II. The Relationship Between National and Transnational Constitutional Law

Hans Kelsen
Sovereignty and International Law[*]

In reference to [the relationship between international and national law], two theories exist that are diametrically opposed, one dualistic (or pluralistic if one considers the multitude of the states or national legal orders), and the other monistic. According to the first, international law and national law, *i.e.*, the particular national legal orders, are different systems of norms independent of each other in their validity; but according to this theory they are simultaneously valid, so that it would be possible to judge a certain human behavior both from the point of view of international and national law and not from the point of view of only the one *or* the other. The monistic theory holds that international law and national law form a unity. This unity may be achieved epistemologically in two ways: either international law is conceived of as superior to national law, meaning that the validity of the latter derives from the former; or, conversely, national law is conceived of as superior to international law, whose validity is based on national law. We speak in the one case of the *primacy of international law*, in the other of the *primacy of national law*.

If we recognize that obligation and authorization of the state by international law means that the international legal order delegates to the national legal order the power to determine the individuals whose behavior forms the content of the obligations and rights established by international law, then the dualistic construction of the relation between international and national law collapses. For reasons of the logic of norms it is not possible to assume the simultaneous validity of two systems of norms regulating human behavior, if these systems are valid independently from each other and therefore may conflict with each other, the one prescribing that a certain action ought to be performed and the other that this action ought not to be performed. Two norms, one of which prescribes that *A* ought to be, and the other that *A* ought not to be, cannot be assumed as simultaneously valid, just as two judgments, the one of which asserts that *A* is, whereas the other declares that *A* is not, cannot be true together.

The logical principle of contradiction, it is true, does not, or at least not directly, apply to norms, because norms are neither true nor false; but it

[*] Excerpted from 48 GEO. L.J. 627 (1960).

does apply to statements describing norms (which statements necessarily are *ought* statements) in the same way as to *is* statements describing facts. The possibility that there is a scientific description, without contradictions, of the relation between international and national law can be proved; and that means that there are no conflicts between international and national law which would necessitate a dualistic construction, thereby excluding the assumption of their simultaneous validity. It can also be shown that positive international law contains in its principle of efficacy a norm that determines the reason and the sphere of validity of the national legal order [i.e., an international legal norm that determines when a geopolitical entity will be recognized as a state], so that the assumption of an epistemological unity of international and national law is possible.

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Flaminio Costa v E.N.E.L.
European Court of Justice (1964)

Reference to the Court under Article 177[1] of the EEC Treaty by the Giudice Conciliatore, Milan, for a preliminary ruling in the action pending before that court between Flaminio Costa and ENEL (Ente Nazionale Energia Elettrica).

By order dated 16 January 1964, duly sent to the court, the Giudice Conciliatore of Milan, "having regard to Article 177 of the treaty of 25 March 1957 establishing the EEC . . ." stayed the proceedings and ordered that the file be transmitted to the Court of Justice. . . .

[1] Article 177 of the EEC Treaty provides:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of this Treaty;
>
> (b) the validity and interpretation of acts of the institutions of the Community;
>
> (c) the interpretation of the statutes established by an Act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

The complaint is made that the intention behind the question posed was to obtain, by means of Article 177, a ruling on the compatibility of a national law with the treaty.

By the terms of Article 177 . . . national courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of Justice so that a preliminary ruling may be given upon the "interpretation of the treaty" whenever a question of interpretation is raised before them. This provision gives the [European Court of Justice] no jurisdiction either to apply the treaty to a specific case or to decide upon the validity of a provision of domestic law in relation to the treaty, as it would be possible for it to do under Article 169.[2]

Nevertheless, the European Court of Justice has power to extract from a question imperfectly formulated by the National Court those questions which alone pertain to the interpretation of the treaty. Consequently a decision should be given by the European Court of Justice not upon the validity of an Italian law in relation to the treaty, but only upon the interpretation of the above mentioned articles in the context of the points of law stated by the Giudice Conciliatore. . . .

The Italian government submits that the request of the Giudice Conciliatore is "absolutely inadmissible," inasmuch as a national court which is obliged to apply a national law cannot avail itself of Article 177.

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.

By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign

[2] Article 169 of the EEC Treaty provides:

> If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each member state of provisions which derive from the community, and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.

The obligations undertaken under the treaty establishing the community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the treaty grants the states the right to act unilaterally, it does this by clear and precise provisions. Applications by member states for authority to derogate from the treaty are subject to a special authorization procedure which would lose [its] purpose if the member states could renounce their obligations by means of an ordinary law.

The precedence of community law is confirmed by Article 189,[3] whereby a regulation "shall be binding" and "directly applicable in all member states." This provision, which is subject to no reservation, would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over community law.

[3] Article 189 of the EEC Treaty provides:

> In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety upon those to whom it is addressed.
>
> Recommendations and opinions shall have no binding force.

It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.

The transfer by the states from their domestic legal system to the community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the treaty arise.

The questions put by the Giudice Conciliatore regarding Articles 102, 93, 53, and 37 are directed first to enquiring whether these provisions produce direct effects and create individual rights which national courts must protect, and, if so, what their meaning is. . . .

The court ruling upon the plea of inadmissibility based on Article 177 hereby declares:

As a subsequent unilateral measure cannot take precedence over community law, the questions put by the Giudice Conciliatore, Milan, are admissible in so far as they relate in this case to the interpretation of provisions of the EEC Treaty;

And also rules . . . .

3. Article 53[4] constitutes a community rule capable of creating individual rights which national courts must protect. It prohibits any new measure which subjects the establishment of nationals of other member states to more severe rules than those prescribed for nationals of the country of establishment, whatever the legal system governing the undertakings.

[4] Article 53 of the EEC Treaty provides:
Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in this Treaty.

4. Article 37(2)[5] is in all its provisions a rule of community law capable of creating individual rights which national courts must protect.

In so far as the question put to the court is concerned, it prohibits the introduction of any new measure contrary to the principles of Article 37(1), that is, any measure having as its object or effect a new discrimination between nationals of member states regarding the conditions in which goods are procured and marketed, by means of monopolies or bodies which must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between member states, and secondly must play an effective part in such trade. . . .

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Internationale Handelsgesellschaft case
European Court of Justice (1970)

Reference to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht (administrative court) Frankfurt-Am-Main, for a preliminary ruling in the case pending before that Court between Internationale Handelsgesellschaft MBH, and Einfuhr—Und Vorratsstelle Fuer Getreide und Futtermittel, Frankfurt-Am-Main.

[1] By Order of 18 March 1970 received at the Court on 26 March 1970, the Verwaltungsgericht Frankfurt-Am-Main, pursuant to Article 177 of the EEC Treaty, has referred to the Court of Justice two questions on the validity of the system of export licences and of the deposit attaching to them

[5] Article 37(2) of the EEC Treaty provides:

> 1. Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.
>
> The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.
>
> 2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the Articles dealing with the abolition of customs duties and quantitative restrictions between Member States.

—hereinafter referred to as "the system of deposits"—provided for by regulation no. 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals and regulation no. 473/67/EEC of the commission of 21 August 1967 on important and export licences.

[2] It appears from the grounds of the order referring the matter that the Verwaltungsgericht has until now refused to accept the validity of the provisions in question and that for this reason it considers it to be essential to put an end to the existing legal uncertainty. According to the evaluation of the Verwaltungsgericht, the system of deposits is contrary to certain structural principles of national constitutional law which must be protected within the framework of community law, with the result that the primacy of supranational law must yield before the principles of the German Basic Law. More particularly, the system of deposits runs counter to the principles of freedom of action and of disposition, of economic liberty and of proportionality arising in particular from Articles 2(1) and 14 of the [German] Basic Law. The obligation to import or export resulting from the issue of the licences, together with the deposit attaching thereto, constitutes an excessive intervention in the freedom of disposition in trade, as the objective of the regulations could have been attained by methods of intervention having less serious consequences.

The protection of fundamental rights in the community legal system

[3] Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of community law. The validity of such measures can only be judged in the light of community law. In fact, the law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.

[4] However, an examination should be made as to whether or not any analogous guarantee inherent in community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such

rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the community legal system. . . .

[20] [T]he fact that the system of licences involving an undertaking, by those who apply for them, to import or export, guaranteed by a deposit, does not violate any right of a fundamental nature. The machinery of deposits constitutes an appropriate method, for the purposes of Article 40(3) of the treaty, for carrying out the common organization of the agricultural markets and also conforms to the requirements of Article 43.

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Dieter Grimm

The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision[*]

As a matter of political taxonomy, the European Community is still a novelty in want of a convincing label. Thus for the time being we can only describe it by distinguishing it from traditional forms. On the one hand, the Community is not a state because it has too little sovereign power. On the other hand, the Community is not an international organization because it possesses too much sovereign power. The sovereign authority it exercises with direct effect within the Member States distinguishes it from ordinary international organizations. Its inability to determine autonomously the form and substance of its own political existence distinguishes the Community from a state. Both its basis and its authority are in effect determined by the Member States. The Community, therefore, is a hybrid that is without either precedent or imitation. . . .

European Community Law and National Law

European Community law and national law derive from independent sources and exist separately. Both legal orders share the same territory, however, and may occasionally provide different rules for adjudicating the same facts. It is therefore necessary to develop rules to deal with conflict

[*] Excerpted from 3 COLUM. J. EUR. L. 229 (1997).

among the two legal orders, just as in a federal state. The European Treaties do not contain any express rule in this regard. Yet there is consensus that, in principle, Community law—both primary sources (the EC Treaties and general principles of law) and secondary sources (Community legislation)—prevails over national law. This follows quite naturally from the Community's character. Its end is the harmonization of Member State laws in particular areas. The Community would hardly be able to achieve its goal if, in a case of conflict, domestic law were determinative. . . .

The principle of supremacy of Community law clearly applies to non-constitutional national law. It also generally applies to national constitutional law. National constitutions, however, determine to what extent and for what purposes states may transfer sovereign powers to the European Community, and thus govern that decision. If the transfer of sovereign powers has taken place through a process that was constitutional, then the Community's exercise of the powers transferred is valid and legal within the Member State concerned, even if such exercise is contrary to other constitutional provisions. However, the supremacy of Community law is not unrestricted. First, most national constitutions allow only for a transfer of limited powers from their domestic legal systems to the Community legal system. Second, national constitutions generally prohibit the relinquishment of their own identity. In Germany, these restrictions used to flow from Articles 79(3) and 24(1) of the Basic Law. Since 1992, however, Article 23(1) of the Basic Law explicitly defines these limitations with respect to the European Community. Hence, we can identify two exceptions to the principle of supremacy of Community law: the first concerns national fundamental rights, the second Community competencies. However, the former has ceased to be of crucial importance, while the latter, strictly speaking, is no exception at all. . . .

Fundamental Rights

The German Constitutional Court has ruled that the effective protection of fundamental rights is an essential and inalienable feature of the Basic Law. This entails, according to the Court, not only the necessity of Community law being compatible with national (German) fundamental rights provisions; it also led the Court to assert in *Solange I* its own power to check Community rules against the standards of fundamental rights protection contained in the Basic Law. . . .

The ECJ, partly in order to assert the supremacy of Community law over national law in all circumstances, embarked on a course of assembling

fundamental rights at the Community level and made clear that it would itself annul any provision of Community law that was contrary to those human rights. Drawing on both national constitutional expressions of fundamental rights and international human rights instruments (notably the European Convention for the Protection of Human Rights and Fundamental Freedoms) as sources of inspiration, the ECJ has read into the Community legal order an unwritten Bill of Rights against which it measures all Community legislation and its application by Community institutions. Thus, the German Constitutional Court in *Solange II* indicated that an effective and adequate level of fundamental rights protection on the Community level was now generally ensured. Regarding the Community protection of fundamental rights as substantially similar to that under the German Constitution, the Court concluded that scrutiny by national constitutional courts was no longer required and held that as long as that was the case, it would "no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation." [This] development does not mean that the German Constitutional Court has relinquished its competence to scrutinize Community legislation. The Court is merely refraining from exercising its—still existing—jurisdiction. . . .

Competencies

Turning to the competence structure of the Community legal order, the principle is that Community institutions which act *ultra vires* may not only violate the EC Treaties but may also overstep the competence accorded to them by the national provision that makes Community law applicable within a Member State's territory. The reason lies in the dual character of the EC Treaties: on the one hand they constitute the legal foundation of the European Community, while on the other they, in connection with the national acts of ratification, form the basis for the transfer of sovereign powers to the Community. It is only within the boundaries of that transfer that Community law takes precedence over national law.

The question now is who gets to decide where the boundaries are and when they are violated. Within the European Community there is an institution whose special task is to determine whether or not organs of the Community have violated the Treaties—the ECJ. On the Community level, therefore, the question of competence is clear: if the ECJ concludes that a measure meets all Treaty requirements, then the boundary has not been violated. In relation to the German legal order, however, the German Constitutional Court has been reluctant to acknowledge the institutional preeminence of the ECJ. The German Court considers it possible that the

ECJ, in not realizing and therefore approving of Treaty violations committed by Community institutions, may itself violate the EC Treaties. Although the German Court, in an earlier decision, conceded that the ECJ had a role to play not only in applying but also in developing the law, in the *Maastricht Decision* it underscored the boundary between development and amendment of Community law. The ECJ, it stated, did not have the power to interpret the EC Treaties in a way that is equivalent to treaty amendment. The amendment of the Treaties is reserved to a unanimous decision of the Member States. If such an amendment emanates from the action of a Community institution it is not binding on Germany. Herein lies the German Constitutional Court's competence to scrutinize the applicability of Community law, a competence that extends even to the actions of the ECJ.

The *Maastricht Decision* offers no hint at a development of the competence problematic parallel to that of fundamental rights protection. The Court does not allude to the possibility of refraining from exercising its jurisdiction, as it did in *Solange II* with regard to fundamental rights. On the contrary, the German Constitutional Court for the first time expressly asserted this jurisdiction, although it has never exercised it. Notably, neither in its decision in the *Banana* litigation, nor in the *Television Without Frontiers* Case, has the German Court reviewed measures by Community institutions as to their compatibility with the EC Treaties. It is an open question, then, whether or not the ECJ will take the issue of competencies seriously—as the German Constitutional Court demands in the *Maastricht Decision*—and whether the German Court, as it did in the field of fundamental rights, will let its jurisdiction rest.

As long as the German Constitutional Court does not alter its position, conflicts between it and the ECJ are possible. It is true, both courts check Community measures against different standards. The ECJ determines whether Community legislation violates the boundaries set up by the EC Treaties—i.e., questions of EC law. The German Constitutional Court determines whether Community legislation is compatible with the scope of application of the Treaties in Germany as prescribed in the German Act of Accession—which is a question of national law. However, in both instances it is Community legislation that is under review and the EC Treaties provide the answer (only, in the first case, as the basic norms of the Community, and in the latter case, as the act of transferral of German sovereign power to the Community under the Act of Accession). That is why there might be different answers by the German Court and the European Court to apparently identical questions; and if there are, the

German Constitutional Court, within Germany, reserves for itself the final say. . . .

There is, however, no smooth solution readily available. Therefore, I will concentrate on ways and means of taking the sting out of the conflict before it erupts. Although the German Constitutional Court does not mention the term "cooperative relationship" with regard to competencies (in contrast to its fundamental rights jurisprudence), the possibility of building such a relationship clearly exists. The procedural tool is the system of preliminary rulings according to Article 177 of the EC Treaty. If confronted with the question of whether it should declare an act of Community legislation inapplicable within Germany because of a violation of the EC Treaties, the German Constitutional Court could refer the problem of compatibility with the Treaty to the ECJ and request a preliminary ruling. The German Court has never made use of the Article 177 procedure—but in 1974 it recognized that, in principle, Article 177 is applicable to the German Constitutional Court as well; the Court later added that if it requested a preliminary ruling, the interpretation given to Community law by the ECJ would be binding for the German courts in that case.

A referral to the ECJ would have two effects. First, the European Court of Justice would be warned that the German Court is seriously concerned about what it regards as a violation of the EC Treaties, and that a conflict between the two courts might be about to break out. Second, the referral would produce information for the German Constitutional Court. If Community institutions trespass on Member State competencies, all Member States should be concerned, not only one. This is why under the Article 177 preliminary reference procedure all Member States are given the opportunity to state their respective positions. In case the ECJ reaches the conclusion that there has been no violation of the EC Treaties, and if then the German Constitutional Court exercises its jurisdiction, it does so with the background knowledge of all other Member States' positions. This, in turn, heightens the possibility of mutually agreed decisionmaking. The danger of severe conflict is thus minimized, although it is not entirely removed. The eruption of such conflict would make any legal solution unavailable; only a political solution would be viable. . . .

What Remains Unresolved

It is disquieting for lawyers to be confronted with the possibility of a jurisdictional conflict that cannot be resolved within the existing legal order. While they are used to encountering contradictions in a given legal order,

they also habitually resolve them by means of interpretation. This, however, works only if the contradicting provisions derive from the same source of law. . . .

[T]he remaining and unresolved contradictions between national law and Community law are . . . a sign of . . . divided sovereignty that is not reconciled under the umbrella of federalism. . . . Since converting the Union into a European federal state is not an immediately desirable goal—if desirable at all[1]—the residual competence of the German Constitutional Court and of constitutional courts in other Member States makes sense. It is a contribution to preserving the supranational character of the Community and refusing to let it be sacrificed in the name of a European State, one not founded on political consensual will, but on decisionmaking by the administration and the judiciary.

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The Treaty proposing a "Constitution" for Europe contained a provision providing for the supremacy of European law. Although the Treaty was never ratified, it did receive anticipatory review for constitutionality in France and in Spain.

Olivier Dutheillet de Lamothe
The Primacy of Community Law over National Constitutions: The Case of France and Spain

1. The principle of primacy of Community law over national law results from the European Court of Justice case-law. . . .

National Courts, and in particular French courts, recognize fully [the] primacy of European law over legislation and regulations. They do not hesitate to set aside statutes and regulations which they deem to be contrary to European law. But the Courts do not recognize this primacy of European law over the Constitution itself: the French Conseil d'Etat and Cour de Cassation have ruled that, in the domestic legal order, the Constitution must prevail according to article 55 of the French Constitution (C.E., Ass, October 30, 1998, Sarran; Cass. Ass., June 2, 2000, Fraisse). This article states that international law prevails over statutes but not over the Constitution: "Treaties or agreements duly ratified or approved shall, upon

[1] Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L.J. 282 (1995).

publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party."

The principle of primacy of European law was written down in a Treaty for the first time in the [proposed] Treaty establishing a Constitution for Europe.

Article I-6 of the [proposed] Treaty stated: "The Constitution and law adopted by the institutions of the Union, in exercising competences conferred on it, shall have primacy over the law of the Member States."

So the [proposed Treaty raised the question]: [Would] this article settle a primacy of European law not only over statutes but over the Constitution itself?

In the case of France, [would] this article [be] contrary to article 55 of the Constitution?

To this basic, fundamental question, the French Constitutional Council and the Spanish Constitutional Tribunal have given a similar answer.

2.1. The French Constitutional Council based its Decision on the [proposed] Treaty establishing a Constitution for Europe:

- not on article 55 of the French Constitution which regards international law in general;

- but on article 88-1 which concerns specifically the European Union.

This article was introduced to allow the ratification of the Treaty of Maastricht. It now provides for a specific constitutional basis for the European Community. It states: "The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen, under the treaties that established them, to exercise some of their powers in common." The Council ruled that "the drafters of this provision thus formally acknowledged the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order."

So, the Council now fully recognises the specificity of Community law within international law.

The French Conseil d'Etat recently joined this position, and also ruled that the primacy of Community law is based on article 88-1 of the Constitution and not on article 55 (C.E., Ass, January 26, 2007, Arcelor).

2.2. To decide whether article I-6 of the [proposed] Treaty establishing a Constitution for Europe was contrary or not to the French Constitution, the Council developed a reasoning in 3 points:

- 1st point: The [proposed] treaty establishing the European Constitution is not a Constitution but a Treaty.

- 2nd point: If it is a Treaty, we have to look for, to interpret it, the common intention of the parties. What scope did they intend to give to article I-6?

2 elements were to be taken into account:

- Article I-6 comes immediately after article I-5 which states: "The Union shall respect the national identities of Member States, inherent in their fundamental structures, political and constitutional."

- The inter-governmental Conference made a Declaration on Article I-6 according to which: "The Conference notes that Article I-6 reflects existing case-law of the Court of Justice of the European Communities and of the Court of First Instance."

- So the conclusion was that: "the whole provisions of the Treaty, particularly the close proximity of Articles I-5 and I-6 thereof, show that it in no way modifies the nature of the European Union, nor the scope of the principle of the primacy of Union law as duly acknowledged by Article 88-1 of the Constitution, and confirmed by the Constitutional Council in its decisions referred to hereinabove." Hence Article I-6 does not entail any revision of the Constitution and the French Constitution keeps its place "at the summit of the domestic legal order."

2.3. By referring to its previous decisions, the Council wanted to reserve the hypothetical where a Community Act would run counter to a rule or principle inherent to the constitutional identity of France.

The Constitutional Council has expressly ruled that "the transposition of a directive cannot run counter to a rule or principle inherent to the constitutional identity of France," that is for example the principle of secularism in the French meaning of the word.

3. Confronted with the same question—the compatibility between article I-6 of the [proposed] Treaty establishing a Constitution for Europe and the Spanish Constitution—the Spanish Constitutional Tribunal gave the same answer in its Declaration of 13 December 2004.

3.1. As the French Constitutional Council based its decision on article 88-1 of the French Constitution, the Spanish Constitutional Tribunal based its decision on article 93 of the Spanish Constitution which provides for a specific basis for the European Community. This provision reads: "By means of an organic law, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution." The Court acknowledged that the integration of Community law in the Spanish legal order entails inevitable limits to sovereign state powers, which are "only acceptable to the extent that European law is compatible with the fundamental principles of the social and democratic State, subject to the rule of law, established by the national Constitution." The Court then admitted that these substantial limits are not explicitly mentioned in the Constitution but must be implicitly derived from the Constitution and the essential meaning of article 93 of the Spanish Constitution itself. These limits imply respect for State sovereignty, for Spain's basic constitutional structures and for the system of fundamental values and principles recognised by the Spanish Constitution, especially its fundamental rights. As long as these limits are observed, which is the case, Article 93 allows the adherence to a treaty that assigns to other legal orders the exercise of powers derived from the Constitution.

3.2. As regards the issue of primacy of European law over the Spanish Constitution and the conformity of article I-6 with the Spanish Constitution, the Spanish Tribunal followed the same reasoning [as] the French Constitutional Council.

First, the Court scrutinised the meaning of Article I-6 within the context of the European Constitution. The Court observed that Article I-6

intends to reflect no more than the existing case-law of the Court of Justice of the European Communities and that the primacy of Union law is limited to the area where the European institutions exercise the powers assigned to them. That primacy is not imposed as a superior hierarchy but as an "existential requirement" of Union law in order to achieve direct effect in practice and uniform application in all member states.

According to the Court, Articles I-2 and I-5(1) of the [proposed] Treaty guarantee sufficiently that Spain's basic constitutional structures and the fundamental rights recognised in the Spanish Constitution will be observed. Interesting is the Court's observation in this context that Article II-113 of the [proposed] Treaty expressly establishes that nothing in the Charter shall be interpreted "as restricting or adversely affecting human rights and fundamental freedoms as recognised . . . by the Member States' constitutions." These provisions, amongst others, guarantee the existence of the states and their basic structures, as well as their values, principles and fundamental rights.

In sum, the [proposed] Treaty [would] not substantially change the existing situation. Rather, it should be noted that the competences the exercise of which has been transferred to the European Union could not, without breaching the [proposed] Treaty itself, serve as a basis for the production of European law whose contents are contrary to the values, principles or fundamental rights of the Spanish Constitution.

Following from that interpretation of the [proposed] Treaty establishing the European Union, the Court found, that there is no contradiction between the proclaimed primacy of European law over Spanish national law in Article I-6 of the [proposed] Treaty and the Spanish Constitution's proclamation of supremacy.

4. This position, which preserves the constitutional identity of the Member States, is, in fact, common to all European constitutional courts.

The German Constitutional Court had paved the way. According to its case-law, which has developed gradually, [the German Court] has ruled that as long as (*solange*) the European Court of Justice exercises review of the respect of fundamental rights at the community level, [the German Court] does not have to [review] whether a community law violates the fundamental rights guaranteed by the German Constitution. The renunciation [of] review remains conditional (29 May 1974, Solange I).

The Italian Constitutional Court, which thoroughly recognizes the primacy of Community Law, has reserved the right to safeguard "*the supreme principles of the Italian legal order*" (Sentenza N° 232, 13 April 1989, Fragd).

Therefore, the process of community integration has built up, to quote the beautiful words of Mrs. Delmas-Marty, an "*ordered pluralism*": pluralism of the national legal orders integrated into one single community legal order. The national values proper to each Member State mark the limits of this integration. It is this basic reality that article I-5 of the [proposed] Treaty, establishing a Constitution for Europe, recognizes: "*The Union shall respect the national identities of its Member States, inherent in their fundamental structures, political and constitutional*."

The absence of these guarantees justified the reservations the constitutional courts of Germany, Italy and France made with regard to the primacy of European law as such guarantees had not been laid down in the previous and present European treaties. In other words, the limits those other courts' reservations referred to [would be] unequivocally proclaimed in the [proposed] Treaty itself, which [would] accommodate its provisions to the exigencies of the Member States' constitutions.

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Miguel Poiares Maduro

Sovereignty in Europe: The European Court of Justice and the Creation of a European Political Community[*]

The traditional rhetoric about the emergence of the European legal order describes the creation of the European Constitution as a product of the European Court of Justice. The stress is on an autonomous legal order with supremacy and direct effect as an expression of European legal sovereignty vis-à-vis national legal orders. The European Court of Justice itself emphasized this top-down vision of EU law and its relation to national legal orders. In great part, this emphasis followed the need for the Court to establish its authority and that of EU law in accordance with traditional views of law. Law has always been conceived as hierarchically organized. There was always some sort of basis—a "*Grundnorm*," "a set of rules of

[*] Excerpted from COURTS CROSSING BORDERS: BLURRING THE LINES OF SOVEREIGNTY 50-52, 55-58 (Mary L. Volcansek & John F. Stack, Jr. eds., 2005).

recognition," or positivized natural law, conceived as the "higher law" of the legal system, serving as the criterion of validity for all other legal norms. The internal conception of the EU legal order was also made to fit this model. EU primary law is understood as the "higher law" of the Union, the criterion for validity of secondary rules and decisions as well as of all national legal rules and decisions within its scope. Moreover, the Court of Justice is the higher court of this legal system and therefore is the ultimate authority on the interpretation of its rules. In a nutshell, while challenging the sovereignty of the states, this conception did not challenge the traditional conception of sovereignty.

The success of creating a European legal order was only possible because the Court looked or and found the cooperation of different national actors. For this, it also had to negotiate with those actors, in particular with national courts, but also with others. This need to negotiate was fundamental both in promoting the developments of the European legal order and in securing its legitimacy. The Court developed doctrines promoting the participation of a variety of national actors. Notably, it promoted the "subjectivation" of the treaties. By "subjectivation" I mean the movement from a state-based interpretation of the treaties into an individual-based interpretation: the treaties are not simply to be interpreted as an agreement among states, but as having been created for the "peoples of Europe." EU rules are directed to individuals and can be invoked by them. EU law becomes a new source of rights to which litigants can appeal. According to Ole Due, former President of the Court, "[I]t is remarkable . . . that those judgments which are often described as landmarks have generally contributed to promoting integration and at the same time to protecting the legal position of individual citizens and undertakings vis-à-vis both the authorities of the Member States and the Community institutions." One could say, as did Burley and Mattli, that "the Court created a pro-community constituency of private individuals by giving them a direct stake in promulgation and implementation of Community Law."

The Court was also quite open to questions posed by national courts and often relied on them to come up with original interpretations of EU rules. On the other hand, the role played by national courts in requesting rulings from the ECJ and in applying these rulings provided ECJ decision in national legal orders with the same authority as national judicial decisions. This created a dynamic that Mary Volcansek has characterized as "a pattern of positive reinforcement for national courts seeking preliminary rulings." This dynamic promoted cooperation and discourse with national courts and helped to establish the autonomy and authority of Community law.

National courts are responsible for the effective incorporation of EU law into national legal orders by accepting the principles of direct effect and supremacy and in promoting the use of EU law in national proceedings. Often lower courts promoted the incorporation of EU law since this new set of rules could be used to bring about decisions that national judges would prefer in terms of substantive justice. Essentially, the supremacy and direct effect of EU rules allowed national courts to set aside national laws whose application they did not favor. In these circumstances, EU law transformed all courts into constitutional courts. The empowerment of national courts through EU law explains much of their willingness to support the application of EU law and also explains why they often brought forward some of the most expansive and creative interpretations of EU law. . . .

We have seen how the rhetoric of European law assumes that between EU law and national law, the final authority belongs to the former. We have also seen how that assumption is related to the need of fitting EU law into the classic conception of the law and sovereignty. But European integration attacks this hierarchical understanding of the law and the monistic conception of sovereignty. In reality, both national and European constitutional law assume, in the internal logic of their respective legal systems, the role of higher law and, when they coincide, challenge the idea of a monistic final authority. According to the internal conception of the EU legal order developed by the European Court of Justice, EU primary law will be the "higher law" of the Union, the [criterion] of the validity of secondary rules and decisions and of all national legal rules and decisions within its scope. Moreover, the Court of Justice is the higher court in this legal system. Yet a different perspective is taken by national legal orders and national constitutions. Here, EU law owes its supremacy to its recognition by a higher national law (normally constitutions). The higher law remains, in the national legal orders, the national constitution, and the ultimate power of legal adjudication belongs to national constitutional courts. As a result, the question of who decides has different answers in the European and the national legal orders, and when viewed from a perspective outside both national and EU legal orders, the question requires a conception of the law which is no longer dependent upon a hierarchical construction and a conception of sovereignty as single and indivisible. Such a conception of sovereignty has been under challenge by notions such as shared sovereignty, but what the relationship between the EU and national legal orders brings is an even more challenging notion—that of competitive sovereignty. The idea is one of equal claims to independent political and legal authority that compete for final authority in a model of constitutional pluralism.

An understanding of EU law and its relationship with national constitutions based on constitutional pluralism was first convincingly argued by Neil MacCormick[1] and more recently by Neil Walker.[2] Generally, national courts may tend to comply with the "European Constitution," but several national high courts still challenge the absolute supremacy of EU law. Such challenges are seen either in the description that national constitutionalism makes for itself or in the dependence of EU law effectiveness upon national law and national courts. To use the remarkable expression offered by Damian Chalmers, national law still holds a veto power over national law. The shadow of such a veto is important even when it is not effectively exercised. The European legal order is characterized by both the "norm" (national courts' compliance with supremacy and direct effect) and, as Schmitt would argue, the power of exception still affirmed, but never exercised, by national constitutional courts. In fact, the possibility of the latter ends up also determining how the normal application and interpretation of EU law takes place.

There are therefore powerful pragmatic and normative reasons not to adopt a hierarchical alternative imposing a monist authority of European law and its judicial institutions over national law, or vice versa. That solution would be difficult to impose in practical terms and could undermine the base of legitimacy on which European law has developed. Though the grammar used by EU lawyers in describing the process of constitutionalization may assume a top-down approach, the reality is that the legitimacy of European constitutionalism has developed in close cooperation with national courts and national legal communities. That, in turn, has had an increasingly bottom-up effect on the nature of the European legal order. At the same time, in spite of their claims to ultimate authority and legal sovereignty, both the EU and national legal orders make more or less explicit concessions toward the claims of authority of the other legal order. They make the necessary adjustments to their respective claims in order to prevent an actual collision. EU law has introduced substantive constitutional changes, such as fundamental rights, in order to accommodate the claims made by national constitutions.[3] National constitutions have

[1] Neil MacCormick, "Beyond the Sovereign State," 56 *Modern Law Review* (1993), 1.

[2] Neil Walker, "The Idea of Constitutional Pluralism," 65 *Modern Law Review* (2002), 317.

[3] *See* Miguel Poiares Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action," in Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, forthcoming).

been interpreted in a manner that tends to prevent the review of specific EU acts.

Another reason to adopt a pluralist conception of the European legal order is related to a broader conception of the legitimacy of the process of European integration, one that finds legitimacy in its role of correcting the constitutional limits of national political communities. This notion traditionally relates constitutionalism with a single political community and, at the same time, tends to concentrate power in a final authority through its hierarchical organization. However, in part, this notion contradicts constitutionalism itself, since it eliminates one of its forms of limited power. European constitutionalism promotes inclusiveness in national constitutionalism both from an external and internal perspective. From an external perspective, it requires national constitutionalism to take into account out-of-state interests that may be affected by the deliberations of national political communities and limits the possible abuses that could derive from the concentration of power on national communities inherent in the traditional conceptions of constitutionalism and sovereignty; from an internal perspective, the challenges brought by European constitutionalism to the sovereignty of national deliberations under national constitutionalism also allow a new form of voice to disenfranchised national groups and often reintroduce true deliberation in areas where the national political process has been captured by a certain composition of interests or certain indisputable definitions of the public good. On the other hand, national constitutionalism serves as a guarantee that the traditional monistic conception of sovereignty is not going to be replicated at the European level. As long as the possible conflicts of authority do not lead to a disintegration of the European legal order, the pluralist character of European constitutionalism in its relationship with national constitutionalism should be viewed as a welcome discovery and not as a problem in need of a solution.

We have seen how the processes of constitutionalization and Europeanization have promoted the emergence of a European political community. Inherent in these processes is a claim to independent political and legal authority associated with a community of open and undetermined social goals. These processes were a product of the cooperation between the European Court of Justice and a particular set of actors. These actors were "used" by the Court to enhance the creation of a European political community, but the actors also "used" the Court to give a particular content to the European constitution and to change national policies and even constitutional settlements. At the same time, the sovereign claim involved

in the emerging European political community and its constitution has never been fully recognized by national constitutions. The question of ultimate authority is an open one in Europe, giving rise to a form of constitutional pluralism in the relationship among these different political communities. The question has important consequences both for Europe and for the concepts of sovereignty and constitutionalism. . . .

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Gerald L. Neuman

Human Rights and Constitutional Rights: Harmony and Dissonance[*]

Austria has had long experience with constitutional enforcement of the European Human Rights Convention, which contains a lengthy (though not comprehensive) list of civil and political rights. The direct applicability and constitutional rank of treaty rights authorize their use in constitutional review of statutes in the Austrian constitutional court. The European Convention rights stand alongside other rights in the Austrian constitution, both older and newer, often with similar content. In their quality as convention rights, they possess an authoritative interpreter in Strasbourg.

After an initial period of resistance, the constitutional court has generally followed the European Court of Human Rights's interpretations of the convention rights. Moreover, the European Court's influence has been credited with modernizing the constitutional court's methodology of interpreting and applying the other constitutional rights.

In one set of cases, however, the Austrian Constitutional Court refused to accept the European Court's dynamic interpretation of a convention right. The provision at issue was article 6(1), the fair trial provision, which governs only the determination of civil rights and obligations and criminal charges. The convention has no general procedural due process clause, and this fact has fueled suprapositive[**] arguments to

[*] Excerpted from 55 STAN. L. REV. 1863 (2003).

[**] Neuman defines the "suprapositive" aspect of a norm in this way:

All constitutional norms and treaty norms claim consensual bases, but fundamental rights norms have another aspect. Positive fundamental rights embodied in a legal system are often conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system (hence the adjective "suprapositive"). The alternative normative systems may include natural law, religious traditions, universal morality, or the fundamental ethical values of a particular culture. The legal rights are sometimes described as positivizations or

expand the scope attributed to the triggering factors "criminal charges" and "civil rights and obligations." The European Court has steadily extended the field of application of article 6(1), while still retaining some areas of public law to which it does not apply. The growth of article 6(1) caused difficulties for Austria, where less formal administrative procedures were predicated on older public law concepts. In 1987 the constitutional court protested against the European Court's liberalizing interpretation, insisting that it created too much conflict between the constitutionalized convention right and other, structural provisions of the Austrian constitution. The constitutional court argued that the European Court was departing too far from the intention of the convention drafters and the Austrian ratifiers, and that following the Strasbourg interpretation would exceed the proper limits of its own interpretive role. Only a new constitutional amendment could impose so broad a vision of article 6(1) on Austrian administrative procedures. The constitutional court also suggested that to confer on the European Court creative power to change the content of Austrian constitutional rights might amount to a "total revision" of the constitution, which could not be accomplished by the ordinary amendment procedure.

Although this particular impasse was resolved by a constitutional amendment reforming administrative procedures, it illustrates a central dilemma produced by constitutional incorporation of a human rights treaty with an authoritative interpreter. If incorporation of the treaty does not incorporate authoritative interpretations, then constitutional review will not guarantee future compliance with international standards, and the constitutional court will be authorized to maintain an idiosyncratic version of what is ostensibly the treaty. The constitution-givers may be deprived of the suprapositive and consensual expectations that underlay the incorporation. If incorporation of the treaty does incorporate authoritative

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concretizations of preexisting suprapositive norms, or legal provisions are explained as merely recognizing preexisting suprapositive rights. The suprapositive force of the norms provides one source of legitimation for the enforcement of the legal norms. Reference to the assumed content of the suprapositive norms may provide one source of guidance in the interpretation of the legal norms. That content may be regarded as inherent in their ordinary meaning, or indicate the goal to be served by teleological or purposive interpretation. . . .

In international human rights law it is claimed that all international human rights derive ultimately from the inherent dignity of the human person, and thus at a minimum serve suprapositive ends indirectly. The suprapositive aspect of international human rights distinguishes that category of international treaty from international treaties generally, many of which involve self-interested stipulation of the terms of technical cooperation or bargaining for commercial advantage. . . . [T]he pervasiveness and prominence of the suprapositive aspect in human rights law affects the international law and politics of the field, and justifies separate analysis of the category.

interpretations, then the meaning of a portion of the national constitution is effectively delegated to an international tribunal. The constitutional court will be bound by discretionary modifications of case law from time to time by the tribunal, possibly adopted without significant attention to the institutional setting and expectations of the particular country. In that case, the constitution-givers' expectations may be frustrated by the tribunal. Moreover, ventriloquistic jurisprudence may not be conducive to social respect for the constitutional court, or its own self-respect . . . .

Far less tension should arise when a constitution incorporates a treaty that lacks an authoritative interpreter, and does not make the international oversight body's views more binding in domestic law than they are in international law. The treaty body's construction of the treaty may be entitled to serious consideration by the constitutional court, but the court would remain empowered to disagree for sufficient reason.

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Von Hannover v. Germany
European Court of Human Rights (2004)

PROCEDURE

[1] The case originated in an application against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of Monaco, Caroline von Hannover ("the applicant"), on 6 June 2000.

[2] The applicant alleged that the German court decisions in her case had infringed her right to respect for her private and family life as guaranteed by Article 8 of the Convention. . . .

I. THE CIRCUMSTANCES OF THE CASE

[3] The applicant, who is the eldest daughter of Prince Rainier III of Monaco, was born in 1957. Her official residence is in Monaco but she lives in the Paris area most of the time.

As a member of Prince Rainier's family, the applicant is the president of certain humanitarian or cultural foundations, such as the

Princess Grace Foundation or the Prince Pierre of Monaco Foundation, and also represents the ruling family at events such as the Red Cross Ball or the opening of the International Circus Festival. She does not, however, perform any function within or on behalf of the State of Monaco or any of its institutions.

A. Background to the case

[4] Since the early 1990s the applicant has been trying—often through the courts—in a number of European countries to prevent the publication of photos about her private life in the tabloid press.

[5] The photos that were the subject of the proceedings described below were published by the Burda publishing company in the German magazines *Bunte* and *Freizeit Revue*, and by the Heinrich Bauer publishing company in the German magazine *Neue Post*. . . .

B. The proceedings in the German courts

(a) Judgment of the Hamburg Regional Court of 4 February 1993

[6] On 13 August 1993 the applicant sought an injunction in the Hamburg Regional Court (*Landgericht*) against any further publication by the Burda publishing company . . . on the ground that they infringed her right to protection of her personality rights (*Persönlichkeitsrecht*), guaranteed by Articles 2 § 1 and 1 § 1 of the Basic Law (*Grundgesetz*), and her right to protection of her private life and to the control of the use of her image, guaranteed by sections 22 *et seq.* of the Copyright (Arts Domain) Act (*Kunsturhebergesetz*—"the Copyright Act" [the "KUG"]).

[7] In a judgment of 4 February 1993, the Regional Court [held that] . . . [u]nder section 23(1) no. 1 of the Copyright Act, the applicant, as a figure of contemporary society "*par excellence*" (*eine "absolute" Person der Zeitgeschichte*), had to tolerate this kind of publication.

The Regional Court held that she had failed to establish a legitimate interest (*berechtigtes Interesse*) justifying an injunction against further publication because, where figures of contemporary society "*par excellence*" were concerned, the right to protection of private life stopped at their front door. All the photos of the applicant had been taken exclusively in public places. . . .

(c) Judgment of the Federal Court of Justice of 19 December 1995

[8] The applicant appealed on points of law against that judgment.

[9] In a judgment of 19 December 1995, the Federal Court of Justice (*Bundesgerichtshof*) allowed the applicant's appeal in part, granting her an injunction against any further publication of the photos . . . showing her . . . in a restaurant courtyard on the ground that the photos interfered with her right to respect for her private life.

The Federal Court held that even figures of contemporary society "*par excellence*" were entitled to respect for their private life and that this was not limited to their home but also covered the publication of photos. Outside their home, however, they could not rely on the protection of their privacy unless they had retired to a secluded place—away from the public eye (*in eine örtliche Abgeschiedenheit*)—where it was objectively clear to everyone that they wanted to be alone and where, confident of being away from prying eyes, they behaved in a given situation in a manner in which they would not behave in a public place. . . .

However, the Federal Court dismissed the remainder of her appeal on the ground that, as a figure of contemporary society "*par excellence*", the applicant had to tolerate the publication of photos in which she appeared in a public place even if they were photos of scenes from her daily life and not photos showing her exercising her official functions. The public had a legitimate interest in knowing where the applicant was staying and how she behaved in public.

(d) Judgment of the Federal Constitutional Court of 15 December 1999

[10] The applicant then appealed to the Federal Constitutional Court (*Bundesverfassungsgericht*), submitting that there had been an infringement of her right to the protection of her personality rights (Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law). . . .

[11] In a landmark judgment of 15 December 1999, delivered after a hearing, the Constitutional Court allowed the applicant's appeal in part on the ground that the publication of the three photos . . . featuring the applicant with her children had infringed her right to the protection of her personality rights guaranteed by Articles 2 § 1 and 1 § 1 of the Basic Law, reinforced by her right to family protection under Article 6 of the Basic

Law. It referred the case to the Federal Court of Justice on that point. However, the Constitutional Court dismissed the applicant's appeal regarding the other photos.

[What follows in italics is an edited version of the relevant passages from the original decision of the German Constitutional Court, 1 BvR 653/96, 15 December 1999:]

> *[30] The constitutional safeguard of the protection of the general right of personality also extends to images of an individual made by third parties. . . .*
>
> *[38] As distinguished from the right to control over one's own image, the protection of privacy, which also flows from the general right of personality, does not refer to images in particular but is determined by the subjects of the images and the places in which they are taken. On the one hand, the protection of privacy comprises matters that, due to the information conveyed, are typically regarded as "private", because their public discussion or display is regarded as unseemly, because they are regarded as embarrassing if they become known, or if they provoke adverse reactions from the environment. This applies e.g. to reflections about oneself in diaries; to confidential communication between husband and wife; to the sphere of sexuality; in the case of socially deviant behaviour and in the case of diseases. If such matters were not protected from others taking note of them, the reflection about oneself, the uninhibited communication among individuals who are close to each other, the development of one's sexuality and the resort to medical aid could be impaired or made impossible even though these types of behaviour are protected by fundamental rights.*
>
> *[39] On the other hand, protection extends to a physical space in which the individual can recover, relax and also let him- or herself go. It is true that such a space also provides the possibility to behave in a way that is not meant for the public and the observation and display of which by outside observers would be embarrassing or detrimental for the individual affected. In essence, this is a space in which it is possible for the individual to be free from public observation, and thus free from the self-control imposed by the public even if the individual affected does not necessarily behave differently in this space than he or she would in public. If such a possibility of retreating no longer existed, this could overstrain the*

individual psychically because he or she would always have to be aware of the effect he or she has on others and would always have to consider whether he or she is behaving correctly. This would deprive the individual of phases in which he or she can be alone and recover; such phases are necessary for the development of one's personality, and without them the development of one's personality would be seriously impaired. Such need for protection also exists in the case of individuals who, on account of their rank or reputation, of their position or influence or of their abilities or actions are the subject of particular public attention. The fact that someone, whether wanted or unwanted, has become a person upon whom the public focuses, does not mean that this person has lost his or her right to a sphere of privacy that is withdrawn from the observation of the public. This also applies to democratically elected office holders. They are certainly accountable to the public for the way in which they administrate their office, and they have to tolerate public attention in this context. They do not, however, have to tolerate the same extent of public attention regarding their private life in so far as their private life does not affect the administration of their office.

[40] By common consent, the domestic sphere constitutes such a protected area. Due to its connection with the free development of one's personality, the area of withdrawal must not, from the outset, be restricted exclusively to the domestic sphere. This holds true if only for the reason that the functions that the area of withdrawal serve[s] do not end at the walls of one's house or at the boundaries of one's property. The free development of an individual's personality would be seriously impaired if the individual could only evade public curiosity in his or her own home. In many cases, it is only possible in the seclusion of a natural environment, e.g. in a holiday resort, for an individual to recover from being a part of the public, which is characterised by compulsions to function in a certain way and by the presence of the media. This is why the individual must also have, in principle, the possibility to move in the open country, although it is secluded, and in places that are recognisably secluded from the broad public in a manner that is free from public observation. This especially applies with regard to technologies of imaging that overcome physical seclusion without the person affected being able to recognise this.

[41] The physical boundaries of privacy outside the home cannot be determined in a general and abstract manner. Rather, they can

be determined only from the particular characteristics of the place visited by the concerned person. The decisive standard is whether the individual finds or creates a situation in which he or she can reasonably, i.e. in a way that is also recognisable for others, assume that he or she is not exposed to the observation of the public.

[42] Whether the prerequisites of seclusion are fulfilled can only be ascertained for each particular situation. In one and the same place, there may be a time in which an individual can, with good reasons, feel unobserved, whereas this is not the case at other points in time. Nor does the fact that an individual stays in a closed room always mean that this place is secluded. The decisive question is whether the individual has good reasons to expect that he or she is unobserved or whether the individual visits places in which he or she moves under the eyes of the public. Therefore, seclusion, which is the prerequisite for the protection of privacy outside the domestic sphere, can be lacking in closed rooms as well.

[43] Places in which the individual is among many people, lack, from the outset, the prerequisites of the protection of privacy within the meaning of Article 2.1 in conjunction with Article 1.1 of the Basic Law. Such places cannot cater to an individual's need of withdrawal, and they therefore do not justify the protection of fundamental rights that this need deserves for reasons of the free development of one's personality. Neither can the individual, by showing a behaviour that would not usually be displayed in public, redefine these places in such a way that they become part of his or her sphere of privacy. It is not the individual's behaviour, whether alone or with others, that constitutes the sphere of privacy but the objective characteristics of the place at the time in question. Thus, if an individual behaves, in places that do not show the characteristics of seclusion, in the manner he or she would behave if he or she were not under observation, this individual eliminates the need for protection of behaviour that is of no concern to the public.

[44] The protection of privacy, over and against the public's observation, is also eliminated if someone declares his or her agreement with the fact that certain matters that are usually regarded as private are made public, e.g. if someone enters into exclusive contracts concerning media coverage of his or her private sphere. The constitutional protection of privacy provided by Article 2.1 in conjunction with Article 1.1 of the Basic Law is not meant to

serve the interest of the commercialisation of the person of an individual. Certainly no one is prohibited from opening his or her private sphere in such a manner. When doing so, however, one cannot claim protection of privacy, because privacy is the status of being removed from the observation of the public. Therefore, someone who expects that others may only to a limited extent or not at all observe matters or behaviour that take place in an area that normally serves for the withdrawal from the observation of the public, must express this expectation in a consistent manner that is not bound to a particular situation. This also applies if someone revokes his or her decision to permit or tolerate reporting about certain issues in his or her private sphere. . . .

II.

[57] In the present case, the interpretation and application of §§ 22 and 23 of the Art Copyright Act does not only have to consider the general right of personality but also the freedom of the press, which is affected by these provisions as well.

[58] The right to freely determine the nature and tendency, contents and form of an organ of the press is in the centre of the guarantee of the fundamental right of the freedom of the press. This includes, inter alia, the decision whether and how to illustrate an organ of the press. The protection is not restricted to specified subjects of illustrations. It also comprises the depiction of persons. The protection does not depend on the nature or the level of the organ of the press. Any distinction of this kind would ultimately amount to public authorities assessing and controlling the press, a fact that would plainly contradict this fundamental right.

[59] The freedom of the press serves to facilitate, for individuals and the public, the free formation of opinions. Such formation of opinions can only be successful under the condition that free reporting, i.e. reporting without any prescribed or precluded subjects or manners of presentation, is possible. In particular, the formation of opinions is not restricted to the political sphere. In the interest of a functioning democracy, the formation of opinions with regard to the political sphere is certainly of special importance. The formation of opinions in the political sphere, however, is embedded in a comprehensive, highly interconnected communication process that can neither under the aspect of the development of one's

personality nor from the point of view of democratic governance, be split up into relevant and irrelevant areas. The press must be allowed to decide according to its own publishing standards what it regards as being worthy of the public interest and what it does not deem to be worthy of such interest.

[60] The fact that the press has to fulfill an opinion-forming mission does not exclude entertainment from the constitutional free press guarantee. The formation of opinions does not stand in opposition to entertainment. Entertaining articles can also contribute to the formation of opinions. Such articles can, under certain circumstances, stimulate or influence the formation of opinions in a more sustainable way than information that is exclusively fact-related. Moreover, in the media, an increasing tendency toward the elimination of the distinction between information and entertainment can be observed both with respect to specific organs of the press as a whole as well as with regard to individual articles, i.e., to disseminate information in an entertaining manner or to mix information and entertainment ("infotainment"). This means that many readers obtain the information that they regard as important or interesting exactly from entertaining articles.

[61] Nor can it be denied from the outset that mere entertainment has an influence on the formation of opinions. It would be a narrow view to assume that entertainment only satisfies wishes for amusement, relaxation, distraction and escape from reality. Entertainment can also convey images of reality and provides topics for conversation that can be followed by processes of discussion and integration that refer to views on life, to standpoints concerning values and patterns of behaviour, and in this respect, it fulfils important functions in society. For this reason, entertainment in the press cannot be neglected or even be regarded as worthless in the context of the freedom of the press, for which constitutional protection is intended; entertainment is, therefore, also covered by the protection that this fundamental right provides.

[62] This also applies to reporting about individuals. Personalising a theme is an important journalistic means for attracting attention. Personalising a theme often awakens the interest in certain problems in the first place and is the basis of the wish for factual information. Sympathy for events and situations is

often conveyed by personalising the theme. Moreover, prominent persons also stand for certain ethical positions and views of life. Therefore, prominent persons provide orientation for their own concepts of life to many people. Prominent persons become focuses for approval or rejection and thus fulfil the function of role-models or of examples of life-styles from which people want to detach themselves. This is the reason for the public interest in the most varied aspects of the lives of prominent persons.

[63] As regards persons from political life, the public's interest has always been recognised as legitimate from the point of view of democratic transparency and control. In principle, however, it cannot be denied that such interest also exists concerning other persons with roles in public life. In this respect, the depiction of individuals that is not restricted to specified functions or events complies with the tasks of the press and therefore also falls under the scope of protection provided by the freedom of the press. Only when a balance is established between the freedom of the press and colliding rights of personality, can it be of importance whether questions that essentially concern the public are discussed in a serious, fact-related manner or whether merely private matters that only satisfy curiosity are divulged.

[64] The judgement of the Federal Court of Justice mainly stands up to the review of constitutionality. . . .

[67] The concept of contemporary history in § 23.3(1) of the Art Copyright Act is not linked to the proviso of a judicial definition of its contents, by which its coverage might, for instance, be limited to events of historical or political importance; rather, it is determined by the public's interest in being informed. This takes the importance and the scope of the freedom of the press into account without disproportionately restricting the protection of the general right of personality. The core of the freedom of the press and the freedom of opinion includes that the press has sufficient room to manoeuvre, within the boundaries of the law, so that it may decide, according to its publishing standards, which facts claim public interest, and that it becomes apparent in the process of formation of public opinion which matters are matters of public interest. As has been stated, entertaining articles are not exempt from this.

[68] Moreover, it is not objectionable that the Federal Court of Justice has also assigned to the "sphere of contemporary history" pursuant to § 23.1(1) of the Art Copyright Act images of persons who have not attracted public attention at a certain point through their involvement with a specific event of contemporary history but instead encounter general public attention, independently of single events, on account of their status and their importance. In this context, the increased importance that photojournalism has acquired today in comparison with the time in which the Art Copyright Act was enacted carries weight as well. Certainly, the concept of an "absolute person of contemporary history", to which reference is frequently made in scholarly literature and jurisprudence in this context, imperatively follows neither from the law nor from the Constitution. If this concept is understood, as the Higher Regional Court and the Federal Court of Justice present it, as describing, in an abridged manner, persons whose images the public deems worthy of notice for the depicted person's sake, it is unobjectionable from the constitutional point of view. It is important, however, that a balancing take place, in each individual case, between the public's interest in being informed and the legitimate interest of the depicted person.

[69] The general right of personality does not require that the publication of images of persons who are of importance in contemporary history without the consent of the depicted person, must be limited to images that show them when exercising the function that they discharge in society. Frequently, the public interest that such persons claim is characterised exactly by the fact that it is not restricted to the exercise of this person's public function in the narrower sense. Due to the person's exposed function and to the effect of the function, the interest can also extend to information about how the persons generally move in public, i.e. when they are not exercising their respective public function. The public has a legitimate interest in learning whether such persons, who are often regarded as a role-model or as an example, convincingly bring into agreement the behaviour that they show in their public function and their personal behaviour.

[70] If the publishing of images was limited to the function of a person who is of importance to contemporary history, this would, however, fail to adequately take into account the interest that such persons legitimately arouse in the public. Moreover, this would

encourage a selective manner of representation which would deny the public the required opportunity to assess persons from social and political life on account of their functions as role-models and on account of their influence. This does not open the press unlimited access to images of persons of contemporary history. Rather, § 23.2 of the Art Copyright Act provides the courts with sufficient possibilities to bring the requirements of protection to bear that are stipulated by Article 2.1 in conjunction with Article 1.1 of the Basic Law.

[71] In principle, the standards that the Federal Court of Justice has developed when interpreting the element of a "legitimate interest" in § 23.2 of the Art Copyright Act are not objectionable from the constitutional point of view.

[72] Pursuant to the challenged judgement, the privacy that is worthy of protection, to which the so-called absolute persons of contemporary history are also entitled, requires (1) a local seclusion to which someone has withdrawn to be alone; (2) that this wish to be alone is recognisable by an objective person; and (3) that the person, confiding in the seclusion, behaves in a manner in which he or she would not behave in the broad public. The Federal Court of Justice assumes that a violation of §§ 22 and 23 of the Art Copyright Act exists if images of the person affected are published that, in such a situation, were taken secretly or by catching the person unawares.

[73] The standard of physical seclusion, on the one hand, takes the sense of the general right to privacy into account, i.e. to secure to individuals a sphere outside their home in which they are aware that they are not under constant public observation and therefore do not have to control their behaviour in view of such observation but find it possible to relax and to recover. On the other hand, the standard of physical seclusion does not excessively restrict the freedom of the press, as it does not completely withdraw the daily and private life of persons of contemporary history from photojournalism but makes it accessible to pictorial representation to the extent that it takes place in public. In the case of an outstanding public interest in being informed, the freedom of the press can, pursuant to these rulings, also prevail over the protection of privacy.

[74] It is also not objectionable that in its ruling, the Federal Court of Justice took the individual's behaviour in a specific situation as an indicator that he or she is recognisably in a situation of seclusion. The protection against pictorial representations in this sphere, however, is not triggered only if the person affected shows a behaviour in this sphere that he or she would avoid under the eyes of the public. Rather, physical seclusion can fulfill its protective function with respect to its role in the development of someone's personality only if the seclusion ensures the individual, irrespective of the behaviour in which he or she engages in a given moment, a space for relaxation in which he or she need not constantly expect the presence of photographers or camera teams. This, however, is not the decisive question in this case, as pursuant to the findings of the Federal Court of Justice, the first prerequisite for the protection of privacy was lacking in the first place.

[75] Finally, it is not objectionable from the constitutional point of view that the method of obtaining information is regarded as important when balancing the public interest in information and the protection of privacy. There are, however, doubts about whether images that are taken secretly or by catching the subject unawares, without more, violate the privacy that exists outside the depicted individual's home. With regard to the function that the Constitution assigns to this sphere, and in view of the circumstance that one often cannot tell whether an image was taken secretly or by catching the subject unawares, an impermissible encroachment upon privacy can, in any case, not only be assumed if these characteristics exist. As the Federal Court of Justice, as concerns the photographs in dispute in these proceedings, denied in the first instance that the context in which the photos were made constituted a sphere of seclusion, the doubts about the manner in which the photographs were taken do not affect the result of its decision.

[The European Court of Human Rights' opinion continues below.]

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

[12] The applicant submitted that the German court decisions had infringed her right to respect for her private and family life, guaranteed by Article 8 of the Convention, which is worded as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. . . .

B. The Court's assessment

2. Applicability of Article 8

[13] The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name.

Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life". . . .

[14] As regards photos, with a view to defining the scope of the protection afforded by Article 8 against arbitrary interference by public authorities, the European Commission of Human Rights had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public.

[15] In the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life.

3. Compliance with Article 8

(a) The domestic courts' position

[16] The Court notes that, in its landmark judgment of 15 December 1999, the Federal Constitutional Court interpreted sections 22 and 23 of the Copyright (Arts Domain) Act by balancing the requirements of the freedom of the press against those of the protection of private life, that is, the public interest in being informed against the legitimate interests of the applicant. In doing so the Federal Constitutional Court took account of two criteria under German law, one functional and the other spatial. It considered that the applicant, as a figure of contemporary society "*par excellence*," enjoyed the protection of her private life even outside her home but only if she was in a secluded place out of the public eye to which persons retire "with the objectively recognisable aim of being alone and where, confident of being alone, they behave in a manner in which they would not behave in public." In the light of those criteria, the Federal Constitutional Court held that the Federal Court of Justice's judgment of 19 December 1995 regarding publication of the photos in question was compatible with the Basic Law. The court attached decisive weight to the freedom of the press, even the entertainment press, and to the public interest in knowing how the applicant behaved outside her representative functions . . . .

(b) General principles governing the protection of private life and the freedom of expression

[17] In the present case the applicant did not complain of an action by the State, but rather of the lack of adequate State protection of her private life and her image.

[18] The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. That also applies to the protection of a person's picture against abuse by others.

The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable

principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.

[19] That protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention.

In that context, the Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."

In that connection, the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest. . . .

[20] Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of "ideas," but of images containing very personal or even intimate "information" about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.

[21] In the cases in which the Court has had to balance the protection of private life against freedom of expression, it has always stressed the contribution made by photos or articles in the press to a debate of general interest. . . .

(c) Application of these general principles by the Court

[22] The Court notes at the outset that in the present case the photos of the applicant in the various German magazines show her in scenes from her daily life, thus involving activities of a purely private nature such as engaging in sport, out walking, leaving a restaurant or on holiday. . . .

[23] The Court also notes that the applicant, as a member of the Prince of Monaco's family, represents the ruling family at certain cultural or charitable events. However, she does not exercise any function within or on behalf of the State of Monaco or any of its institutions (see ¶ 8 above).

[24] The Court considers that a fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest," [it] does not do so in the latter case. . . .

[25] In these conditions freedom of expression calls for a narrower interpretation. . . .

[26] The Court finds it hard to agree with the domestic courts' interpretation of section 23(1) of the Copyright (Arts Domain) Act, which consists in describing a person as such . . . a figure of contemporary society "*par excellence*." Since that definition affords the person very limited protection of their private life or the right to control the use of their image, it could conceivably be appropriate for politicians exercising official functions. However, it cannot be justified for a "private" individual, such as the applicant, in whom the interest of the general public and the press is based solely on her membership of a reigning family, whereas she herself does not exercise any official functions.

In any event the Court considers that, in these conditions, the Act has to be interpreted narrowly to ensure that the State complies with its positive obligation under the Convention to protect private life and the right to control the use of one's image. . . .

[27] In the Court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case, merely classifying the applicant as a figure of contemporary society "*par excellence*" does not suffice to justify such an intrusion into her private life.

(d) Conclusion

[28] As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution, since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

[29] Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

[30] Lastly, in the Court's opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life.

[31] Having regard to all the foregoing factors, and despite the margin of appreciation afforded to the State in this area, the Court considers that the German courts did not strike a fair balance between the competing interests.

[32] There has therefore been a breach of Article 8 of the Convention. . . .

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention.

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The Görgülü Case
German Constitutional Court (2004)

[I]n the proceedings on the constitutional complaint of the Turkish citizen Görgülü:

GROUNDS: In his constitutional complaint, the complainant challenges inter alia what he regards as the unsatisfactory enforcement of the judgment of the European Court of Human Rights (ECHR) of 26 February 2004 pronounced in his case and the disregard of international law by the Naumburg Higher Regional Court. The complainant is the father of the child Christofer, who was born illegitimate on 25 August 1999. The mother of the child, who at first did not name the complainant to the authorities as the father of the child, gave the boy up for adoption one day after his birth and first declared her prior consent to the adoption by the foster parents in a notarial deed of 1 November 1999; she repeated her consent on 24 September 2002. The boy has been living with the foster parents since 29 August 1999. The complainant learned in October 1999 of the child's birth and release for adoption; his contact with the mother of the child had broken off in July 1999. Thereupon he began himself to attempt to adopt his son. . . .

In an order of 9 March 2001, the Wittenberg Local Court transferred the sole parental custody of Christofer to the complainant in accordance with his application. Before this, there had been a total of four meetings between the child and the complainant by way of access. Upon the appeal of the foster parents and the Wittenberg Youth Welfare Office (*Jugendamt*), which was appointed official guardian after the birth, the Local Court's custody decision was reversed by order of 20 June 2001 of the Naumburg Higher Regional Court, and the complainant's application for transfer of custody was dismissed on the merits. At the same time, the Higher Regional Court, of its own motion, excluded rights of access between the complainant and the boy until 30 June 2002 on the grounds of the best interest of the child. . . .

In September 2001, the complainant filed an individual application under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) at the European Court of Human Rights. He challenged in particular a violation of Article 8 of the Convention, which protects the right to respect for private and family life. He submitted that carrying out a forced adoption in disregard of the rights of the natural father was a flagrant violation of human dignity and the

fundamental right to respect for family life. He stated that he had the right to bring up his son himself. In a judgment of 26 February 2004, a chamber of the Third Section of the ECHR declared unanimously that the decision on custody and the exclusion of the right of access violated Article 8 of the Convention. On the basis of Article 41 of the Convention, the ECHR awarded the complainant EUR 15,000.00 in damages and EUR 1,500.00 to reimburse costs and expenses . . . .

Thereupon, in the parallel proceedings on custody, . . . [t]he Naumburg Higher Regional Court . . . held that arrangements for access [were barred by procedural default. A temporary injunction giving complainant access to his son could not] be justified by the decision of the ECHR. It was true that the decision showed that the exclusion of access ordered in June 2001 had violated the rights of the complainant and father of the child under Article 8 of the Convention and that the Federal Republic of Germany, by reason of its duty under Article 46 of the Convention, was obliged to grant the complainant at least the right of access. But the judgment bound only the Federal Republic of Germany as a subject of public international law, but not its bodies, authorities and the bodies responsible for the administration of justice, which are independent under Article 97.1 of the Basic Law. The effect of the judgment, therefore, subject to a change of domestic law, is limited as a matter of law and as a matter of fact to establishing the sanctioning of what in the opinion of the ECHR was a past violation of law. The judgment of the ECHR remained a judgment that at all events for the domestic courts was not binding, without any influence on the finality and non-appealability of the decision appealed against. Where a decision of the ECHR established that a sovereign German act was contrary to the Convention, neither the European Convention on Human Rights nor the Basic Law created an obligation to accord to that decision the power to reverse finality and non-appealability. . . .

In his constitutional complaint, the complainant challenges a violation of his fundamental rights under Article 1, Article 3 and Article 6 of the Basic Law, and of the right to fair trial. At the same time he applies for a temporary injunction on access to his son to be issued. . . .

The constitutional complaint is well-founded. In its order of 30 June 2004, the Higher Regional Court violated Article 6 of the Basic Law in conjunction with the principle of the rule of law. The authorities and courts of the Federal Republic of Germany are obliged, under certain conditions, to take account of the European Convention on Human Rights as interpreted by the ECHR in making their decisions (I.). The challenged decision of the

Higher Regional Court does not do justice to this obligation, since the court does not pay sufficient attention to the judgment of the ECHR of 26 February 2004 in the case of the complainant (II.).

I.

In the German legal system, the European Convention on Human Rights has the status of a federal statute, and it must be taken into account in the interpretation of domestic law, including fundamental rights and constitutional guarantees (1.). The binding effect of a decision of the ECHR extends to all state bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention (2.). The nature of the binding effect depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law (3.). A complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law (4.).

1.

The European Convention on Human Rights and its protocols are agreements under public international law. The Convention leaves it to the States parties to decide in what way they comply with their duty to observe the provisions of the Convention. The federal legislature consented to the above treaty in each case by a formal statute under Article 59.2 of the Basic Law . . . . In doing this, the federal legislature transformed the Convention into German law . . . . Within the German legal system, the European Convention on Human Rights and its protocols, to the extent that they have come into force for the Federal Republic of Germany, have the status of a federal statute.

This classification means that German courts must observe and apply the Convention within the limits of methodically justifiable interpretation like other statute law of the Federal Government. But the guarantees of the European Convention on Human Rights and its protocols, by reason of this status in the hierarchy of norms, are not a direct

constitutional standard of review in the German legal system. A complainant can therefore not directly challenge the violation of a human right contained in the European Convention on Human Rights by a constitutional complaint before the Federal Constitutional Court. However, the guarantees of the Convention influence the interpretation of the fundamental rights and constitutional principles of the Basic Law. The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law—and this the Convention itself does not desire.

This constitutional significance of an agreement under international law, aiming at the regional protection of human rights, is the expression of the Basic Law's commitment to international law (*Völkerrechtsfreundlichkeit*); the Basic Law encourages both the exercise of state sovereignty through the law of international agreements and international cooperation, and the incorporation of the general rules of public international law, and therefore is, if possible, to be interpreted in such a way that no conflict arises with duties of the Federal Republic of Germany under public international law. The Basic Law has laid down in its programme that German public authority is committed to international cooperation (Article 24 of the Basic Law) and to European integration (Article 23 of the Basic Law). The Basic Law has granted the general rules of public international law priority over ordinary statute law (Article 25 sentence 2 of the Basic Law) and has integrated the law of international agreements, by Article 59.2 of the Basic Law, into the system of the separation of powers. In addition, it has opened the possibility of joining systems of mutual collective security (Article 24.2 of the Basic Law), created the duty to ensure the peaceful settlement of international disputes by way of arbitration (Article 24.3 of the Basic Law) and declared that the disturbance of the peace, and in particular preparing a war of aggression, is unconstitutional (Article 26 of the Basic Law). In this complex of norms, the German constitution, as is also shown by its preamble, aims to incorporate the Federal Republic of Germany into the community of states as a peaceful member having equal rights in a system of public international law serving peace.

However, the Basic Law did not take the greatest possible steps in opening itself to international-law connections. On the domestic level, the law of international agreements is not to be treated directly as applicable

law, that is, without an Act subject to the consent of the German parliament under Article 59.2 of the Basic Law, and—like customary international law (see Article 25 of the Basic Law)—not endowed with the status of constitutional law. The Basic Law is clearly based on the classic idea that the relationship of public international law and domestic law is a relationship between two different legal spheres and that the nature of this relationship can be determined from the viewpoint of domestic law only by domestic law itself . . . . The commitment to international law takes effect only within the democratic and constitutional system of the Basic Law.

The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted.

The Basic Law is intended to achieve comprehensive commitment to international law, cross-border cooperation and political integration in a gradually developing international community of democratic states under the rule of law. However, it does not seek a submission to non-German acts of sovereignty that is removed from every constitutional limit and control. Even the far-reaching supranational integration of Europe, which accepts the order to apply a norm, when this order originates from Community law and has direct domestic effect, is subject to a reservation of sovereignty, albeit one that is greatly reduced (see Article 23.1 of the Basic Law). The law of international agreements applies on the domestic level only when it has been incorporated into the domestic legal system in the proper form and in conformity with substantive constitutional law.

On this basis, the legal effect of the decisions of an international court that was brought into existence under an international agreement is determined according to the content of the incorporated international agreement and the relevant provisions of the Basic Law as to its applicability. If the Convention law of the European Convention on Human Rights, and with it the federal legislature on the basis of Article 59.2 of the Basic Law, has provided that the legal decisions are directly applicable, then they have this effect below the level of constitutional law. Under domestic law, it is first the duty of the competent nonconstitutional courts to establish this legal effect.

2.

The decisions of the ECHR have particular importance for Convention law as the law of international agreements, because they reflect the current state of development of the Convention and its protocols. Convention law itself accords varying legal effects to the ECHR's decisions on the merits. Under Article 42 and Article 44 of the Convention, the judgments of the ECHR become final and thus formally non-appealable. In Article 46 of the Convention, the States parties have agreed that in all legal matters to which they are party they will abide by the final judgment of the ECHR. It follows from this provision that the judgments of the ECHR are binding on the parties to the proceedings and thus have limited substantive res judicata.

The substantive res judicata in individual application proceedings under Article 34 of the Convention is restricted by the personal, material and temporal limits of the matter in dispute. The decisions of the ECHR in proceedings against other States parties merely give the states that are not involved an occasion to examine their domestic legal systems and, if it appears that an amendment may be necessary, to orient themselves to the relevant case-law of the ECHR. In this respect, Convention law has no provision comparable to § 31.1 of the Federal Constitutional Court Act, under which all the federal and *Land* constitutional bodies and all courts and authorities are bound by the decisions of the Federal Constitutional Court. Article 46.1 of the Convention provides only that the State party involved is bound by the final judgment with regard to a specific matter in dispute (res judicata).

In the question of fact, the ECHR pronounces a declaratory judgment; the decision establishes that the State party in question—with regard to the specific matter in dispute—complied with the Convention or acted in contradiction to it; however, there is no judgment of cassation that would directly quash the challenged measure of the State party.

If it is declared that there has been a violation of the Convention, the first consequence is that the State party may no longer hold the view that its acts were in compliance with the Convention. In principle, the decision also obliges the State party affected with regard to the matter in dispute to restore, if possible, the state of affairs without the declared violation of the Convention. If the violation that has been found is still continuing, for example in the case of continued arrest in violation of Article 5 of the Convention or an encroachment upon private and family life in violation of

Article 8 of the Convention, the State party is under an obligation to end this state. The State party would therefore commit a new violation of the European Convention on Human Rights if it failed to terminate or repeated its conduct that has been established to be contrary to the Convention. However, it should be taken into account that the effect of the decision relates only to the res judicata and that the factual and legal position may change before new domestic proceedings to which the complainant is a party.

The fact that the ECHR may award the complainant a "just compensation" in the form of money if the domestic law of the State party involved permits only inadequate compensation shows that the Convention allows the State party involved some latitude with regard to the correction of decisions that have already been made and that are non-appealable.

However, in its more recent case-law relating to Article 41 of the Convention, the ECHR points out that the States parties, in ratifying the Convention, agreed to ensure that their domestic legal systems are in accordance with the Convention. It is therefore, according to the ECHR, for the defendant state to remove every obstacle in domestic law that prevents a redress of the complainant's situation. . . .

The legal effect of a decision of the ECHR, under the principles of public international law, is directed in the first instance to the State party as such. In principle, the Convention takes a neutral attitude towards the domestic legal system, and, unlike the law of a supranational organisation, it is not intended to intervene directly in the domestic legal system. On the domestic level, appropriate Convention provisions in conjunction with the consent Act and constitutional requirements bind all organisations responsible for German public authority in principle to the decisions of the ECHR.

This legal position corresponds to the conception of the European Convention on Human Rights as an instrument for protection and for the enforcement of particular human rights. The obligation of the States parties, integrated into federal law by the consent Act, to create a domestic instance at which the person affected can have an "effective remedy" against particular conduct by the state already extends into the domestic structure of the state system and is not restricted to the executive branch, which is competent to act externally. In addition, the States parties must guarantee the "effective implementation of any of the provisions" of the European Convention on Human Rights in their domestic law, which is possible in a

state under the rule of law governed by the principle of the separation of powers only if all the organisations responsible for sovereign power are bound by the guarantees of the Convention. In this view, the German courts too are under a duty to take the decisions of the ECHR into account.

3.

The binding effect of decisions of the ECHR depends on the area of competence of the state bodies and the relevant law. Administrative bodies and courts may not free themselves from the constitutional system of competencies and the binding effect of statute and law by relying on a decision of the ECHR. But the binding effect of statute and law also includes a duty to take into account the guarantees of the Convention and the decisions of the ECHR as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECHR and the "enforcement" of such a decision in a schematic way, in violation of prior-ranking law, may therefore violate fundamental rights in conjunction with the principle of the rule of law.

The obligation created by the consent Act to take into account the guarantees of the European Convention on Human Rights and the decisions of the ECHR at least demands that notice is taken of the relevant texts and case-law and that they are part of the process of developing an informed opinion of the court appointed to make a decision, of the competent authority or of the legislature. Domestic law must if possible be interpreted in harmony with public international law, regardless of the date when it comes into force.

If there are decisions of the ECHR that are relevant to the assessment of a set of facts, then in principle the aspects taken into account by the ECHR when it considered the case must also be taken into account when the matter is considered from the point of view of constitutional law, in particular when proportionality is examined, and there must be a consideration of the findings made by the ECHR after weighing the rights of the parties.

If, in concrete application proceedings in which the Federal Republic of Germany [is] involved, the ECHR establishes that there has been a violation of the Convention, and if this is a continuing violation, the decision of the ECHR must be taken into account in the domestic sphere, that is, the responsible authorities or courts must discernibly consider the decision and, if necessary, justify understandably why they nevertheless do

not follow the international-law interpretation of the law. Precisely in cases in which national courts, as in private law, have to structure multipolar fundamental rights situations, it is always important that various subjective legal positions are sensitively weighed against each other, and if there is a change in the persons involved in the dispute or a change in the actual or legal circumstances, this weighing up may lead to a different result. There may therefore be constitutional problems if one of the subjects of fundamental rights in conflict with another obtains an ECHR judgment in his or her favour against the Federal Republic of Germany and German courts schematically apply this decision to the private-law relationship, with the result that the holder of fundamental rights who has "lost" in this case and was possibly not involved in the proceedings at the ECHR would no longer be able to take an effective part in the proceedings as a party.

If the ECHR has declared a domestic provision to be contrary to the Convention, either this provision may be interpreted in conformity with public international law when applied in practice, or the legislature has the possibility of altering this domestic provision that is incompatible with the Convention. If the violation of the Convention consists in effecting a specific administrative act, the authority responsible has the possibility of cancelling this act under the provisions of the law of administrative procedure. Administrative practice that is in violation of the Convention can be amended, and courts may establish the duty to do this.

If judicial decisions violate the Convention, neither the European Convention on Human Rights nor the Basic Law imposes an obligation to accord to a judgment of the ECHR that establishes that a decision of a German court was made in violation of the European Convention on Human Rights the effect of removing the non-appealability of this decision. Admittedly, it cannot be concluded from this that decisions of the ECHR need not be taken into account by German courts.

Under Article 20.3 of the Basic Law, judicial decisions are bound by statute and law. The constitutionally guaranteed independence of the judge, who is subject to the law, is not affected by this commitment, which is derived from the principle of the rule of law. Both the commitment to law and the commitment to statute put into concrete terms the judicial power that is entrusted to the judges. Since the European Convention on Human Rights—as interpreted by the ECHR—has the status of a formal federal statute, it shares the primacy of statute law and must therefore be complied with by the judiciary.

With regard to the principle of legal certainty, it must be noted that the federal legislature in the year 1998, in § 359 no. 6 of the Code of Criminal Procedure (*Strafprozessordnung—StPO*), introduced into the law of criminal procedure a new ground for reopening criminal proceedings. This provides that it is admissible to reopen proceedings that ended in a non-appealable judgment if the ECHR has established that there was a violation of the European Convention on Human Rights or its protocols and the German judgment is based on this violation. This amendment of the law is based on the idea that a violation of the Convention whose effect continues in a specific individual case should be terminated, at all events in the area of criminal law, which is a particularly sensitive one for human rights, even if it is already non-appealable, if the judgment of the ECHR is relevant to the national proceedings. In this way, the competent court is given the opportunity to deal again, on application, with the case which has actually been closed, and to include the new legal facts in its development of an informed opinion. In this connection, the statute expresses the fundamental expectation that the court will change its original decision—which was contrary to the Convention—to the extent that this is based on the violation.

In other rules of procedure, there is no conclusive answer to the question as to how the Federal Republic of Germany, if the ECHR rules against it, is to react, if national court proceedings have been completed and are non-appealable. There may be facts and circumstances in which German courts may make a new decision, not about the res judicata, but about the matter on which the ECHR has established that there has been a violation of the Convention on the part of the Federal Republic of Germany. This may be the case, for example, when the court is intended to consider the matter again on the basis of a new application or changed circumstances, or the court in another constellation is still dealing with the matter. In the last instance, it is decisive whether a court, within the scope of the applicable law of procedure, has the possibility of making a new decision in which it can take account of the relevant decision of the ECHR.

In such case constellations, it would not be acceptable merely to refer the complainant to money damages, although restoration would fail neither for factual nor for legal reasons.

In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular with regard to a partial system of domestic

law whose legal consequences are balanced and that is intended to achieve an equilibrium between differing fundamental rights.

Individual application proceedings under Article 34 of the Convention before the ECHR are intended to decide specific individual cases in the two-party relationship between the complainant and the State party, by the measure of the European Convention on Human Rights and its protocols. The decisions of the ECHR may encounter national partial systems of law shaped by a complex system of case-law. In the German legal system, this may happen in particular in family law and the law concerning aliens, and also in the law on the protection of personality, in which conflicting fundamental rights are balanced by the creation of groups of cases and graduated legal consequences. It is the task of the domestic courts to integrate a decision of the ECHR into the relevant partial legal area of the national legal system, because it cannot be the desired result of the international-law basis nor express the will of the ECHR for the ECHR through its decisions itself to undertake directly any necessary adjustments within a domestic partial legal system.

In this respect, it is necessary for the national courts to evaluate the decision when taking it into account; in this process, account may also be taken of the fact that the individual application proceedings before the ECHR, in particular where the original proceedings were in civil law, possibly does not give a complete picture of the legal positions and interests involved. The only party to the proceedings before the ECHR apart from the complainant is the State party affected; the possibility for third parties to take part in the application proceedings is not an institutional equivalent to the rights and duties as a party to proceedings or another person involved in the original national proceedings.

4.

The constitutional review of the interpretation and application of agreements under international law that have been given by statute the power of domestic German law is governed by the same principles that elsewhere too define the authority of the Federal Constitutional Court to review judicial decisions. The interpretation and application of agreements under international law by the ordinary courts can in principle be examined only to assess whether they are arbitrary or are based on a fundamentally incorrect view of the significance of a fundamental right or are incompatible with other constitutional provisions.

Admittedly, as 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 given rise to an international-law responsibility on the part of Germany. 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.

This applies in a particularly high degree to the duties under public international law arising from the Convention, which contributes to promoting a joint European development of fundamental rights (*gemeineuropäische Grundrechtsentwicklung*). In Article 1.2 of the Basic Law, the Basic Law accords particular protection to the central stock of international human rights. This protection, in conjunction with Article 59.2 of the Basic Law, is the basis for the constitutional duty to use the European Convention on Human Rights in its specific manifestation when applying German fundamental rights too. 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 ECHR, for example because the facts on which it is based have changed, 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 ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law. In any event, the Convention provision as interpreted by the ECHR must be taken into account in making a decision; the court must at least duly consider it. Where the facts have changed in the meantime or in the case of a different fact situation, the courts will need to determine what, in the view of the ECHR, constituted the specific violation of the Convention and why a changed fact situation does not permit it to be applied to the case. Here, it will always be important how taking account of the decision takes in the system of the field of law 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 ECHR.

Against this background, it must at all events be possible, on the basis of the relevant fundamental right, to raise the objection in proceedings before the Federal Constitutional Court that state bodies disregarded or failed to take into account a decision of the ECHR. In this process, the fundamental right is closely connected to the priority of statute embodied in the principle of the rule of law, under which all state bodies are bound by statute and law within their competence (see BVerfGE 6, 32 (41)).

II.

The challenged decision of the Naumburg Higher Regional Court of 30 June 2004 violates Article 6 of the Basic Law in conjunction with the principle of the rule of law. The Higher Regional Court did not take sufficient account of the judgment of the ECHR of 26 February 2004 when making its decision, although it was under an obligation to do so. . . . The Higher Regional Court should have considered in an understandable way how Article 6 of the Basic Law could have been interpreted in a manner that complied with the obligations under international law of the Federal Republic of Germany.

Here it is of central importance that the Federal Republic of Germany's violation of Article 8 of the Convention established by the ECHR is a continuing violation from the perspective of Convention law, for the complainant still has no access to his son. In its judgment, the ECHR held that the Federal Republic of Germany, in the choice of the means with which the judgment has to be enforced on the domestic level, is free, insofar as these means are compatible with the conclusions from the judgment. In the view of the ECHR, this means that it must at least be possible for the complainant to have access to his child. This opinion of the ECHR should have caused the Higher Regional Court to consider the question as to whether and how far personal access of the complainant to his child might precisely be in the best interest of the child and what obstacles that could be documented—if necessary by way of a new expert witness's report—are presented by the consideration of the best interest of the child to the access which the ECHR regards as appropriate and which are protected by Article 6.2 of the Basic Law.

The Higher Regional Court in particular assumes in a manner that is not acceptable under constitutional law that a judgment of the European Court of Human Rights binds only the Federal Republic of Germany as a subject of public international law, but does not bind German courts. All the state bodies of the Federal Republic of Germany are—to the extent set out

here under C. I. above—bound by operation of law within their jurisdiction by the Convention and the protocols that have entered into force in Germany. They must take into account the guarantees of the Convention and the case-law of the ECHR when interpreting fundamental rights and constitutional guarantees.

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CONSTITUTION OF ARGENTINA

Section 75:

Congress is empowered:

22. To approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against [Women]; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy . . . . They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House. In order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress.

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Christine A.E. Bakker

A Full Stop to Amnesty in Argentina: The Simón *Case*[*]

In *Simón*, the Argentine Supreme Court held that two amnesty laws, adopted in the late 1980s in order to shield authors of serious human rights

[*] Excerpted from 3 J. INT'L CRIM. JUST. 1106 (2005).

violations committed during the so-called 'Dirty War' (1976-1983), were unconstitutional and void. Although the Argentine Congress had already repealed the two laws in 2003, uncertainty about the validity of this parliamentary decision had led to some controversy. With its decision in *Simón*, the Supreme Court put an end to the legal uncertainty concerning the prosecution of serious human rights violations committed under the military regime and cleared the path for judicial actions against their authors . . . .

In their joint conclusion, the majority of the Court (i) declared the *Ley de Punto Final* and the *Ley de Obediencia Debida* unconstitutional and confirmed the appealed judgments; (ii) held that Law 25.779 of November 2003 annulling these laws was valid; and (iii) stated that:

> [L]aws 23.492 and 23.521 [are] without any effect, as well as any other act which could affect the progress of the proceedings under instruction: the trial and possible conviction of those responsible: or which could in any way hinder the investigations already completed through the competent channels, for crimes against humanity committed within Argentine territory.

This last point amounts to the retroactive nullity of the amnesty laws and of any act based upon them, regardless of their nature. It particularly quashes all judicial decisions granting amnesty to those accused of crimes against humanity, thereby clearing the way for the reopening of closed cases as well as for new investigations, prosecutions and trials.

The reasoning supporting this conclusion is presented in the individual opinions of the seven Supreme Court members who voted in favour of striking down the amnesty laws. Although, on some points, the arguments of the Justices differ, there was a consensus about the precedence of international law over municipal law in the Argentine legal order, and this view was the basis of each of these opinions. . . .

A. Precedence of International Law and Inter-American Court of Human Rights ("IACHR") Case Law over National Law

A central point in the reasoning of the Supreme Court is the precedence of international law in the Argentine legal order. [S]ince the reform of the National Constitution in 1994, the Argentine state has taken on a series of obligations with respect to international law and, in particular, to the Inter-American legal order, which were given constitutional rank and

status. The progressive consolidation and refining of these international obligations has led to fundamental changes in the Argentine legal order which, according to most members of the Court, imposed a reconsideration of the validity of the amnesty laws.

The 1994 Constitution explicitly mentions the international instruments to which constitutional rank is awarded. These instruments include the American Convention on Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the 1984 Convention against Torture. In Argentine case law, the precedence of international treaty law over national legislation has been confirmed on several occasions; also, the priority of customary international rules over national law has been upheld recently.

The Argentine Supreme Court attaches particular importance to the case law of the IACHR, which constitutes an essential source for interpreting the obligations derived from the American Convention. In *Simón*, a member of the Court analysed the decisions of this regional judicial body concerning amnesty laws. He pointed to a jurisprudential evolution starting with the recognition that the duty of states to guarantee the rights protected by the Convention includes not only the duty to prevent, investigate and punish violations of these rights, but also the obligation to organize all state organs involved in the exercise of public power in such a way that they are capable of ensuring human rights.

The content of this obligation has been progressively determined in later decisions, culminating in *Barrios Altos*. In this case, the IACHR concluded that the Peruvian so-called 'self-amnesty laws' violated the judicial guarantees imposed by Articles 8 (right to a fair trial) and 25 (right to an effective remedy), as well as the general obligations to guarantee the rights of the American Convention laid down in Articles 1.1. and 2. According to the IACHR, amnesty laws also lead to the defencelessness of the victims and to the perpetuation of impunity, and are therefore manifestly incompatible with the letter and spirit of the American Convention. In unusually specific terms, the IACHR finally held that the Peruvian amnesty laws therefore 'lack any legal effect and may no longer constitute an obstacle for the investigation of the facts of the case nor for the identification and punishment of those responsible.'

Several members of the Court rightly found that the Argentine amnesty laws violate the same principles of international human rights law as the Peruvian 'self-amnesty laws,' since they all aim to avoid the

prosecution of grave human rights violations. In their view, the mere termination of the amnesty laws would not comply with the standard set by the IACHR.

The Inter-American case law indeed constitutes a strong precedent prohibiting the State Parties to the American Convention from passing amnesty laws. Although, formally, a decision of the IACHR in a particular case only has legal consequences for the state in question, e.g. Peru in the *Barrios Altos* case, they provide authoritative interpretations of the Convention.

It should also be noted that in his opinion, the dissenting Judge held that international law did not take precedence over the national Constitution; he also held that *Barrios Altos* could not be applied to Argentine amnesty laws. . . .

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CONSTITUTION OF SOUTH AFRICA

Section 39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

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Azanian Peoples Organisation (AZAPO) v. President of the Republic of South Africa,

Constitutional Court of South Africa (July 25, 1996)

MAHOMED DP:

[2] During the eighties it became manifest to all that our country with all its natural wealth, physical beauty and human resources was on a disaster course unless that conflict [attending apartheid] was reversed. It was this realisation which mercifully rescued us in the early nineties as those who controlled the levers of state power began to negotiate a different

future with those who had been imprisoned, silenced, or driven into exile in consequence of their resistance to that control and its consequences. Those negotiations resulted in an interim Constitution committed to a transition towards a more just, defensible and democratic political order based on the protection of fundamental human rights. It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past.

[3] This fundamental philosophy is eloquently expressed in the epilogue to the Constitution which reads as follows:

> *National Unity and Reconciliation*
>
> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu [openness, self-assurance, humanitarianism] but not for victimisation.
>
> In order to advance such reconciliation and

> reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
>
> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Pursuant to the provisions of the epilogue, Parliament enacted during 1995 what is colloquially referred to as the Truth and Reconciliation Act. Its proper name is the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Act").

[4] The Act establishes a Truth and Reconciliation Commission. The objectives of that Commission are set out in § 3. Its main objective is to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past." It is enjoined to pursue that objective by "establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights" committed during the period commencing 1 March 1960 to the "cut-off date." For this purpose the Commission is obliged to have regard to "the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations." It also is required to facilitate "the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective" . . . .

[18] The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependants of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and correspondingly to allow the culprits of such deeds to remain perhaps physically free but inhibited in their capacity to become active, full and

creative members of the new order by a menacing combination of confused fear, guilt, uncertainty and sometimes even trepidation. Both the victims and the culprits who walk on the "historic bridge" described by the epilogue will hobble more than walk to the future with heavy and dragged steps delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge, which is the vision which informs the epilogue.

[19] Even more crucially, but for a mechanism providing for amnesty, the "historic bridge" itself might never have been erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimised by abuse but also those threatened by the transition to a "democratic society based on freedom and equality." If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation. . . .

[25] Mr Soggot contended on behalf of the applicants that the state was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of § 20(7) which authorised amnesty for such offenders constituted a breach of international law. We were referred in this regard to the provisions of article 49 of the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, article 50 of the second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, article 129 of the third Geneva Convention relative to the Treatment of Prisoners of War and article 146 of the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. The wording of all these articles is exactly the same and provides as follows: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches . . ." defined in the instruments so as to include, inter alia, wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health. They add that each High Contracting Party shall be under an obligation to search for persons alleged to have committed such grave breaches and shall bring such persons, regardless of their nationality, before its own courts.

[26] The issue which falls to be determined in this Court is whether § 20(7) of the Act is inconsistent with the Constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law. International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.

[27] These observations are supported by the direct provisions of the Constitution itself referring to international law and international agreements. . . . It is clear . . . that an Act of Parliament can override any contrary rights or obligations under international agreements entered into before the commencement of the Constitution. . . . Section 35(1) of the Constitution is also perfectly consistent with these conclusions. It reads as follows: "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law." The court is directed only to "have regard" to public international law if it is applicable to the protection of the rights entrenched in the chapter.

[28] The exact terms of the relevant rules of public international law contained in the Geneva Conventions relied upon on behalf of the applicants would therefore be irrelevant if, on a proper interpretation of the Constitution, § 20(7) of the Act is indeed authorised by the Constitution, but the content of these Conventions in any event do not assist the case of the applicants.

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In *Roper v. Simmons,* the United States Supreme Court held that the execution of individuals who were under 18 years of age at the time of their capital crimes was prohibited by the Eighth and Fourteenth Amendments to the Constitution. In the course of his opinion for the Court, Justice Kennedy, J. wrote:

Roper v. Simmons
543 U.S. 551 (2005)
Supreme Court of the United States

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop,* the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102-103 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime") . . . .

As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989. No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. See ICCPR, Art. 6(5), 999 U.N.T.S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5); American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969 (same); African Charter on the Rights and Welfare of the Child, Art. 5(3) (same).

Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then

each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice.. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689 . . . . As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. . . .

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. See The Federalist No. 49, p. 314 (C. Rossiter ed. 1961). The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

SCALIA, J., Dissenting (joined by REHNQUIST, C.J. and THOMAS, J.):

Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.

The Court begins by noting that "Article 37 of the United Nations Convention on the Rights of the Child [entered into force Sept. 2, 1990,] which every country in the world has ratified *save for the United States* and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18." The Court also discusses the International Covenant on Civil and Political Rights (ICCPR), which the Senate ratified only subject to a reservation that reads:

> The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position. That the Senate and the President—those actors our Constitution empowers to enter into treaties, see Art. II, § 2—have declined to join and ratify treaties prohibiting execution of under-18 offenders can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. That the reservation to the ICCPR was made in 1992 does not suggest otherwise, since the reservation still remains in place today. It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since "the punishment of life imprisonment without the possibility of parole is itself a severe sanction," gives little comfort. . . .

[T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law-including not

only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. The Court-pronounced exclusionary rule, for example, is distinctively American. When we adopted that rule in *Mapp v. Ohio*, it was "unique to American jurisprudence." Since then a categorical exclusionary rule has been "universally rejected" by other countries, including those with rules prohibiting illegal searches and police misconduct, despite the fact that none of these countries "appears to have any alternative form of discipline for police that is effective in preventing search violations." England, for example, rarely excludes evidence found during an illegal search or seizure and has only recently begun excluding evidence from illegally obtained confessions. Canada rarely excludes evidence and will only do so if admission will "bring the administration of justice into disrepute." The European Court of Human Rights has held that introduction of illegally seized evidence does not violate the "fair trial" requirement in Article 6, § 1, of the European Convention on Human Rights.

The Court has been oblivious to the views of other countries when deciding how to interpret our Constitution's requirement that "Congress shall make no law respecting an establishment of religion . . . ." Amdt. 1. . . .

And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. Though the Government and *amici* in cases following *Roe v. Wade* urged the Court to follow the international community's lead, these arguments fell on deaf ears.

The Court's special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion. It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought. . . . The Court has, however—I think wrongly—long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation's *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European

courts dominated by continental jurists—a legal, political, and social culture quite different from our own. If we took the Court's directive seriously, we would also consider relaxing our double jeopardy prohibition, since the British Law Commission recently published a report that would significantly extend the rights of the prosecution to appeal cases where an acquittal was the result of a judge's ruling that was legally incorrect. We would also curtail our right to jury trial in criminal cases since, despite the jury system's deep roots in our shared common law, England now permits all but the most serious offenders to be tried by magistrates without a jury.

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.

The Court responds that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." To begin with, I do not believe that approval by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment. More importantly, however, the Court's statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited *to set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today.

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Tavita v Minister of Immigration
Court of Appeal, Wellington, New Zealand (1994)

HEADNOTES:

Mr Tavita, a citizen of Western Samoa, arrived in New Zealand in December 1987 and was granted a visitor's permit. He became an overstayer in March 1989. After a removal warrant was issued by the District Court on 12 March 1990, he appealed to the Minister of Immigration pursuant to the Immigration Act 1987, § 63, seeking the cancellation of the warrant on humanitarian grounds. By letter dated 4 April 1991, the Minister declined the appeal. Mr Tavita's daughter was born in New Zealand on 29 June 1991 and on 7 July 1991, he married the mother of his daughter. In September 1993, the New Zealand Immigration Service took steps to execute the removal warrant issued in 1990, now classified as a removal order by virtue of the provisions of the Immigration Amendment Act 1991. Judicial review proceedings were brought on Mr Tavita's behalf seeking the setting aside of the removal order and a reconsideration of the appeal. Reliance was placed on the International Covenant on Civil and Political Rights [of] 1966, including the First Optional Protocol, and the Convention on the Rights of the Child [of] 1989. An application for an interim order under the Judicature Amendment Act [of] 1972, § 8, was dismissed on 3 November 1993 by McGechan J. who pointed out that the decisions attacked were made before the birth of the child and the marriage, so that there was then no call to take the Covenant or the Convention into account. An interim order for a stay of removal was made pending appeal.

In the Court of Appeal it was accepted by counsel for the Minister that at no stage had the Minister or the Immigration Service taken either the Covenant or the Convention into account. It was submitted, however, that they were not obliged to and that in any event, they were entitled to ignore the international instruments. It was also submitted that no request had been made for a reconsideration of the case. The major question in the appeal was whether, against the background of the powers available under the Immigration Act 1987, the Minister and the Immigration Service should have regard to the international obligations concerning the child and the family in considering whether now to enforce the removal order.

JUDGES: Cooke P, Richardson, Hardie Boys JJ

JUDGMENT BY: COOKE P . . .

The judicial review proceeding was commenced on 5 October 1993. The proceeding sought an interim order preserving the position of the applicant and his child and his wife; an order quashing the removal order (as the warrant is now classified under the current legislation: see the Immigration Amendment Act 1991, §§ 2(6) and 34); an order directing a rehearing of the applicant's appeal or appeals; an order requiring the Minister to cancel the removal order and issue a permit under § 35 or otherwise allow the applicant to remain in New Zealand; and further or other relief. Reliance was placed on the International Covenant on Civil and Political Rights [of] 1966 and the Optional Protocol thereto. The Protocol gives an individual subject to New Zealand jurisdiction who has exhausted all available domestic remedies a right to apply to the Human Rights committee of the United Nations. That Committee is in substance a judicial body of high standing. Reliance was also placed on the Convention on the Rights of the Child [of] 1989. Certain administrative law grounds not related to those international instruments were also pleaded but were not relied on as separate grounds in the argument in this Court.

The application for an interim order under the Judicature Amendment Act 1972, § 8, came before McGechan J. on 1 November 1993 and was dismissed by him on 3 November, but the Judge made an interim order for in effect a stay of the removal pending appeal. On the hearing of the appeal this Court reserved judgment. The stay remains in force.

The Secretary for Foreign Affairs and Trade has advised that New Zealand ratified the abovementioned International Covenant on 28 December 1978 and acceded to the Optional Protocol on 26 May 1989; and that with certain reservations New Zealand ratified the Convention on the Rights of the Child on 13 March 1993. It is not in dispute that sufficient instruments of ratification or accession have been deposited to bring the Convention into force under art 49. It is important to note that, at the dates of the declining of the residence applications, the granting of the removal warrant, and the Associate Minister's decision to reject the appeal, the appellant's child had not been born. The circumstances now are of course quite different.

In an affidavit sworn on 21 October 1993 the Associate Minister, the Hon RFH Maxwell (now the Minister), states inter alia:

> The applicant's marriage and the birth of his child both occurred after I had made my decision to decline the § 63 appeal. I can say however that had these new facts been

> before me it is unlikely that my decision would have been any different. For an appeal to succeed under § 63 I had to be first satisfied that, because of exceptional circumstances of a humanitarian nature, it would be unjust or unduly harsh for the person concerned to be removed from New Zealand or for the removal warrant to remain in force for the full five years. In my experience it is common to find persons, in New Zealand unlawfully, who have entered into relationships or marriage with New Zealand citizens or residents; it is also common to find persons, in New Zealand unlawfully, who have children born in New Zealand. While the new circumstances which have arisen since I declined the applicant's appeal are clearly of a humanitarian nature, they are not exceptional.

The Associate Minister's affidavit makes no reference in any way to the international instruments. In the statement of defence it is admitted that the Minister did not take either the Covenant or the Convention into account when making "his decision." The meaning of "his decision" was not entirely clear, but counsel for the Crown accepted in this Court that at no stage has the Associate Minister or the Department taken the instruments into account. The essential argument for the Crown has been that they are not obliged to do so.

The primary provisions of the Covenant invoked for the applicant are in arts 23(1) and 24(1):

> 23(1). The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> 24(1). Every child shall have, without any discrimination as to race, colour, . . . national or social origin . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

It may be noted also that art 24(3) states[,] "Every child has the right to acquire a nationality."

The primary provisions of the Convention invoked for the applicant are in art 9(1):

> 9(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

That must be read together with art 9(4):

> 9(4) Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

In his judgment McGechan J. pointed out that the decisions attacked, up to April 1991, were made before the birth of the child and the marriage, so that there was then no call to take the Covenant or the Convention into account. While expressly leaving the point open, the Judge recognised that on a 1993 reconsideration it might be appropriate to take those international obligations into account. The Judge did say that it was made clear in the submissions to him that the applicant would want the Minister to reconsider on the basis of current factors. The statement of claim includes allegations bringing the execution of the removal order within the scope of the proceeding. Possibly because of the urgency of his decision, possibly because of the general nature of the argument before him, the Judge does not appear to have focused on what certainly has emerged as the major question in the appeal: namely, against the background of such powers as are available under the Immigration Act, should the Minister and the Department have regard to the international obligations concerning the

child and the family, in considering whether now to enforce the removal order?

Two decisions of the European Court of Human Rights appear distinctly relevant. Neither was cited to us in argument, but that implies no criticism, for the case had to be prepared under pressure and such decisions are not always easy to locate. For that reason we will quote the main passages in the judgments in extenso. Both cases relate, so far as now relevant, to art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as [is] in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In Berrehab v Netherlands (1988) 11 EHRR 322, the first applicant, a Moroccan citizen, was refused an entry permit after his divorce from his Dutch wife. The second applicant was his minor daughter, who lived with her mother. The first applicant had since remarried the mother but that point was not treated as important. The applicants complained that the father's deportation, inhibiting further contact between them, amounted to a violation of their rights to family life. By six votes to one it was held that there had been a breach of art 8. The majority judgment stated . . . :

> In the applicants' submission, the refusal to grant Mr. Berrehab a new residence permit after the divorce and his resulting expulsion amounted to interferences with the right to respect for their family life, given the distance between the Netherlands and Morocco and the financial problems entailed by Mr. Berrehab's enforced return to his home country. . . .
>
> The applicants claimed that the impugned measures could not be considered 'necessary in a democratic society'. . . .

In determining whether an interference was 'necessary in a democratic society', the Court makes allowance for the margin of appreciation that is left to the Contracting States.

In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. According to the Court's established case law, however, 'necessity' implies that the interferences correspond to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

Having to ascertain whether this latter condition was satisfied in the instant case, the Court observes, firstly, that its function is not to pass judgment on the Dutch immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Dutch Court of Cassation also noted the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life.

As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there—he had married a Dutch woman, and a child had been born of the marriage.

As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Berrehab and his daughter for several years and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young.

> Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8.

In Beldjoudi v France (1992) 14 EHRR 801 the facts are summarised in the headnote:

> While a minor, the first applicant lost his French nationality because his parents, Algerian by birth, failed to comply with French nationality legislation. Thereafter he consistently showed a desire to regain his French nationality, continued to live and work in France, and married a French woman. They had no children. After reaching the age of majority, the first applicant was convicted of numerous criminal offences for which he served a total of ten years' imprisonment. A deportation order was subsequently made against him and appealed unsuccessfully. While appeals were pending, he and his wife continued to live in France. The applicants complained that the deportation order would interfere with their right to private and family life within the meaning of Article 8 of the Convention and discriminated against the first applicant within the meaning of Article 14 of the Convention.

The Court held by seven votes to two that, if the decision to deport the husband were implemented, there would be a violation of art 8 with respect to both applicants. The majority judgment acknowledged that it was for the contracting states to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens. But the decisions of the contracting states in that field must, in so far as they might interfere with a right protected under art 8(1), be necessary in a democratic society: that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. . . .

It would appear therefore that under the European Convention a balancing exercise is called for at times. A broadly similar exercise may be required under the two international instruments relevant in the present case, but the basic rights of the family and the child are the starting point. It is accepted by the Crown that this case has never been considered from that point of view. Consideration from that point of view could produce a different result. . . .

Mr Carter for the respondents did not go as far as to submit that it is not possible under any provision of the [Immigration Act of 1987] to give the case effective reconsideration in the light of the birth and New Zealand citizenship of the child and the family situation. He pointed out correctly, however, that since the birth of the child no request had been made for reconsideration; and the main burden of his argument was that in any event the Minister and the Department are entitled to ignore the international instruments.

That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although, for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there must at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution. For the appellant Mr. Fliegner drew our attention to the Balliol Statement of 1992, . . . with its reference to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights. It has since been reaffirmed in the Bloemfontein Statement of 1993. . . .

In Ashby v Minister of Immigration [1981] 1 NZLR 222 there were recognitions in this Court that some international obligations are so manifestly important that no reasonable Minister could fail to take them into account. It is not now appropriate to discuss . . . whether [in New Zealand] when an Act is silent as to relevant considerations, international obligations are required to be taken into account as such.

If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol[,] the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments

to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.

This emerges as a case of possibly far-reaching implications. On the other hand it can be seen as dependent on its own facts. The Minister or Associate Minister has had no opportunity to consider it in the light of the rights of the child. Whatever the merits or demerits of either of her parents, she is not responsible for them, and her future as a New Zealand citizen is inevitably a responsibility of this country. Universal human rights and international obligations are involved. It may be thought that the appropriate Minister would welcome the opportunity of reviewing the case in the light of an up-to-date investigation and assessment. Nothing of the sort appears to have occurred within the Department. Still less has the case been reconsidered, in the light of current circumstances, at ministerial level. This is fully understandable. The opportunity of reconsideration should be given.

For those reasons we adjourn the appeal sine die, to be brought on at seven days' notice, to enable the appellant to make such application as he is advised to make in the light of current circumstances; and to enable the Minister and his Department to consider any such application. In the meantime the stay remains in force.