explain the differences in the national jurisprudence? A positivist will be inclined to trace them back to the different texts of the relevant constitutional provisions. But neither the German constitution nor the EC treaty tell us very much about the domestic effect of international treaties. And an unprejudiced glance at Art. VI para. 2 of the American constitution would probably have suggested a much more internationalist position than the one developed by the U.S. Supreme Court in *Medellín*. The explanation has to be a different one. The extent to which the authority to issue decisions with direct domestic effect can be entrusted to international institutions is a matter of trust.¹⁴⁷ The more the international decision-making procedures embrace the rule of law, the more the trust in these procedures will be enhanced. Formal guarantees are not everything, though. The performance of a decision-making procedure equally depends on the mind-set of the actors operating within this procedure.¹⁴⁸

The extent to which a constitutional court places trust in the actors involved in international procedures also depends on the own cultural predetermination.¹⁴⁹ It is thus no surprise that the ECJ, which is a hybrid body somewhere in between a constitutional court and an international tribunal itself, takes the most internationalist stance of the three examined courts. But even the internationalist perspective does not require an unconditional supremacy of international law. This is expressed by the *Kadi* judgment, where the Court dismissed a U.N. sanctions system that does not even come close to resembling a procedure guided by the rule of law. The ECJ followed a prudent strategy addressing signals to two different kinds of actors. With regard to the international system, it did not close the door, but entered into an institutional dialogue by leaving open the opportunity of accepting a revised sanctioning system in the future.¹⁵⁰ Concerning the Constitutional courts of the EU member states, the ECJ took one important step in order to strengthen their trust in its adherence to fundamental rights and the rule of law.¹⁵¹

¹⁴⁷ See JOSEPH H.H. WEILER, *THE CONSTITUTION OF EUROPE* 318 (1999).

¹⁴⁸ It is thus not without reason that the literature on democratization focuses on trust as an important factor in order to enhance democratization processes. See CHARLES TILLY, *TRUST AND RULE* 132-37 (2005).

¹⁴⁹ See Paul W. Kahn, *American Hegemony and International Law*, 1 CHI. J. INT'L L. 1, 17 (2000) (claiming that the American narrative of popular sovereignty makes some American constitutional lawyers suspect to decisions taken outside the national realm). See also Krisch, *supra* note 10, at 212 for the observation that national judges have often internalized the values of their own legal system to such an extent that they consider them to be superior to foreign solutions. But *cf. equally* Benvenisti, *supra* note 11 (pointing out the increasing willingness of national courts for international cooperation).

¹⁵⁰ *Contra* Andrea Gattini, *Case Comment*, 46 COM. MKT. L. REV. 213, 226-27 (2009); de Búrca, *supra* note 103, at 58-59 (both criticizing that the ECJ did not enter into a dialogue with other actors in the international arena). Gattini claims that the Court should have sought the solution by analyzing the legality of the U.N. Security Council resolutions under international law, in particular *ius cogens*. However, *ius cogens* alone may not provide us with sufficient standards in order to examine the *legitimacy* of the actions of the U.N. Security Council. See *supra*, part A.

¹⁵¹ Accord Heiko Sauer, *Rechtsschutz gegen völkerrechtsdeterminiertes Gemeinschaftsrecht?*, 61 NEUE JURISTISCHE WOCHENSCHRIFT 3685, 3687 (2008).