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Varying Degrees of Openness Towards the International and Supranational Legal Sphere in the German Constitutional Order

– A Contemporary Appraisal of and Reflection on Helmut Steinberger's 'Lines of Development in the Recent Case-Law of the Federal Constitutional Court on Questions of International Law' –

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Abstract

The article analyses key problem areas identified by Helmut Steinberger in his contribution on 'Lines of Development in the Recent Case-Law of the Federal Constitutional Court on Questions of International Law' (original German title 'Entwicklungslinien in der neueren Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen') from 1988 through the lens of the current body of the case-law of the Federal Constitutional Court. In particular, the focus is directed at the dualistic construction of the entanglement of the international legal order with the German constitutional order, the status and rank of the European Convention on Human Rights within the inner logic of German constitutional law, the possibility to invoke supranational fundamental rights within the constitutional complaint procedure before the Federal Constitutional Court, the aspect of the primacy of EU law, universal minimum standards as present within case-law of the Federal Constitutional Court and, finally, the limits of executive prerogatives within the international sphere. The article also reflects – from a broader perspective – on Steinberger's shift of professional identities – from a judge of the Federal Constitutional Court to an academic and, in particular, Director of the Max Planck Institute for Comparative Public Law and International Law commenting on decisions of the Court which he was co-responsible for.

Keywords

entanglement of the German Constitution with public international law and EU law – the 'open constitutional state' – possibility to invoke ECHR rights and supranational fundamental rights – judicial self-restraint and foreign affairs – Federal Constitutional Court

Helmut Steinberger's[1] contribution on the 'Lines of Development in the Recent Case-Law of the Federal Constitutional Court on Questions of International Law'[2] (original German title 'Entwicklungslinien in der neueren Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen') was published in 1988.[3] The article is written by a former judge of the

1 Helmut Steinberger served as a judge to the Federal Constitutional Court from 1975 to 1987. He held the Chair for Public Law and Public International Law at the University of Heidelberg. He served as director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg since 1987.

2 Translation by the author.

3 Steinberger, 'Entwicklungslinien in der neueren Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen', HJIL 48 (1988), 1-17 (1 et seq.) (translation by the author with the assistance of DeepL).

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Federal Constitutional Court (FCC) who had recently returned – after a long-running and illustrious career in the judiciary – to an academic role (I.). In the article, Steinberger reflects on the various problems arising from the entanglement of the national with the international legal sphere that the FCC has addressed in its case-law (II.),[4] which has frequently oscillated between legal progressiveness on the one hand and judicial self-restraint on the other (III.).

I. Former Judge to Academic – A Shift of Professional Identities

Helmut Steinberger was a judge of the FCC, who served in its second senate from 1975 to 1987.[5] The article in question was hence published in the year after his term came to an end. In his role as a judge of the FCC, Steinberger contributed to landmark decisions of the FCC which shaped the openness of the German constitutional order towards supranational and international law, particularly in the sphere of human rights protection: Amongst these are the *Solange II*-ruling,[6] as well as decisions acknowledging the normative significance of international (treaty) law, in particular, the European Convention on Human Rights[7] (ECHR)[8] (e. g. the *Pakelli*-order[9]) within the German constitutional order (and the legal possibility for individuals to invoke ECHR rights before German courts – at least indirectly).[10] One of the most controversial judgments shaped *inter alia* by Helmut Stein-

4 Steinberger (n. 3), 2 et seq.

5 His term expired on 16 November 1987.

6 FCC, order of 22 October 1986, 2 BvR 197/83 – *Solange II*, BVerfGE 73, 339 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1986/10/rs19861022_2bvr019783en.html>, last access 7 August 2025).

7 213 UNTS 221; ETS No. 005.

8 See commentary by Jochen Frowein, 'Anmerkung zur Pakelli-Entscheidung des Bundesverfassungsgerichts', HJIL 46 (1986), 286-289 (286) (comment).

9 FCC, order of 11 October 1985, 2 BvR 336/85 – *Pakelli* (participating judges Wolfgang Zeidler, Helmut Steinberger and Ernst-Wolfgang Böckenförde) (reprinted in HJIL 46 (1986), 289-294).

10 See e. g. FCC, *Pakelli* (n. 9), HJIL 46 (1986), 289-294 (290): 'A judicial decision adversely affecting an individual that is based on a provision of national law that is contrary to general international law or an interpretation and application of a provision of national law that is incompatible with general international law violates the right to free development of the personality protected by Article 2(1) of the Basic Law. This applies irrespective of whether the violated general rule of international law establishes rights or obligations for the individual or is directed exclusively at states or other subjects of international law.' (translation by the author with assistance by DeepL).

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berger concerned the North Atlantic Treaty Organization (NATO) double-track decision,[11] which dealt with the constitutional limits of a transfer of sovereign rights in the sense of Art. 24 para. 1 Basic Law (BL – 'Grundgesetz') as well as questions of restrained judicial control in the spheres of foreign policy.[12]

Consequently, Steinberger's piece fits (partly) into the scholarship category of a 'former judge commenting on his own rulings'. From that perspective and somewhat inevitably, Steinberger's contribution appears as an effort to shape the academic narrative on key FCC lines of reasoning that Steinberger himself had participated in developing. This, in turn, raises deeper questions:

From a 'traditional' point of view, judges are expected to speak only *through* their judgments,[13] and refrain from speaking *about* their judgments. Lord Kilmuir famously stated: 'So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism. It would, moreover, be inappropriate for the Judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment: and in no circumstances, of course, should a Judge take a fee in connection with a broadcast.'[14] More recently, this rule gave way to understanding the communication of judgments, within certain limits,[15] as an important task of the judicial branch.[16] Courts and judges communicate not only through their judgments but also beyond the

11 FCC, judgment of 18 December 1984, 2 BvE 13/83 – *Atomwaffenstationierung*, BVerfGE 68, 1 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1984/12/rs19841218_2bve001383en.html>, last access 7 August 2025); see Hans-Joachim Cremer, 'Nachruf Bundesverfassungsrichter a. D. Prof. Dr. iur. Helmut Steinberger', HJIL 74 (2014), 685-688 (686 et seq.).

12 See also comments further below at II. 6. (p. 24 et seq.).

13 See Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses* (V. S. Verlag 2010), 455. See on judges and media Daryl Dawson, 'Judges and the Media', UNSWLJ 10 (1987), 17-31.

14 Letter from Lord Kilmuir to Sir Ian Jacob K. B. E. (12 December 1955), reprinted in Anthony W. Bradley, 'Judges and the Media – the Kilmuir Rules', Public Law (1986), 383-386 (385).

15 Jannika Jahn, 'Verfassungsrichter in der Defensive', *Verfassungsblog,* 21 May 2025, doi: 10.17176/20200521-133146-0, <https://verfassungsblog.de/verfassungsrichter-in-der-defensive>, last access 7 August 2025. For a foundational analysis Jannika Jahn, *Die Medienöffentlichkeit der Rechtsprechung und ihre Grenzen* (Nomos 2021), 29 et seq.

16 See on this question very recently the panel 'From the Court to the Public and Back: Constitutional Courts in the Battlefield of Communication' (28 July 2025) with presentations by Rodrigo Garcia Cadore, Livia Guimaraes, Maria Pia Guerra and Pedro Henrique Gonçalves de Oliveira Ribeiro within the I•CON-S annual conference in Brasilia (28 to 30 July 2025).

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mere judgment itself.[17] This is particularly important in times of backlash against major features of modern constitutionalism characterising the era of the 'post-factual' and conspiracy theories. Communicating judgments is a manifestation of the ideals of publicity[18] and transparency[19] within the legal order, which necessitate interactions with the public and professional audiences. In Germany, the idea of publicity regarding the process of rendering judgments took considerable time to gain traction: Actual practices and processes of adjudication outside the actual courtroom have remained in an inaccessible 'black box' that is only rarely reflected upon in scholarship.[20] It was not until 1970[21] that the FCC started publishing dissenting opinions. While the 'backstage'[22] of the FCC remains to some extent opaque (deliberations occur behind closed doors),[23] the FCC made greater efforts to communicate its judgements in the public sphere in its

17 See e. g. interviews given by Peter Huber, Andreas Voßkuhle and Koen Lenaerts on the PSPP judgment of the FCC (FCC, judgment of 5 May 2020, 2 BvR 859/15 – *PSPP*, BVerfGE 154, 17 (official translation: <https://www.bverfg.de/e/rs20200505_2bvr085915en.html>, last access 7 August 2025)), in which the court declared both EU secondary law and the CJEU judgment confirming its compatibility with EU primary law as acts *ultra vires*. See interview with Peter Huber, 'Das EZB-Urteil war zwingend notwendig', FAZ, 12 May 2020, <https://www.faz.net/aktuell/politik/inland/peter-huber-im-gespraech-das-ezb-urteil-war-zwingend-16766682.html>, last access 7 August 2025; interview with Andreas Voßkuhle, 'Erfolg ist eher kalt', Die Zeit, 13 May 2020, <https://www.zeit.de/2020/21/andreas-vosskuhle-ezb-anleihen kaeufe-corona-krise>, last access 7 August 2025; interview with Koen Lenaerts, 'Europese Hof komt meer center stage', NRC, 17 May 2020, <https://www.nrc.nl/nieuws/2020/05/17/president-koen-lenaerts-europese-hof-komt-meer-center-stage-a4000000>, last access 7 August 2025. On this see Jahn, '*Verfassungsrichter*' (n. 15).

18 Comprehensively Jahn, *Medienöffentlichkeit* (n. 15), 60 et seq. On the issue of 'publicity'and 'democracy' (with further references) already Paulina Starski, 'Art. 53a' in: Peter Huber and Andreas Voßkuhle (eds), *Grundgesetz* (8th edn, C. H. Beck 2024), para. 102.

19 On transparency Jürgen Bröhmer, *Transparenz als Verfassungsprinzip: Grundgesetz und Europäische Union* (Mohr Siebeck 2004), 33 et seq. (with view to the BL).

20 But see Gertrude Lübbe-Wolff, *Beratungskulturen* (Konrad Adenauer Stiftung 2023), 31 et seq.

21 Viertes Gesetz zur Änderung des Gesetzes über das Bundesverfassungsgericht, BGBl. I 1970 S. 176. See § 30 para. 2 1st cl. of the Statute on the Federal Constitutional Court (BGBl. 1993 I S. 1473; BGBl. 2024 I Nr. 440).

22 See Barbara Stollberg-Rilinger, 'Privacy at Court? Reconsidering the Public/Private Dichotomy' in: Dustin M. Neighbors, Lars Cyril Nørgaard and Elena Woodacre (eds), *Notions of Privacy at Early Modern European Courts* (Amsterdam University Press 2024), 75-93 (77 et seq.). The term 'backstage practices' is – in its constitutional dimension – particularly shaped by *Rodrigo Cadore*, see 'The Constitution Is (Not Quite) What Judges Say It Is: How the 'Third Senate' of the German BVerfG and the Eleven Cabinets of the Brazilian STF Shape the Law from Behind the Scenes', presentation during the I•CON-S annual conference in Brasilia on 29 July 2025. On the 'backstage' at the ECtHR see Matthias Jestaedt, 'Case-law à la Strasbourg' in: Claudia Seitz, Ralf Michael Straub and Robert Weyeneth (eds), *Rechtsschutz in Theorie und Praxis* (Helbing Lichtenhahn 2022), 973-987.

23 See § 30 para. 1 cl. 1 of the Statute on the Federal Constitutional Court (see n. 21).

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recent past.[24] Obviously, the challenges connected with the communication of judgments by the Court itself – e. g. within press releases or via particularly 'catchy' and clear 'Leitsätze' ('headnotes') – are distinct from those that entail when judgments are commented on by individual judges who are (co-)responsible for them. The latter practice raises challenging questions about its possible negative effects on the public trust in the judicial branch and the authority of the law in its adjudicated form.[25] Many scholars would agree that the sitting judges should at least critically reflect on the manner in which they comment on their rulings and pursue restraint, particularly when commenting outside the courtroom.[26] The expiry of a judge's term forms an important caesura that changes the relevant legal considerations to be made about commenting on judgments and will typically come along with a greater inclination of former judges to become more 'talkative'. This is particularly true of the judges with a professional background in academia who return to the role of mere observers and analysts of the case-law of 'their' court after their term of office expires.

Steinberger – who interests us here – writes his article in a rather distant style that does not openly address which piece of case-law he was responsible for. While more transparency in this regard would not have been ill-advised, Steinberger's analysis displays a careful tone, far from being lurid or pushy. This seems to correspond with his character: Steinberger was known to be rather reserved and not keen on any form of 'staging'.[27] As the footnotes explain, Steinberger's article 'is based on a lecture given on the occasion of the author's joining the Institute's Board of Directors'.[28] Hence, it can be assumed that the article at hand had also been crafted to shed light on Steinberger's future academic agenda and to highlight the topics that would become particularly prominent at the Max Planck Institute for Comparative Public and Public International Law (MPIL), with Steinberger's appointment as a director. From that perspective, Steinberger's contribution might serve as evidence of a shift of professional identities – from the 'academic who became judge' to a mere academic (who formerly served as a judge). Yet even after his full-time return to academia, Steinberger did not take the judge's robe off for a long time: Already in 1990, he was appointed as president of the arbitral

24 See the practice of press releases, the specific form of the delivery of decisions and the distribution of short pronouncements to journalists. On the topic of 'judgment communication' see Angelika Nußberger, 'Rechtsprechungskommunikation' in: Anna-Bettina Kaiser et al. (eds), *Über Recht sprechen* (Mohr Siebeck 2025), 107-123.

25 See here e. g. Jahn, *Medienöffentlichkeit* (n. 15), 47.

26 On the debate Jahn, *Medienöffentlichkeit* (n. 15), 44 et seq.

27 Cremer (n. 11), 687. See Convention on Conciliation and Arbitration within the CSCE (adopted by the CSCE Council at Stockholm, on 15 December 1992).

28 Steinberger (n. 3), 1 (*) (translation by the author with the assistance of DeepL).

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tribunal based on the Treaty on the Creation of a Monetary, Economic and Social Union between the Federal Republic of Germany and the German Democratic Republic;[29] since 1995 he served, furthermore, as judge to the Court of Conciliation and Arbitration of the Organization for Security and Co-operation in Europe (OSCE), and became its vice-president in 2001.[30] This inclination towards judicial roles may account for his rather distanced, ostensibly neutral treatment of the FCC's case-law.

II. Steinberger's Vision and the Constitutional Reality as of Today

In his final considerations, Steinberger notes a quantitative increase in FCC case-law on the questions of international law and regards this as 'partly a reflection of the constantly growing international integration of the Federal Republic of Germany'.[31] According to Steinberger, the Court has elaborated on significant issues of the entanglement of the German constitutional order with international and supranational law, while the 'difficulties in dealing with them judicially' have manifested themselves in the course of its judicial activity.[32] Quite easily, one would have reached a similar conclusion after analysing the engagement of the FCC with questions of international and supranational law in the period from 1988 to 2024.

In the years since the publication of Steinberger's contribution and the footprints he left on the corpus of FCC case-law, the Court has given shape to the idea of a constitutional order which is open towards the inter- and supranational sphere (the concept of the 'offene Verfassungsstaat' or the essentially dynamic 'open constitutional state'),[33] thereby simultaneously raising further foundational questions concerning its specific contours.

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29 See Art. 7 Vertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik vom 18. Mai 1990, BGBl. 1990 II S. 537.

30 Cremer (n. 11), 688.

31 Steinberger (n. 3), 16 (translation by the author with the assistance of DeepL).

32 Steinberger (n. 3), 16 (translation by the author with the assistance of DeepL).

33 On the idea of the 'open constitutional state' in general see Paulina Starski, 'Art. 59' in: Ingo v. Münch and Philip Kunig, *Grundgesetz-Kommentar*, vol. 1 (8th edn, C. H. Beck 2025), para. 12 with further references, in particular Christian Tomuschat,' § 226 Staatsrechtliche Entscheidung für die internationale Offenheit' in: Josef Isensee and Paul Kirchhof (eds), *Handbuch des deutschen Staatsrechts*, vol. XI (3rd edn, C. F. Müller 2013), 3-61; Bardo Fassbender, *Der offene Bundesstaat* (Mohr Siebeck 2007), 8 et seq. The notion of the 'open constitutional state' was shaped by Klaus Vogel, *Die Verfassungsentscheidung des GG für eine internationale Zusammenarbeit* (Mohr Siebeck 1964), 33 et seq., 46 et seq.

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But how does Steinberger view the case-law of the FCC, and how does his 'vision' for the internationally and supranationally-entangled constitutional state relate to the constitutional reality of today?

In the following parts, I will focus on some of the problem areas identified by Steinberger in his piece from 1988, and reflect on the entanglement of the national legal order with the international and supranational legal sphere as it manifests in the current body of FCC jurisprudence (1.). I will subsequently address the case-law of the FCC on the status and rank of the ECHR (2.), display the recent turn in FCC jurisprudence on the possibility to invoke supranational fundamental rights within the constitutional complaint procedure (3.), and sketch the hierarchical relationship of European Union (EU) and German law ('limbo') from the perspective of current FCC case-law (4.). The following section will then shed some light on the 'universal minimum standard' in the context of extraditions (5.), and ultimately turn to questions of judicial review in the sphere of foreign policy (6.). In each case I will put Steinberger's propositions and predictions into the context of the current FCC jurisprudence, simultaneously critically engaging with some of Steinberger's claims.

1. The Entanglement of the National Legal Order With the International Legal Sphere and Aspects of Judicial Review

In his analysis Steinberger sketched – at the outset – the oscillation of the FCC between the so-called 'transformation theory'[34] on the one hand and the 'enforcement theory'[35] on the other hand.[36] Both theories aim to explain the relationship between international and national law from a constitutional perspective. As it is true for every constitutional order, it is up to the BL to decide how it constructs its relationship with international law.[37] Within the

34 See Silja Vöneky, '§ 236 Verfassungsrecht und völkerrechtliche Verträge' in: Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland,* vol. XI (3rd edn, C. F. Müller 2013), 413-427, para. 10.

35 See only Karl J. Partsch, *Die Anwendung des Völkerrechts im innerstaatlichen Recht* (C. F. Müller 1964), 19 et seq.; Walter Rudolf, *Völkerrecht und deutsches Recht* (Mohr Siebeck 1967), 164 et seq.; Gerhard Boehmer, *Der völkerrechtliche Vertrag im deutschen Recht* (Carl Heymanns 1965), 36 et seq.; Erich Kaufmann, 'Normenkontrollverfahren und völkerrechtliche Verträge' in: Otto Bachof, Martin Draht, Otto Gönnewein and Ernst Walz (eds), *Forschungen und Berichte aus dem Öffentlichen Recht, Gedächtnisschrift für Walter Jellinek* (Isar Verlag 1955), 445-456 (447 et seq.).

36 See Steinberger (n. 3), 3 et seq.

37 My comments on 'transformation theory' v. 'enforcement theory' here and in the coming paragraphs draw from Starski, 'Art. 59', (n. 33), para. 99 et seq.

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German constitutional architecture, Art. 25 BL and Art. 59 BL serve as the key 'valves' which open its structure to customary international law (CIL) and general principles of law (Art. 25 BL) as well as international treaty law (Art. 59 BL). While Steinberger acknowledges that FCC jurisprudence turned to the 'transformation theory' in its early days, there was later a rapprochement to the idea of a 'reception' of international treaty law.[38] This trend in FCC jurisprudence should not be understood – as Steinberger argues – as a 'pleasing partisanship in an academic doctrinal dispute between the theories of formation and implementation, incorporation or reception'.[39] Behind this trend, instead, would lie 'factual problems of judicial legal determination'.[40] Steinberger is highly critical of the 'transformation theory', attesting to 'unevenness'; in terms of interpretation, it would engender 'severe distortions'.[41] Steinberger's critical stance towards the 'transformation theory' appears more than justified since this theoretical construct creates unnecessary problems:

Both theories – the 'transformation theory' on the one hand and the 'enforcement theory' on the other hand[42] manifest in divergent practical outcomes: Following a dualist logic in the sense of Heinrich Triepel,[43] the 'transformation theory' assumes[44] that international law becomes part of a national legal order by virtue of an act of transformation.[45] This transforming act (e. g. a parliamentary statute which 'approves' the respective interna-

38 Steinberger (n. 3), 4.

39 Steinberger (n. 3), 4 (translation by the author with the assistance of DeepL).

40 Steinberger (n. 3), 4 (translation by the author with the assistance of DeepL).

41 Steinberger (n. 3), 4 (translation by the author with the assistance of DeepL).

42 See also critically Dana Burchardt, 'Looking Behind the Façade of Monism, Dualism and Pluralism' in: Helmut Aust, Heike Krieger and Thomas Kleinlein (eds), *Research Handbook on International Law and Domestic Legal Systems* (Edward Elgar 2024), 261-279. From a constitutionalist perspective see Mattias Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement' in: Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press 2007), 256-293 (256 et seq.); Joseph G. Starke, 'Monism and Dualism in the Theory of International Law', BYIL 17 (1936), 66-81 (66 et seq.); Pierre-Hugues Verdier and Mila Versteeg, 'Modes of Domestic Incorporation of International Law' in: Wayne Sandholtz and Christopher A. Whytock (eds), *Handbook on the Politics of International Law* (Edward Elgar 2017), 149-175 (149 et seq.). For an empirical analysis see Pierre-Hugues Verdier and Mila Versteeg, 'International Law in National Legal Systems', AJIL 109 (2015), 514-533 (514 et seq.).

43 Dualism is prominently connected with Triepel according to whom international law and national law are 'two circles that at most touch but never intersect', see Heinrich Triepel, *Völkerrecht und Landesrecht* (C. L. Hirschfeld 1899), 111 (translation by the author).

44 Generally Florian Becker, 'Völkerrechtliche Verträge und parlamentarische Gesetzgebungskompetenz', NVwZ 24 (2005), 289-291 (289 et seq.).

45 Triepel (n. 43), 112 et seq.; Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, reprint of the 20th edn (C. F. Müller 1999), para. 102.

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tional treaty) duplicates the relevant international legal rule within the national legal sphere. Following this concept, an international legal rule does not become binding within the national sphere simply because it forms part of international law; rather, its validity and binding nature originate in the national legislative act. Since the foundation of its validity becomes 'nationalised', the international legal rule is ultimately subjected to national legal logic. Consequently, its fate becomes independent of developments on the international plane (e. g. an internationally valid termination of the relevant international treaty).[46] These undesirable consequences have to be alleviated through operationalising conditions within the legal doctrine that ensure that the national legal reality is not detached from the international (in) validity of rules.[47] Following the 'transformation theory' resolutely, a 'transformed' and thereby 'nationalised' international legal rule would also have to be interpreted along the lines of national rules of exegesis.[48] The 'enforcement theory' follows a more 'monistic'[49] normative logic: An international legal rule retains its international legal nature and is declared to be enforceable within the national legal sphere.[50] This has significant consequences: Since the rule in question does not forfeit its quality as an element of international law, its existence, interpretation, and possible modifications are governed by the principles of international law. A 'moderate'[51] version of the 'transformation theory', which operates with a very generalised mode of transformation, arrives at results similar to the 'enforcement theory' (e. g. in terms of subjecting the international legal rule to international standards of interpretation).[52]

The FCC has refrained until now from explicitly taking sides in this conceptual dispute, and has remained ambiguous in its language regarding the two models: The oscillation of the FCC jurisprudence already pointed out by Steinberger has persisted for a considerable time, yet some trends are identifiable:[53] In 1952, the FCC declared that the parliamentary approval

46 See on the effects on comparative arguments in the interpretation of constitutional provisions Andreas v. Arnauld, *Völkerrecht* (5th edn, C. F. Müller 2023), para. 509: The 'transformation theory' would render it easier to block out the 'persuasive authority of comparative arguments' (translation by the author).

47 Steinberger (n. 3), 4.

48 See Steinberger (n. 3), 4.

49 See Hans Kelsen, *Reine Rechtslehre*, reprint of the 1st edn (Mohr Siebeck 2008), 143 (= 134 et seq.).

50 Partsch (n. 35), 19 et seq., 142 et seq., 147.

51 See Rudolf (n. 35), 164 et seq.

52 See on 'moderate dualism' Rudolf Streinz, 'Art. 25' in: Michael Sachs, *Grundgesetz* (10th edn, C. H. Beck 2024), para. 13.

53 See on a 'dualist trend' FCC, judgment of 30 July 1952, 1 BvF 1/52 – *Deutschlandvertrag*, BVerfGE 1, 396 (410 et seq.).

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statute in the sense of Art. 59 para. 2 cl. 1 BL would convey 'the substance of the international treaty validity as domestic German law (transformation)'.[54] Later on, however, the FCC found that Art. 25 BL could be interpreted as a 'general order to apply the law'[55] ('Rechtsanwendungsbefehl') with regard to CIL.[56] At times, the FCC appears to opt for a combination model: Thus, the Court stated in its decisions that '[t]he federal legislator […] transposed the treaties into national law' thereby 'giving them legal effect'.[57] With regard to the ECHR,[58] EU law,[59] secondary legal acts of international organisations,[60] and other treaty law,[61] the FCC refers to an 'order on the application of the law',[62] to a 'national order giving effect' to inter-/supranational law 'at

54 FCC, *Deutschlandvertrag* (n. 53), 411 (translation by the author).

55 FCC, order of 13 December 1977, 2 BvM 1/76 – *Philippinische Botschaft*, BVerfGE 46, 342 (363).

56 FCC, order of 10 November 1981, 2 BvR 1058/79 – *Eurocontrol II*, BVerfGE 59, 63 (90); FCC, judgment of 12 July 1994, 2 BvE 3/92 – *Out-of-area Einsätze*, BVerfGE 90, 286 (364).

57 See FCC, order of 14 October 2004, 2 BvR 1481/04 – *Görgülü*, BVerfGE 111, 307 (official translation: <https://www.bverfg.de/e/rs20041014_2bvr148104en.html>, last access 7 August 2025), para. 31. 'Rechtsanwendungsbefehl' should, however, rather be translated with 'command to apply as/the law' or 'order on the application of the law'. With reference to the *Görgülü* order also FCC, order of 18 December 2008, 1 BvR 2604/06, NJW 2009, 1133, para. 23.

58 FCC, judgment of 4 May 2011, 2 BvR 2365/09 – *Sicherungsverwahrung*, BVerfGE 128, 326 (official translation: <https://www.bverfg.de/e/rs20110504_2bvr236509en.html>, last access 7 August 2025), para. 87; FCC, judgment of 12 June 2018, 2 BvR 1738/12 – *Streikverbot für Beamte*, BVerfGE 148, 296 (official translation: <https://www.bverfg.de/e/rs20180612_2bvr173812en.html>, last access 7 August 2025), para. 127. But see FCC, *Görgülü* (n. 57), para. 31 et seq.

59 FCC, judgment of 30 June 2009, 2 BvE 2/08 – *Lissabon*, BVerfGE 123, 267 (official translation: <https://www.bverfg.de/e/es20090630_2bve000208en.html>, last access 7 August 2025) ('order giving effect to European law contained in the act of approval'), para. 343. See furthermore FCC, order of 15 December 2015, 2 BvR 2735/14 – *Identitätskontrolle*, BVerfGE 140, 317 (official translation: <https://www.bverfg.de/e/rs20151215_2bvr273514en.html>, last access 7 August 2025), para. 40; FCC, judgment of 21 June 2016, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 – *OMT*, BVerfGE 142, 123 (official translation: <https://www.bverfg.de/e/rs20160621_2bvr272813en.html>, last access 7 August 2025), para. 120; FCC, order of 13 February 2020, 2 BvR 739/17 – *Einheitliches Patentgericht*, BVerfGE 153, 74 (official translation: <https://www.bverfg.de/e/rs20200213_2bvr073917en.html>, last access 7 August 2025), para. 115.

60 FCC, order of 24 July 2018, 2 BvR 1961/09 – *Europäische Schulen*, BVerfGE 149, 346 (361).

61 Concerning a double taxation treaty: FCC, order of 15 December 2015, 2 BvL 1/12 – *Treaty Override,* BVerfGE 141, 1 (official translation: <https://www.bverfg.de/e/ls20151215_2bvl000112en.html>, last access 7 August 2025), para. 46. Concerning the Convention Relating to the Status of Refugees see FCC, order of 8 December 2014, 2 BvR 450/11, NVwZ 2015, 361, para. 35. With view to the European Mutual Assistance Convention FCC, order of 8 June 2010, 2 BvR 432/07, NJW 2011, 591, para. 27.

62 With regard to the ECHR see FCC, *Sicherungsverwahrung* (n. 58) para. 87.

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national level'[63] or an 'order giving effect to an international treaty at the national level'.[64]

However, the 'non-determination' of the FCC in terms of the 'conceptual frame' does not come as a surprise:

First, since the 'transformation theory' and 'enforcement theory' are 'theories' in the original sense of the term – aiming to describe and explain a (legal) reality that the FCC contributes to[65] – there has been no formal necessity for the Court to take a stand on either side. Secondly, the FCC is able to avoid addressing the 'severe inconsistency'[66] of the 'transformation theory' regarding the rules guiding the interpretation of international treaties by referring to the principle of the 'friendliness' or 'cordiality' of the German constitutional order towards international law derived from Art. 1 para. 2, Art. 9 para. 2, Art. 24 to Art. 26 and Art. 59 BL.[67] This principle requires an interpretation of the national statutes in accordance with international law ('völkerrechtskonforme Auslegung'), which is compatible with both of the theories. Hence, the Court found 'work-arounds', which allow it to remain (theoretically) ambiguous. The appeal of operating with 'work-arounds' rather than taking a clear position remains, however, opaque.

2. Status and Rank of International Treaties and the European Convention on Human Rights – The *Görgülü* Turn

The friendliness of the BL towards international law also serves as a key concept to grasp the status of the ECHR within the German constitutional order. Along these lines, Steinberger attests the case-law of the FCC an

63 FCC, *Identitätskontrolle* (n. 59), para. 40. See also FCC, judgment of 6 December 2022, 2 BvR 547/21, 2 BvR 798/21 – *Next Generation EU*, para. 114 ('order giving effect to European law').

64 FCC, *Treaty Override* (n. 61), para. 46.

65 See Rudolf (n. 35), 158 et seq.

66 Steinberger (n. 3), 4 (translation by the author: 'schweren Verwerfungen').

67 See Mehrdad Payandeh, 'Verfassungsrechtliche Grundlagen der Völkerrechtsfreundlichkeit in Deutschland', HJIL 83 (2023), 609-628 (613) and Mehrdad Payandeh, 'Völkerrechtsfreundlichkeit als Verfassungsprinzip', JöR 57 (2009), 465-502 (483); Andreas Paulus, 'Völkerrechtsfreundlichkeit in der Rechtsprechung des Bundesverfassungsgerichts', HJIL 83 (2023), 869-892; Daniel Knop, *Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze* (Mohr Siebeck 2013), 200 et seq. See recent decisions of the FCC, order of 6 November 2019, 1 BvR 16/13 – *Recht auf Vergessen I*, BVerfGE 152, 152 (official translation: <https://www.bverfg.de/e/rs20191106_1bvr001613en.html>, last access 7 August 2025), para. 61; FCC, order of 1 December 2020, 2 BvR 1845/18, 2 BvR 2100/18 – *Rumänien II*, BVerfGE 156, 182 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/12/rs20201201_2bvr184518en.html>, last access 7 August 2025), para. 63.

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enhanced openness towards the ECHR,[68] and already points towards the *Görgülü*-rationale which took the Court another 16 years to adopt.[69] In a way, *Görgülü* can be seen as the crystallisation of the doctrinal groundwork laid out by the jurisprudence of the FCC during Steinberger's term. Here, the broader context is of importance:

Art. 25 BL[70] provides that general rules of international law, including CIL and general principles of law (Art. 38 para. 1 lit. c ICJ Statute[71]), rank within the normative hierarchy between the BL and ordinary statutes.[72] This status does, however, not apply to international treaties.[73] In principle, both the 'enforcement theory' as well as the 'transformation theory' would lead to the result that international treaty law shares the rank of the statute which transforms it into national law or renders it applicable within the national legal order (see Art. 59 para. 2 cl. 1 BL).[74] A parliamentary statute cannot confer a higher rank to an international rule than it carries itself. The ECHR, whose validity and applicability rests on Art. 59 para. 2 cl. 1 BL in conjunction with the parliamentary approval statute, shares the formal rank of statutory law.[75] Theoretically, a more recent parliamentary statute could overwrite a normatively conflicting applicable international treaty according to the legal collision principle of *lex posterior derogat legi priori*.[76] The FCC has acknowledged that 'subsequent legislatures must be able to revise, with the limits set by the Basic Law, legislative acts undertaken by earlier legislatures'.[77] This idea of a 'treaty override'[78] brings us to a normative conflict between two constitutional principles – the principle of democracy (see Art. 20 para. 1, 2 BL) on the one hand, and the openness of the German constitutional order towards international law on the other. Both require a

68 Steinberger (n. 3), 8.

69 FCC, *Görgülü* (n. 57).

70 For the BL translation see <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html>, last access 7 August 2025.

71 UNCIO XV, 355.

72 The following considerations draw from Starski, 'Art. 59' (n. 33), para. 104 et seq.

73 See Ferdinand Wollenschläger, 'Art. 25' in: Horst Dreier (ed.), *Grundgesetz Kommentar* (3rd edn, Mohr Siebeck 2015), para. 17.

74 On the special case of administrative treaties see Art. 59, para. 2, cl. 2 BL.

75 FCC, order of 14 October 2004, 2 BvR 1481/04 – *Berücksichtigung der Entscheidungen des EGMR durch deutsche Gerichte*, NJW 2004, 3407, 3412; Christian Hillgruber, 'Art. 1' in: Volker Epping and Christian Hillgruber (eds), *BeckOK Grundgesetz* (62th edn, C. H. Beck, 15 June 2025), para. 57.

76 Starski, 'Art. 59', (n. 33), para. 104.

77 FCC, *Treaty Override* (n. 61), para. 53.

78 See Starski, 'Art. 59' (n. 33), para. 104 (with further references). See generally Robert Frau, *Der Gesetzgeber zwischen Verfassungsrecht und völkerrechtlichem Vertrag* (Mohr Siebeck 2015), 27 et seq.

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careful balance.[79] Since any 'treaty override' would lead to a violation of the respective treaty and form the basis of international legal responsibility on the part of Germany, the FCC presumes that the legislator does not intend to contradict international treaties binding on Germany with the statutes it adopts[80] – a thought which is also taken up by Steinberger in his piece.[81] The intent to deviate from international treaty law would have to be manifest within a statute passed by the legislative organs, Steinberger argues, 'which is hardly ever to be assumed'.[82] Here, Steinberger appears to be slightly too optimistic: The decision of the FCC on the Agreement for the Avoidance of Double Taxation with respect to Taxes on Income and Capital between Turkey and Germany[83] evidences that a 'treaty override' is, from the perspective of the FCC, actually more than just a theoretical option.[84]

The ECHR presents, however, a distinct case regarding a possible 'treaty override' *inter alia* because of its entanglement with supranational law (see e. g. Art. 6 para. 3 Treaty on European Union [TEU]).[85] Nevertheless, the presumption of the legislator intending to act in conformity with international law forms also an element of the FCC jurisprudence on the ECHR. It is a manifestation of an international law-friendly interpretation ('völkerrechtsfreundliche Auslegung')[86] and normatively linked to Art. 59 para. 2 BL. Yet, according to the FCC, it is particularly Art. 1 para. 2 BL which contains a constitutional commitment to 'inviolable and inalienable human rights' and attributes an enhanced normative significance to the ECHR.[87]

79 See the separate opinion by Doris König in the Treaty Override Decision *Treaty Override* (n. 61), paras 1 et seq.

80 FCC, order of 26 March 1987, 2 BvR 589/79 – *Unschuldsvermutung*, BVerfGE 74, 358 (370); FCC, *Treaty Override* (n. 61), para. 30. Concerning the ECHR see also Mehrdad Payandeh and Heiko Sauer, 'Menschenrechtskonforme Auslegung als Verfassungsmehrwert', Jura 4 (2012), 289-298 (295); Johannes Masing, '§ 2 Verfassung im internationalen Mehrebenensystem und völkerrechtliche Verträge' in: Matthias Herdegen, Johannes Masing, Ralf Poscher and Klaus Ferdinand Gärditz (eds), *Handbuch des Verfassungsrechts* (C. H. Beck 2021), paras 127, 130, 131; Johannes Masing, '§ 2 Constitution and Multi-Level Governance Under the Conditions of Internationalisation' in: Matthias Herdegen, Johannes Masing, Ralf Poscher and Klaus Ferdinand Gärditz (eds), *Constitutional Law in Germany* (C. H. Beck 2025), para. 53 et seq.

81 E. g. Steinberger (n. 3), 9.

82 Steinberger (n. 3), 9 (translation by the author with the assistance of DeepL).

83 BGBl. 2012 II 17, 526 et seq.

84 FCC, *Treaty Override* (n. 61), para. 53.

85 See also and further remarks below at II. 3.

86 FCC, *Görgülü* (n. 57), para. 33; Andreas Voßkuhle, 'Art. 93' in: Peter Huber and Andreas Voßkuhle (eds), *Grundgesetz* (8th edn, C. H. Beck 2024), para. 88.

87 FCC, *Streikverbot für Beamte* (n. 58), para. 130; FCC, *Sicherungsverwahrung* (n. 58), para. 90; Hillgruber (n. 75), para. 57.

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The key questions are then, first, to what extent the ECHR is relevant for the interpretation of the BL; second, whether the FCC is constitutionally obliged to apply the ECHR in line with the case-law of the European Court of Human Rights (ECtHR); and third, whether, and if so, under which conditions the ECHR could be invoked within a constitutional complaint procedure (see Art. 94 para. 1 no. 4a BL).

In its *Görgülü* ruling, the FCC underlined that the guarantees of the ECHR, which lack a formal constitutional rank, do not constitute 'a direct constitutional standard of review in Germany'.[88] However, the Court accorded a special, indirectly constitutional[89] status to the ECHR by acknowledging that the ECHR as interpreted by the ECtHR is to be considered by the German courts when interpreting fundamental rights enshrined in the BL.[90] The ECHR and the case-law of the ECtHR serve as 'guidelines for interpretation when determining the contents and scope of fundamental rights'.[91] This interpretative strategy is intended to 'give effect to the guarantees of the European Convention on Human Rights as extensively as possible in Germany, and, in addition, it may contribute to avoid the Federal Republic of Germany being held in violation'.[92] An 'orienting and guiding function' ('Orientierungs- und Leitfunktion') is accorded to the judgments and decisions of the ECtHR,[93] even beyond the specific case in question. ECtHR case-law is relevant even if it concerns other complainants and/or even other

88 FCC, *Görgülü* (n. 57), para. 32.

89 Payandeh and Sauer (n. 80), 295.

90 FCC, *Görgülü* (n. 57), para. 32; FCC, *Sicherungsverwahrung* (n. 58), para. 90; FCC, *Streikverbot für Beamte* (n. 58), para. 130; see also Heiko Sauer, 'Principled Resistance to and Principled Compliance with ECtHR Judgments in Germany' in: Marten Breuer (ed.), *Principled Resistence to ECtHR Judgments – A New Paradigm* (Springer 2019), 55-87; Jens Meyer-Ladewig and Herbert Petzold, 'Die Bindung deutscher Gerichte an Urteile des EGMR', NJW 58 (2005), 15-20; Raffael Cammareri, 'Die Bedeutung der EMRK und der Urteile des EGMR für die nationalen Gerichte', JuS 9 (2016), 791-794. See from a comparative perspective Marco Antonio Simonelli, *The European Court of Human Rights and Constitutional Courts* (Springer 2024), 45 et seq.

91 *Inter alia* FCC, order of 30 June 2022, 2 BvR 737/20 – *Kernbrennstoffsteuer*, BVerfGE 162, 325 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/rs20220630_2bvr073720en.html>, last access 7 August 2025), para. 64.

92 FCC, *Streikverbot für Beamte* (n. 58), para. 130; see also FCC, *Sicherungsverwahrung* (n. 58), para. 91.

93 FCC, order of 23 April 2024, 1 BvR 1595/23 – *Kindesrückführung*, NJW 2024, 2389, para. 32; FCC, order of 3 June 2022, 1 BvR 2103/16 – *Schiedsklausel*, NJW 2022, 2677, para. 30; FCC, order of 18 September 2018, 2 BvR 745/18 – *Aufrechterhaltung von Untersuchungshaft*, NJW 2019, 41, para. 41; FCC, order of 29 January 2019, 2 BvC 62/14 – *Wahlrechtsausschluss*, BVerfGE 151, 1 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/01/cs20190129_2bvc006214en.html>, last access 7 August 2025), para. 64.

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parties to the ECHR. This 'orienting and guiding function' therefore reaches beyond the *inter partes* binding effect envisaged by Art. 46 ECHR.[94]

In terms of enforcement of ECtHR judgments and decisions, *Görgülü* opened up the possibility to lodge a constitutional complaint (Art. 94 para. 1 no. 4a BL) based on the submission that German authorities have not sufficiently considered the ECtHR case-law.[95] The FCC has made it clear that such disregard could violate Art. 20 para. 3 BL (enshrining the principle of the 'Rechtsstaat' or 'state governed by law') in conjunction with the fundamental right in question.[96]

Inherent to the BL is hence the idea of 'human rights convergence'[97] which manifests itself in a duty to consider the normative commands of the ECHR as interpreted by the ECtHR. This obligation neither creates a strict legal obligation to adapt nor allows for unjustified deviations.[98] According to the FCC, a 'schematic parallelisation of individual constitutional concepts' is not permitted.[99] ECHR guarantees 'must be "adapted" to the context of the receiving constitutional system in an active process (of acknowledgment)'.[100] In its decision on the ban on strikes for civil servants, the FCC has emphasised the necessity to contextualise ECtHR judgments,[101] thereby relativising the guiding function introduced by the prior FCC jurisprudence.[102] The constitutional 'duty to consider', hence, has its limits. Beyond these strategies of contextualisation and distinction[103] that can be incorporated into the proportionality test

94 FCC, *Kindesrückführung* (n. 93), para. 32; FCC, *Aufrechterhaltung von Untersuchungshaft* (n. 93), para. 41.

95 Hillgruber (n. 75), para. 57.2; Voßkuhle (n. 86), para. 89.

96 FCC, *Görgülü* (n. 57), para. 47; FCC, *Sicherungsverwahrung* (n. 58), paras 85-86; generally Raffaela Kunz, *Richter über internationale Gerichte?* (Springer 2020), 92 et seq.

97 See Heiko Sauer, 'Art. 1, para. 2' in: Horst Dreier (founder), *Grundgesetz-Kommentar* (4th edn, C. H. Beck 2023), para. 24; Paulina Starski, *Bericht der Kommission zur Reproduktiven Selbstbestimmung und Fortpflanzungsmedizin*, 2024, 221-288 (267). With view to term 'convergence' see Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law* (Brill Nijhoff 2017).

98 Payandeh and Sauer (n. 80), 295; Thomas Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten' in: Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar* (3rd edn, Mohr Siebeck 2022), para. 74.

99 FCC, *Aufrechterhaltung von Untersuchungshaft* (n. 93), para. 42 (translation by the author); FCC, *Streikverbot für Beamte* (n. 58), para. 131; FCC, *Sicherungsverwahrung* (n. 58), para. 91. See on this already Starski, 'Art. 59' (n. 33), para. 108.

100 FCC, *Streikverbot für Beamte* (n. 58), para. 131; FCC, *Sicherungsverwahrung* (n. 58), para. 92 ('must be "reconceived" in an active process (of reception) in the context of the receiving constitutional system') (excerpts from the official translations).

101 FCC, *Streikverbot für Beamte* (n. 58), para. 132. See on this also Starski, *Bericht der Kommission* (n. 97), 276 et seq.

102 Matthias Jacobs and Mehrdad Payandeh, 'Das beamtenrechtliche Streikverbot: Konventionsrechtliche Immunisierung durch verfassungsgerichtliche Petrifizierung', JZ 74 (2019), 19-26 (23).

103 Jacobs and Payandeh (n. 102), 22 et seq.

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('Verhältnismäßigkeitsprüfung') inherent to establishing the infringement of a fundamental right,[104] an interpretation in line with ECtHR judgments is ruled out 'where it no longer appears justifiable according to the recognised methods of interpretation of statutes and of the constitution'.[105] This would be the case, first, if it went beyond the wording, secondly, if multipolar constellations required a differentiated balancing approach and, in any case, if it contradicted the 'constitutional identity' of the BL (see the so-called 'eternity clause' in Art. 79 para. 3 BL).[106] Hence, the ECHR as interpreted by the ECtHR might be set aside 'exceptionally', if 'this is the only way to avert a violation of fundamental constitutional principles'.[107] While the concept of a 'duty to consider' with limited grounds for deviation appears overall to be a convincing approach, the legitimate constitutional grounds for deviation should be sharpened.[108]

The FCC has so far proven hesitant to extend its approach regarding the ECHR to international human rights treaties. Although human rights instruments at the universal level (e. g. the International Covenant on Civil and Political Rights[109]) also reflect a commitment to 'inalienable human rights' as addressed by Art. 1 para. 2 BL,[110] the FCC does not attribute a rank comparable to the ECHR to them within the normative hierarchy. The question of whether and under which conditions the 'duty to consider' extends to the pronouncements and interpretations of respective human rights treaty bodies appears particularly problematic.[111] *Views*, *General Comments*,[112] and *Concluding Observations*[113] of treaty bodies are merely 'address[ed]'[114] quite

104 FCC, *Sicherungsverwahrung* (n. 58), para. 94.

105 FCC, *Sicherungsverwahrung* (n. 58), 2nd headnote. See Voßkuhle (n. 86), para. 88a.

106 FCC, *Streikverbot für Beamte* (n. 58), paras 133-134; Payandeh and Sauer (n. 80), 295.

107 FCC, *Wahlrechtsausschluss* (n. 93), para. 63. A doctrinally different approach is to be taken if ECHR rights reflect human rights which enjoy the status of customary international law. Here Art. 25 BL would apply.

108 See Starski, *Bericht der Kommission* (n. 97), 272 et seq.

109 999 UNTS 171.

110 Art. 1, para. 2 BL reads: 'The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.' See on the relevant legal issues Sauer, 'Art. 1' (n. 97), para. 33.

111 The following considerations draw from Starski, *Bericht der Kommission* (n. 97), 225 et seq. See Sauer, 'Art. 1' (n. 97), para. 34.

112 On *General Comments* see Helen Keller and Leena Grover, in: Helen Keller and Geir Ulfstein (eds), UN Human Rights Treaty Bodies (Cambridge University Press 2012), 116-198.

113 On these see Starski, *Bericht der Kommission* (n. 97), 226 et seq., 270 et seq. (with further references).

114 FCC, *Wahlrechtsausschluss* (n. 93), para. 65: 'While statements from committees or similar treaty bodies have significant weight, they are not binding on international or domestic courts [.] […] [D]omestic courts should address the view of such treaty bodies; they do not, however, have to endorse it.'

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loosely and the FCC proceeds rather selectively therein. If the pronouncements of the treaty bodies support a favoured interpretation of fundamental rights, they are referred to, but if they do not fit the line of argument, then the FCC is quick to stress their non-binding nature as *soft law*.[115] In its recent *Ramstein* judgment the FCC has made a case for the obligation of the FCC to engage in a 'reasoned discussion' of human rights body pronouncements.[116] It stressed that whilst '[t]he statements of human rights committees also carry considerable weight in the interpretation of the respective human rights agreements', they would be 'not binding under international law for international and national courts. When interpreting a treaty, a national court should engage in a reasoned discussion of the views of the competent international treaty body, but it is not required to adopt them.'[117] A 'reasoned discussion' hints at a very soft 'duty to consider'.

In that regard, there seem to be ruptures within the normative logic of the FCC and its grounds for differentiation appear vague.[118] The justification for such a distinction between the ECHR and other human rights treaties remains controversial. Possibly, one could refer to the fact that the ECHR creates a human rights court – i. e. the ECtHR – and entrusts it with the obligatory competence to issue binding decisions (Art. 46 ECHR). *Au contraire*, neither are human rights treaty bodies courts nor do they issue formally binding decisions.[119] Whilst the individual complaint procedure established within international human rights treaty regimes[120] (e. g. Art. 1 of

115 Here and previously FCC, order of 26 July 2016, 1 BvL 8/15 – *Zwangsbehandlung*, BVerfGE 142, 313 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/07/ls20160726_1bvl000815en.html>, last access 7 August 2025), para. 90; FCC, *Wahlrechtsausschluss* (n. 93), para. 65. On the concept of *soft law* with further references see Paulina Starski, 'Jenseits des Kernbereichs exekutiver Verantwortung', Der Staat 62 (2023), 373-418 (412 et seq.).

116 FCC, judgment of 15 July 2025, 2 BvR 508/21 – *Ramstein,* para. 107 (translation by the author with the assistance of DeepL) ('argumentativ auseinandersetzen').

117 FCC, *Ramstein* (n. 116).

118 Mehrdad Payandeh, 'Rechtsauffassungen von Menschenrechtsausschüssen der Vereinten Nationen in der deutschen Rechtsordnung', NVwZ 3 (2020), 125-129 (128); Kristina Schönfeldt, 'Soft Law Makes Hard Cases: Transformation von Soft Law in Hard Law durch nationale Behörden und Gerichte?' in: Sebastian Piecha, Anke Holljesiefken et al. (eds), *Rechtskultur und Globalisierung* (Nomos 2017), 189-212 (207 et seq.).

119 See with further references Starski, *Bericht der Kommission* (n. 97), 226 et seq. Generally Rosanne van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in: Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies. Law and Legitimacy* (Cambridge University Press 2012), 356-413; Geir Ulfstein, 'Individual Complaints', in: Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies. Law and Legitimacy* (Cambridge University Press 2012), 73-115.

120 See e. g. Dinah Shelton, 'Human Rights, Individual Communications/Complaints' in: MPEPIL (online edn, Oxford University Press 2006), para. 9 et seq.

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the Optional Protocol on the International Covenant on Civil and Political Rights[121]) resembles a quasi-judicial proceeding, the *View* concluding this procedure remains non-binding. Additionally, the Committees established within the human rights treaty system on the global plane are expert bodies and not courts.

Yet, it is acknowledged on the international plane that human rights body pronouncements are relevant when interpreting human rights guarantees. According to the ICJ, 'great weight' should be attributed 'to the interpretation adopted by this independent body [HRC] that was established specifically to supervise the application of that treaty'.[122] Beyond that, the FCC has acknowledged that ECHR judgments and decisions explain, uphold, and develop ECHR guarantees and that this effect – which goes beyond the *inter partes* binding effect of a judgment – is constitutionally significant.[123] While Art. 32 para. 1 ECHR extends the jurisdiction of the ECtHR within the framework of the envisaged procedures 'to all matters concerning the interpretation and application of the Convention',[124] it does not extend the *inter partes* binding nature of its rulings. Within the ECHR, there is no explicit norm which declares that the interpretation of the ECHR by the ECtHR on which a specific declaratory judgment rests is formally binding.[125] One might also question the procedural pathways leading to the adoption of human rights body pronouncements.[126] This would raise deeper legitimacy questions that the FCC indeed omits to address.

Finally, the special rank attributed to the ECHR could be explained by its interwovenness with the EU. The ECHR is intertwined with the Charter of Fundamental Rights of the European Union (EUChFR)[127] (see its Art. 52 para. 3) and serves as a source for deriving unwritten EU fundamental rights as 'general principles' (Art. 6 para. 3 TEU). The ECHR forms one important

121 999 UNTS 171.

122 ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), merits, judgment of 30 November 2010, ICJ Reports 2010, 639, para. 66.

123 Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' in: Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: the Impact of the ECHR on National Legal Systems* (Oxford University Press 2008), 3-28 (6); Schönfeldt (n. 118), 206; Norman Weiß, 'Von Paukenschlägen und steten Tropfen', Europäische Zeitschrift für Arbeitsrecht 3 (2010), 457-468 (467).

124 See with view to Art. 32 ECHR Sauer, 'Art. 1' (n. 97), para. 35; Stefan Kadelbach, 'Internationale Durchsetzung' in: Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar* (3rd edn, Mohr Siebeck 2022), para. 7.

125 See here and before Payandeh, 'Rechtsauffassungen von Menschenrechtsausschüssen' (n. 118), 126.

126 Starski, *Bericht der Kommission* (n. 97), 227 et seq.

127 2012/C 326/02.

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element of 'common European standards'[128] of fundamental rights protection. Accordingly, Germany's membership in the EU also fosters an alignment of fundamental rights enshrined within the BL with the ECtHR.[129] Nevertheless, the distinction between international human rights treaties and the ECHR is not free from inconsistencies, especially if Art. 1 para. 2 BL and its reference to 'inalienable human rights' are perceived as the normative hook for attributing a special status to the ECHR.

Overall, it would appear as a sensible approach for the Court to differentiate between the different categories of human rights body pronouncements: *General Comments*, *Concluding Observations* and *Views* differ not only in their creation processes but also in their substance.[130] Intuitively, it appears to make sense that the *Views* that particularly concern Germany should be more difficult to disregard within a 'reasoned discussion'[131] than general interpretation guidelines presented with *General Comments*.[132] However, such a differentiated approach is as yet missing in FCC case-law. Beyond that, and in any case, the FCC should substantiate and differentiate its reference to Art. 1 para. 2 BL.

It remains still true that the FCC refrained from allowing individuals to invoke ECHR guarantees directly within the individual complaint procedure. In that regard, things have not changed since the Steinberger analysis of 1988.[133]

3. The Possibility to Invoke Supranational Individual Rights – The '*Right to Be Forgotten*' Paradigm Shift

However, allowing for the direct invocation of supranational individual guarantees became constitutional reality after the FCC carried out a paradigm shift[134] in its case-law.

The FCC left its separation thesis behind, which had suggested that German fundamental rights and EU fundamental rights belong to two spheres

128 On this concept see Peter Häberle, 'Gemeineuropäisches Verfassungsrecht', EuGrZ 18 (1991), 261-274; Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht* (Mohr Siebeck 2011), 269 et seq. Mentioning the principle itself: ECtHR (Grand Chamber), *X, Y, Z v. United Kingdom*, judgment of 22 April 1997, no. 21830/93, para. 44. See Rudolf Bernhardt, Commentary: The European System, Conn J Int'l L. 2 (1987), 299-301 (299 et seq.).

129 Sauer, 'Art. 1' (n. 97), para. 24.

130 See Starski, *Bericht der Kommission* (n. 97), 271.

131 FCC, *Ramstein* (n. 116), para. 107 (translation by the author).

132 See on this already Starski, *Bericht der Kommission* (n. 97), 270 et seq.

133 Steinberger (n. 3), 7 et seq.

134 Daniel Thym, 'Freundliche Übernahme, oder: die Macht des "ersten Wortes" – "Recht auf Vergessen" als Paradigmenwechsel', JZ 75 (2020), 1017-1027 (1017).

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that do not overlap.[135] Following the Court of Justice of the European Union (CJEU) approach,[136] it has accepted that EUChFR guarantees which bind member states 'when they are implementing Union law' (Art. 51 para. 1 EUChFR) may overlap with the sphere protected by fundamental rights enshrined in the BL. The FCC redefined the 'fundamental rights federalism'[137] within the EU on the basis of this axiomatic assumption.

Through its *Right to be Forgotten*-jurisprudence, the FCC established that the acts of German state authority which find their basis in EU law, which grant the member states discretion in their execution, can be reviewed by the FCC based on fundamental rights enshrined in the BL.[138] It is to be presumed – the FCC argues – that fundamental rights of the BL entail protective standards that are also sufficient from the perspective of EU fundamental rights.[139] If, however, the EU law does not allow for any discretion, EU fundamental rights might be invoked within a constitutional complaint procedure. Hence, under such a reading, the term 'fundamental rights' in the sense of Art. 94 para. 1 no. 4 a BL also encompasses supranational fundamental rights.[140] The FCC thus assumes the function of a court which is competent to effectuate EU fundamental rights, and thereby compensates for the deficits in the EU system regarding the judicial protection of individuals. The basic rationale of the FCC is that the high threshold for individuals to initiate an annulment procedure (Art. 263 Treaty on the Functioning of the European Union [TFEU])[141] (*Plaumann* test)[142] and the deficits of the pre-

135 FCC, *Solange II* (n. 6), para. 117; FCC, order of 7 June 2000, 2 BvL 1/97 – *Bananenmarktordnung*, BVerfGE 102, 147 (official translation: <https://www.bverfg.de/e/ls20000607_2bvl000197en.html>, last access 7 August 2025), para. 57.

136 CJEU, *Åkerberg Fransson*, judgment of 26 February 2013, case no. 617/10, ECLI:EU:C:2013:105, para. 29; CJEU, *Melloni*, judgment of 26 February 2013, case no. 399/11, ECLI:EU:C:2013:107, para. 60; CJEU, *Pelham and Others*, judgment of 29 July 2019, case no. 476/17, ECLI:EU:C:2019:624, paras 80 and 81.

137 Thorsten Kingreen, 'Die Grundrechte des Grundgesetzes im europäischen Grundrechtsföderalismus', JZ 68 (2013), 801-811; Thomas Kleinlein, *Grundrechtsföderalismus: eine vergleichende Studie zur Grundrechtsverwirklichung in Mehrebenen-Strukturen – Deutschland, USA und EU* (Mohr Siebeck 2020), 12 et seq.; Martin Nettesheim and Sabine Schäufler, 'Europäischer Grundrechtsföderalismus und Bundesverfassungsgericht' in: Europäisches Zentrum für Föderalismus-Forschung (eds), *Jahrbuch des Föderalismus* 2020 (Nomos 2020), 119-134.

138 FCC, *Recht auf Vergessen I* (n. 67), para. 42.

139 FCC, *Recht auf Vergessen I* (n. 67), para. 55.

140 FCC, order of 6 November 2019, 1 BvR 276/17 – *Recht auf Vergessen II*, BVerfGE 152, 216 (official translation: <https://www.bverfg.de/e/rs20191106_1bvr027617en.html>, last access 7 August 2025), para. 67.

141 *OJ C 326, 26 October 2012, 47-390.*

142 ECJ, *Plaumann & Co. v. Commission of the European Economic Community*, judgment of 15 July 1963, case no. 25-62, ECLI:EU:C:1963:17, 107 et seq.

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liminary reference procedure (Art. 267 TFEU) necessitate compensatory instruments at the national level.[143] The authority of the CJEU is respected via the preliminary reference procedure (Art. 267 TFEU), in case there remain any doubts about the interpretation of EU fundamental rights in accordance with the principle of loyal cooperation (Art. 4 para. 3 TEU).[144] In the end, the *Right to be Forgotten*-rationale echoes the idea of Art. 19 para. 1 subpara. 2 TEU, which requires the 'Member States [to] provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. This provision attributes the function of EU courts to the courts of member states.

The *Right to be Forgotten*-reasoning has shifted tectonics[145] in the entangled fundamental rights architecture of the EU and is to be seen in light of the 'responsibility with regard to European integration'[146] of the FCC. It gives sharper contours to the 'constitutional compound' ('Verfassungsverbund') envisaged by Ingolf Pernice.[147] The general sense of a 'revolution' within the multilevel complex of human rights protection has been, however, relativised by two facts: First, only rarely since 2019 has there been a constitutional complaint based directly on EuChFR rights.[148] Secondly, it remains to be seen how frequently the FCC will utilise the preliminary reference procedure in cases in which EU fundamental rights are directly invoked within a constitutional complaint procedure, which is a key procedural mechanism to uphold the authority of the CJEU. Yet, the direct invocation of individual rights originating outside the BL within the constitutional complaint procedure, as reflected upon by Steinberger,[149] became reality. This step was, however, only possible in the context of the specific constitutional entanglement within the EU which is singular in its conceptual architecture. This singularity brings us to the question of the primacy of EU law and its limits.

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143 FCC, *Recht auf Vergessen II* (n. 140), paras 60, 61: 'Legal recourse under EU law is not sufficient to fill the gap in protection arising from the application of EU fundamental rights by the ordinary courts. This is because individuals have no direct recourse to the Court of Justice of the European Union for asserting a violation of EU fundamental rights in such cases.', (para. 61).

144 FCC, *Recht auf Vergessen I* (n. 67), para. 72; FCC, *Recht auf Vergessen II* (n. 140), para. 69. Official citation of the TEU: OJ C 202, 7 June 2016, 13 et seq. (consolidated version).

145 Various authors spoke of a 'paradigm change' see only Thym (n. 134), 1017.

146 FCC, *Recht auf Vergessen II* (n. 140), para. 53.

147 Ingolf Pernice, *Der Europäische Verfassungsverbund* (Nomos 2020), particularly pieces at 385 et seq.

148 See FCC, order of 24 January 2025, 2 BvR 1103/24 – *Maja T*, NJW 2025, 955, para. 52, 71 et seq. (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2025/01/rk20250124_2bvr110324en.html>, last access 7 August 2025).

149 Steinberger (n. 3), 7 et seq.

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4. Basic Law and EU Law, FCC and CJEU – Judicial Dialogue and Competences of Judicial Review

A crucial lesson learnt based on past experience regarding the European Economic Community is, according to Steinberger, 'that it is not the worst thing for the functioning of federal political entities to leave questions of sovereignty in limbo'.[150] 'For this state of affairs', he goes on, 'keeps legal awareness alive, keeps alive the obligation to seek a concordance of basic legal concepts between the community and its members'.[151] Steinberger furthermore posits that the EU is to be seen as 'an attempt to overcome the excesses of nationalist thinking, not least in order to preserve the diversity of European legal culture'.[152]

The 'limbo'[153] identified by Steinberger requires some contextualisation leading us to the framing of the EU shaped by conflicting poles: On the one hand, certain aspects of EU law follow the classical logic of public international law where the member states are seen as the 'Masters of the Treaties' ('Herren der Verträge').[154] Because the EU is not endowed with non-derivative hence original public authority, it *prima facie* fits into the concept of an international organisation (IO). On the other hand, the EU and EU law display certain features which do not fit into the logic of public international law and IO: Majority voting permeates EU organs like the Council (see e. g. Art. 16 para. 3 TEU). Rules of EU law, which are directly applicable, enjoy primacy in the national jurisdictions of member states,[155] member states have transferred sovereign rights onto the EU extensively via attributing competences to it within primary law (yet it is not endowed with 'Kompetenz-Kompetenz'[156]); not only has an 'internal market' (Art. 26 para. 2 TFEU) been created within the EU, but at the core of the EU lies also a 'monetary union' (Art. 3 para. 4 TEU) (while not all member states have introduced the common currency).

150 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).
151 Steinberger (n. 3), 16 (translation by the author with the assistance of DeepL).
152 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).
153 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).
154 Starski, 'Art. 59' (n. 33), para. 49 with further references.
155 ECJ, *Costa v. ENEL*, judgment of 15 July 1964, case no. 6/64, ECLI:EU:C:1964:66, 593; Monica Claes, 'The Primacy of EU Law in European and National Law' in: Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015), 178-211.
156 From an interesting comparative perspective Erin Delaney, 'Managing in a Federal System Without an "Ultimate Arbiter": Kompetenz-Kompetenz in the EU and the ante-bellum United States', Regional and Federal Studies 15 (2005), 225-244 (230 et seq.).

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Reflecting on Steinberger's observation of the 'limbo'[157] – which still has truth to it – from the current perspective, we might approach it from two opposite angles: the inner logic of the EU legal order as it manifests in the case-law of the CJEU on the one hand, and the logic of constitutional law as reflected in the case-law of the FCC on the other hand. EU treaties accept the sovereign statehood of the member states as, for example, Art. 4 para. 2 TEU evidences. The guiding principle of the competence architecture of the EU is the principle of limited conferral (see Art. 5 para. 1 cl. 1 TEU). The exercise of EU competences beyond that is limited by the principle of proportionality (Art. 5 para. 4 TEU) and, in spheres of non-exclusive EU competences, subsidiarity (Art. 5 para. 3 TEU). While the EU is not bestowed with 'Kompetenz-Kompetenz',[158] the CJEU interprets EU law in a way that ensures its effectivity (*effet utile*)[159] and its uniform application throughout all member states (also in light of Art. 18 TFEU and its principle of non-discrimination).[160] This interpretative method confers a certain dynamic on EU law resulting in a constant deepening of the EU legal order. From the perspective of the FCC, the member states are the sole bearers of formal and full sovereignty within the EU's architecture. The FCC has even derived a 'right to statehood' from the constitutional commands of the BL.[161] The creation of a European federal state would not be possible based on the current German constitution and would require a revolutionary moment (see Art. 146 BL).[162] The so-called 'eternity clause' also, i. e. Art. 79 para. 3 BL, bars the *pouvoir constitué* from eradicating the sovereign statehood of the Federal Republic of Germany.[163]

157 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).

158 On the concept of 'Kompetenz-Kompetenz' FCC, judgment of 12 October 1993, 2 BvR 2134/92 – *Maastricht,* BVerfGE 89, 155 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/10/rs19931012_2bvr213492en.html>, last access 7 August 2025), para. 90 et seq. See also n. 156.

159 See, for example, ECJ, *Franz Grad v. Finanzamt Traunstein*, judgment of 6 October 1970, case no. 9/70, ECLI:EU:C:1970:78, para. 5; Sibylle Seyr, *Der effet utile in der Rechtsprechung des Europäischen Gerichtshofs* (Duncker & Humblot 2008), 94 et seq.

160 ECJ, *Costa v. ENEL* (n. 155), 594.

161 FCC, judgment of 30 July 2019, 2 BvR 1685/14 – *Europäische Bankenunion*, BVerfGE 151, 202 (official translation: <https://www.bverfg.de/e/rs20190730_2bvr168514en.html>, last access 7 August 2025), para. 121 with further references; Erich Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis', GLJ 14 (2013), 75-112; Daniel Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the *Lisbon* judgment of the German Constitutional Court', CML Rev. 46 (2009), 1795-1822 (1797 et seq.).

162 FCC, *Lissabon* (n. 59), para. 179: 'Only the constituent power is authorised to relinquish the state under the Basic Law; the constituted power is not authorised to do so.'

163 See also FCC, *Lissabon* (n. 59), para. 232.

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What still remains in 'limbo',[164] however, is the question of supremacy in case of a conflict between EU law and national, in particular, constitutional law.[165] Here, the case-law of the FCC has evolved significantly since Steinberger wrote his piece. After the groundwork was laid in *Solange I* and *II*,[166] the Court's approach was sharpened in its rulings on the *Maastricht Treaty*,[167] the *Banana Market Organization*,[168] the *Treaty of Lisbon*,[169] *Honeywell*,[170] the *European Arrest Warrant*,[171] *OMT*[172] and ultimately its *PSPP*-judgment.[173] In the sequence of FCC case-law dialectical trends manifest as thus:

While *Solange I* posed a severe challenge to the primacy of EU law,[174] the FCC took an integration-friendly stance in its *Solange II*-order by famously declaring a (revocable) waiver of its constitutional control competences '[a]s long as the European Communities, in particular the decisions of the Court of Justice of the European Communities, generally guarantee the effective protection of fundamental rights vis-à-vis the public authority of the Communities in a manner that is essentially equivalent to the protection that is inalienable under the Basic Law […].'[175] Provided an equivalent fundamental rights protection is guaranteed within the (then) Communities, the FCC would 'no longer exercise its jurisdiction over derived Community law that serves as a legal basis for the conduct of German courts or authorities within the sovereign sphere of the Federal Republic of Germany'.[176] The *Solange-*

164 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).

165 On this see, for example, Paul Craig and Gráinne de Búrca, 'The Relationship Between EU Law and National Law: Supremacy' in: Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2020), 303 et seq.; Bruno de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021), 187-227; Justin Lindeboom, 'Why EU Law Claims Supremacy', Oxford J. Legal Stud. 38 (2018), 328-356. See here and also with view to the following analysis already Paulina Starski, '§ 79 Bundestreue, Unionstreue und Europarechtsfreundlichkeit' in: Markus Ludwigs and Wolfgang Kahl (eds), *Handbuch des Verwaltungsrechts*, vol. III (C. F. Müller 2022), 877-919 (908 et seq.).

166 FCC, order of 29 May 1974, BvL 52/71 – *Solange I,* BVerfGE 37, 271 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1974/ls19740529_2bvl005271en.html>, last access 7 August 2025); FCC, *Solange II* (n. 135).

167 FCC, *Maastricht* (n. 158).

168 FCC, *Bananenmarktordnung* (n. 135).

169 FCC, *Lissabon* (n. 59).

170 FCC, order of 6 July 2010, 2 BvR 2661/06 – *Honeywell*, BVerfGE 126, 286 (official translation: <https://www.bverfg.de/e/rs20100706_2bvr266106en.html>, last access 7 August 2025).

171 FCC, *Identitätskontrolle* (n. 59).

172 FCC, *OMT* (n. 59).

173 FCC, *PSPP* (n. 17).

174 See FCC, *Solange I* (n. 166).

175 FCC, *Solange II* (n. 135), ('Leitsatz 2'/'headnote 2').

176 FCC, *Solange II* (n. 135), ('Leitsatz 2'/'headnote 2').

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II-rationale formed a major step in safeguarding the effectivity of EU law within the German legal order, yet the pendulum swung back towards a clearer demarcation of the ultimate limits of the 'permeability'[177] of the German constitutional order in the later decisions (particularly within the Court's *Lisbon*-judgment).[178]

The current architecture of FCC control competences stands as follows:

The FCC accepts the direct effect and primacy or 'precedence of application'[179] of EU law also with regard to constitutional law[180] (based on Art. 23 para. 1 cl. 2, 3 BL in conjunction with the relevant parliamentary approval statute to the EU treaties). It understands Art. 23 para. 1 BL as a general 'commitment to ensure the effectiveness and enforcement of EU law'.[181]

The primacy of EU law is judicially curtailed, even beyond the FCC's fundamental rights review,[182] through mechanisms such as its *ultra vires* review[183] and constitutional identity control[184] (the latter appearing as an overarching instrument).[185] The friendliness towards the EU reaches its limits with 'responsibility with regard to European integration' ('Integrationsverantwortung')[186] which is also borne by the FCC.[187] According to the idea of the 'Integrationsverantwortung', the German state and its organs are obliged to safeguard the constitutional conditions of integration (Art. 23 para. 1 cl. 1 cl. 3 BL in conjunction with Art. 79 para. 3 BL). The respective control competences are, in turn, limited by the friendliness ('Europarechtsfreundlichkeit') of the BL towards EU law, which mirrors the principle of loyal cooperation (Art. 4 para. 3 TEU),[188] and serves as a 'conflict management instrument'.[189]

177 Wendel (n. 128), 5 et seq.

178 FCC, *Lissabon* (n. 59).

179 FCC, *Recht auf Vergessen II* (n. 140), headnote 2; FCC, *Lissabon* (n. 59), para. 343.

180 FCC, *Recht auf Vergessen II* (n. 140), para. 47 with further references.

181 FCC, *Honeywell* (n. 170), para. 53.

182 *FCC, Solange I* (n. 166), para. 24 et seq.

183 FCC, *Maastricht* (n. 158), para. 106.

184 FCC, *Recht auf Vergessen II* (n. 140), para. 49.

185 Heiko Sauer, 'Der novellierte Kontrollzugriff des Bundesverfassungsgerichts auf das Unionsrecht', EuR 52 (2017), 186-205 (190). But see Robert Uerpmann-Wittzack, 'Art. 23' in: Ingo v. Münch and Philip Kunig, *Grundgesetz-Kommentar*, vol. 1 (8th edn, C. H. Beck 2025), para. 101.

186 On this concept see FCC, *Recht auf Vergessen II* (n. 140), para. 53.

187 See FCC, *Recht auf Vergessen II* (n. 140), para. 53; Uerpmann-Wittzack (n. 185), para. 23. See Max Erdmann, 'Gesetzgebungsautonomie und Unionsrecht', EuR 56 (2021), 62-77 (67).

188 FCC, *Honeywell* (n. 170), para. 100. See Wendel (n. 128), 135, 138. Also Uerpmann-Wittzack (n. 185), para. 16. On its closeness to the idea of the 'Völkerrechtsfreundlichkeit', FCC, *Lissabon* (n. 59), paras 225 et seq.

189 See Ulrich Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie', NVwZ 39 (2020), 817-823 (819).

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In this spirit,[190] the FCC has outlined restrictive procedural and material prerequisites[191] for the successful activation of its control competences rendering them mere 'reserve competences' or a form of 'back-up jurisdiction'.[192] The prerequisites of the *ultra vires* review evidence the FCC's restraint in a pronounced manner: An *ultra vires* act can only be established by the FCC if there is a sufficiently qualified violation of Union law (encompassing a structurally relevant shift in the distribution of competences between the member states and the EU).[193] In any case, the CJEU must be given the opportunity to decide upon the interpretation/validity of EU law before the primacy of EU law is levered.[194] Hence, a twofold determination of an *ultra vires* act is required: Both the EU secondary law and the CJEU judgment declaring it to be *intra vires* must be *ultra vires*.[195]

The dialectical relationship between control competences and 'judicial self-restraint' characterising the cooperative relationship between the CJEU and the FCC[196] have been put to a test by the *PSPP*-judgment[197] – the premiere of a successful invocation of the *ultra vires* control. Here, the ultimately unresolved questions of supremacy within the 'constitutional compound'[198] of the EU and, to use Steinberger's words, the 'limbo'[199] resurfaced. Some regard the *PSPP* judgment as a cathartic event leading to a new finetuning of the judicial dialogue between the FCC and the CJEU, and in the end strengthening not only the EU[200] but also the 'compound of (constitutional)

190 FCC, *Honeywell* (n. 170), para. 57; see also Andreas Voßkuhle, *'Der Europäische Verfassungsgerichtsverbund'*, NVwZ 29 (2010), 1-8 (7).

191 *FCC, Honeywell* (n. 170), para. 61: 'in other words, it must be established, that the violation of competences is sufficiently serious'; FCC, order of 15 December 2015, 2 BvR 2735/14 – *Europäischer Haftbefehl*, BVerfGE 140, 317 (official translation: <http://www.bverfg.de/e/rs20151215_2bvr273514en.html>, last access 7 August 2025), para. 45: 'Therefore, if the Federal Constitutional Court, in exceptional cases and under narrowly defined conditions, declares an act of an institution or an agency of the European Union to be inapplicable in Germany […].'

192 See FCC, *Lissabon* (n. 59), para. 341.

193 FCC, *Europäische Bankenunion* (n. 161), para. 150; FCC, *OMT* (n. 59), para. 147: 'Therefore, a qualified exceeding of competences within this meaning must be manifest […] and of structural significance for the distribution of competences between the European Union and the Member States […].'

194 FCC, *PSPP* (n. 17), para. 118.

195 FCC, *PSPP* (n. 17), paras. 118, 155, 165.

196 FCC, *Maastricht* (n. 158), 175, 178.

197 FCC, *PSPP* (n. 17).

198 See n. 147.

199 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).

200 For a rather 'relaxed view' on *PSPP* see Ulrich Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them: The Relationship Between the Court of Justice of the European Union and the German Federal Constitutional Court', I•CON 19 (2021), 208-240 (239): '[…] European integration has not gone up in flames.'

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courts'[201] that shapes the EU. From this perspective, the *PSPP* judgment could be seen as an instance of 'clearing the air'.[202] Others attribute a negative effect to the judgment, that of serving as a precedent for a further contestation of the EU and CJEU which might destabilise its structure[203] having been rendered amidst the climax of the 'rule of law crisis' challenging the EU and resulting from the detachment of some member states from the foundational values of Art. 2 TEU.[204] In his article, *Steinberger* urged us to take the *Solange II*-waiver 'seriously',[205] and attested an 'admonishing undertone' to the *Solange-II*-rationale, which 'may point less toward the Court of Justice of the European Communities than toward the Brussels administrations'.[206] The 'admonishing tone'[207] is also present in the *ultra vires* as well as the identity-control of the FCC, yet in the relevant case-law the FCC apparently addresses the CJEU itself. In the end, the non-decision regarding the ultimately supreme authority within the 'constitutional compound'[208] of the EU and the relativity of the answer to the primacy question depending on the perspective taken (internal legal logic of German constitutional law or internal legal logic of EU law) together with judicial conflict management strategies appear to function as safeguards of cohesion within the EU provided judicial control competences are exercised carefully.

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201 On the concept of 'Gerichtsverbund'/'Verfassungsgerichtsverbund' see Voßkuhle, *Der Europäische Verfassungsgerichtsverbund*' (n. 190), 1-8.

202 See e. g. Ana Bobić and Mark Dawson, 'Making Sense of the "Incomprehensible": The PSPP Judgment of the German Federal Constitutional Court', CML Rev. 57 (2020), 1953-1998 (1997): 'Just as importantly, this tale tells of a decision which ended not in rupture but in refounding a more cooperative relationship between two of Europe's most prominent courts.'

203 Franz Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's ultra vires Decision of May 5, 2020', GLJ 21 (2020), 1116-1127 (1122); Annamaria Viterbo, 'The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank', European Papers 5 (2020), 671-685 (679, n. 45) with further references. Framing the PSPP judgment as a 'highly paradoxical decision' Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception', GLJ 21 (2020), 979-994 (994).

204 See on the 'rule of law crisis' generally Michal Szwast, Marcin Szwed and Paulina Starski, 'The Evolution and Gestalt of the Polish Constitution' in: Armin von Bogdandy, Peter Huber and Sabrina Ragone (eds), *The Max Planck Handbooks in European Public Law. Volume II: Constitutional Foundations* (Oxford University Press 2023), 431-492 (457 et seq.); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019), 58 et seq.; already Paulina Starski, Stellungnahme zum Gesetzentwurf der SPD, CDU/CSU, BÜNDNIS 90/DIE GRÜNEN und FDP sowie des Abgeordneten Stefan Seidler, Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Artikel 93 und 94), BT-Drs. 20/12977, 11 November 2024, 2 et seq.

205 Steinberger (n. 3), 10 (translation by the author with the assistance of DeepL).

206 Steinberger (n. 3), 10 (translation by the author with the assistance of DeepL).

207 Steinberger (n. 3), 16 (translation by the author with the assistance of DeepL).

208 See n. 147.

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5. Universal Minimum Standards Under International Law and Human Rights Law – The *Soering* Principles and International Human Rights Law in the FCC Jurisprudence

Returning to the international legal plane, Steinberger reflects in his piece on a 'minimal standard of human rights protection' as acknowledged by the FCC particularly as a bar to extraditions. This line of reasoning has remained remarkably steady in the FCC case-law throughout the years: Referring back to its foundational decisions in 1982[209] and 1983[210] respectively, the FCC found in 1991 that while German courts are in principle not tasked with reviewing the legality of foreign criminal judgments for the execution of which a person's extradition is sought, they may very well be constitutionally obliged to assess whether the extradition and the acts on which it is based are compatible with the minimum standards of international law, as these are elements of the German legal order under Art. 25 BL.[211]

It is noteworthy that already during the provisional measures stage leading to the 1982 order, the FCC undertook a significant comparative analysis of the consideration of public international legal standards in the extradition review procedures of France, the Netherlands, Switzerland, and the UK.[212] It also referred to the relevant resolution of the Council of Europe Committee of Ministers,[213] the Second Additional Protocol to the European Convention on Extradition[214] as well as the European Convention on the International Validity of Criminal Judgments.[215]

Ever since, this reasoning has been followed in most of the subsequent cases dealing with extradition review.[216] While the FCC emphasises on the principle of

209 FCC, order of 26 January 1982, 2 BvR 856/81 – *Auslieferungshaft*, BVerfGE 59, 280 (282).

210 FCC, order of 9 March 1983, 2 BvR 315/83 – *Auslieferung Italien*, BVerfGE 63, 332 (337).

211 FCC, order of 24 January 1991, 2 BvR 1704/90 – NJW 1991, 1411.

212 FCC, *Auslieferungshaft* (n. 209), 283 et seq.

213 See FCC, *Auslieferungshaft* (n. 209), 284. Reference to Conseil de l'Europe, Comité des Ministres, Resolution (75) 11 Sur les Critères à suivre dans la Procedure de Jugement en l'absence du prévenu, 21 May 1975.

214 FCC, *Auslieferungshaft* (n. 209), 285 et seq. Reference to the Second Additional Protocol to the European Convention on Extradition of 17 March 1978, ETS No. 98.

215 FCC, *Auslieferungshaft* (n. 209), 286. Reference to the European Convention on the International Validity of Criminal Judgments of 28 May 1970, ETS No. 70.

216 See e. g., FCC (Chamber), order of 9 November 2000, 2 BvR 1560/00 – NJW 2001, 3111, para. 22; FCC, order of 24 June 2003, 2 BvR 685/03 – *Auslieferung nach Indien*, BVerfGE 108, 129 (official translation: <https://www.bverfg.de/e/rs20030624_2bvr068503en.html>, last access 7 August 2025), para. 29; FCC (Chamber), order of 3 March 2004, 2 BvR 26/04 – BVerfGK 3, 27, para. 14; FCC (Chamber), order of 26 February 2018, 2 BvR 107/18, para. 24; FCC (Chamber), order of 8 December 2021, 2 BVR 1282/21 – NStZ-RR 2022, 91, para. 14; FCC (Chamber), order of 3 August 2023, 2 BvR 1838/22 – NVwZ 2024, 1568, para. 45.

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non-reviewability, it simultaneously introduces certain restraints which effectively lead to a limited review: 'German courts are to examine in extradition proceedings whether the extradition and the acts on which it is based are compatible: (1) with the minimum standard under international law that is binding on the Federal Republic of Germany pursuant to Article 25 of the Basic Law; and (2) with the inalienable constitutional principles of its public policy […].'[217]

Having established that the minimum standards under international law form an exceptional review criterion, the FCC consequently had to specify the compatibility of the standards with participation in a system of extradition cooperation. It did so by stressing the 'necessity of placing trust in the requesting State's adherence to principles of the rule of law and the protection of human rights', particularly if 'carried out on a basis in international law' and shaken only by the establishment of 'contradictory facts'.[218] In the meantime, the extradition constellation had also been prominently addressed by the ECtHR on 7 July 1989 in its *Soering*-judgment. Here, the ECtHR found that the extradition of *Soering* from the United Kingdom (UK) to the USA violated Art. 3 ECHR since *Soering* would be put on the death row and suffer from the 'death row phenomenon'.[219] The *Soering* judgment marked the beginning of a long tradition of the ECtHR's jurisprudence. Having already established such a review as a constitutional requirement for extradition decisions before *Soering*, the FCC nonetheless relied heavily on the reasoning of the ECtHR. In particular, its standard of '[…] significant reasons for a substantial likelihood of a real risk of treatment in violation of human rights guarantees […]'[220] echoes the substantive core of the *Soering* judgment, later recalling explicitly the ECtHR standard of 'substantial grounds' for a 'real risk'.[221]

217 FCC, *Auslieferung nach Indien* (n. 216), para. 29.

218 FCC, order of 5 November 2003, 2 BvR 1243/03 – *Lockspitzel I*, para. 73; BVerfGE 109, 13 (35) (translation by the author). See also the German version: '[…] [ist] dem ersuchenden Staat im Hinblick auf die Einhaltung der Grundsätze der Rechtsstaatlichkeit und des Menschenrechtsschutzes grundsätzlich Vertrauen entgegenzubringen[.] Dieser Grundsatz kann so lange Geltung beanspruchen, wie er nicht durch entgegenstehende Tatsachen erschüttert wird […]'; citing FCC, *Auslieferung nach Indien* (n. 216).

219 ECtHR (Plenary), *Soering v. United Kingdom*, judgment (merits and just satisfaction) of 7 July 1989, no. 14038/88, paras 100-111.

220 FCC (Chamber), order of 22 June 1992, 2 BvR 1901/91, para. 12 (translation by the author). See also the German version: '[…] wesentliche Gründe für die beachtliche Wahrscheinlichkeit einer realen Gefahr von menschenrechtswidriger Behandlung […]'.

221 Explicitly FCC, *Auslieferung nach Indien* (n. 216), para. 35: '[…] substantiated evidence concerning the danger of inhuman treatment. This standard of review corresponds to […] the case-law of the European Court of Human Rights (cf. European Court of Human Rights, judgment of 7 July 1989, Series A No. 161, p. 35 No. 91 = *Neue Juristische Wochenschrift* 1990, pp. 2183, 2185 – Soering; Reports of Judgments and Decisions 1996-V, 1853, Nos. 73-74 – Chahal), which, with an identical meaning as regards the content of the terms, refers to "substantial grounds" (*begründete Tatsachen*) of a "real risk" (*tatsächliches Risiko*) of torture.'

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The *Soering*-rationale has been incorporated into positive law within the EU system of fundamental rights protection in Art. 19 para. 2 EUChFR.[222] It has impacted the EU asylum law and the EU arrest warrant system,[223] ultimately leading to the idea of a 'horizontal Solange'[224] within the EU, which shook up the idea of 'mutual trust'.[225] Renditions of individuals between member states of the EU can be barred if a member state does not safeguard fundamental rights sufficiently.[226] The FCC clarified, that even within the EU context, 'the principle of mutual trust applies in extradition proceedings', but it may invalidated.[227] The extraditions based on the European Arrest Warrant would be steered by 'principles that govern extraditions based on international agreements […] by analogy'.[228] In this regard the FCC in its order of 2015 also restated the applicable standard as follows: That '[t]here have to be convincing reasons to believe that there is a considerable probability that the requesting state will not observe the minimum standards required by public international law in the specific case.'[229]

One of Steinberger's observations in the context of 'minimum standards of protection' is particularly interesting: Acknowledging that some 'universal human rights declarations and treaties' appear as mere 'lip services', Steinberger points out that international law is frequently normatively volatile and in a flux.[230] Steinberger then attributes a specific role to the Courts in cases in which a 'legal concept has already gained universal acceptance without being

222 See Explanation to Draft Article 19, para. 2, Explanations relating to the Charter of Fundamental Rights of the European Union of 14 December 2007, Official Journal of the European Union C 303/02, 17, also citing ECtHR (Chamber), *Ahmed v. Austria*, judgment (Merits and Just Satisfaction) of 17 December 1996, no. 25964/94.

223 See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

224 Iris Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the Peoples of Europe"', CML Rev. 50 (2013), 383-421.

225 See CJEU, *Minister of Justice/LM*, judgment of 25 July 2018, case no. C-216/18 PPU, ECLI:EU:C:2018:586, para. 35: 'In order to answer the questions referred, it should be recalled that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected […].' From scholarship see e. g. *Georgios Anagnostaras,* 'The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection', GLJ 21 (2020), 1180-1197 (1188 et seq.). On the 'rule of law crisis' see n. 204.

226 Canor (n. 224), 395 et seq.

227 FCC, *Identitätskontrolle* (n. 59), para. 67.

228 FCC, *Identitätskontrolle* (n. 59).

229 FCC, *Identitätskontrolle* (n. 59), para. 71.

230 Steinberger (n. 3), 13 (translation by the author with the assistance of DeepL).

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supported by correspondingly broad state practice […]'. It would be – Steinberger argues – 'permissible under international law for a state – acting, for example through its courts – to refer to a norm that is in the process of being established or to a norm that has already been established but whose scope of application is still unstable, and thereby to attach legal consequences at least for its own jurisdiction'.[231] To a certain extent, Steinberger here seems to accord a law-generative role to the national courts within the dialogical and dialectical process of the genesis of international legal rules. Steinberger speaks of processes that are shaped by 'legality claims and counter-claims, compromise, thesis, antithesis and synthesis'.[232] This stands in line with Conclusion 6 para. 2 of the International Law Commission (ILC) Draft Conclusions on the identification of CIL which regards 'decisions of national courts' as manifestations of state practice.[233] This active role that he ascribes to Courts is contrasted with Steinberger's view on the restraints of judicial review in the context of foreign matters that the following section addresses.

6. The International Legal Sphere – Executive Prerogatives and Judicial Review

The 'normative volatility'[234] that Steinberger describes, and which is a characteristic of international law, poses challenges in situations where the courts have to decide on the question of whether a certain action or omission is in conformity with international law (following the binary logic based on a dichotomy between 'legal'/'illegal').[235] These challenges are to be seen in light of deeper questions of the separation of powers: Foreign relations have traditionally been regarded in various constitutional orders[236] as a matter

231 Steinberger (n. 3), 13 (translation by the author with the assistance of DeepL).

232 Steinberger (n. 3), 14 (translation by the author with the assistance of DeepL).

233 Draft conclusions on identification of customary international law, Yearbook of the International Law Commission II, Part Two (2018).

234 See on this term Paulina Starski, 'Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force: Normative Volatility and Legislative Responsibility', Journal on the Use of Force and International Law 4 (2017), 14-65 (14 et seq.).

235 See for an in-depth reflection on the concepts of violations of the international legal order Christian Marxsen, *Völkerrechtsordnung und Völkerrechtsbruch* (Mohr Siebeck 2021), 151 et seq.

236 See from a comparative perspective e. g. Jenny S. Martinez, 'The Constitutional Allocation of Executive and Legislative Power over Foreign Relations: A Survey' in: Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019), 97-114; Karl Loewenstein, 'The Balance Between Legislative and Executive Power: A Study in Comparative Constitutional Law', U. Chi. L. Rev. 5 (1938), 566-608; Saikrishna B. Prakash and Michael D. Ramsey, 'The Executive Power Over Foreign Affairs', Yale L. J. 111 (2001), 231-356.

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solely or primarily belonging to the executive sphere. According to Steinberger, it would be important for a state to speak with a uniform voice[237] in situations of 'normative volatility'.[238]

Following this line of thought, Steinberger stresses referring to the *Hess*-ruling (that he participated in),[239] the FCC has accepted that a wide sphere of discretion is to be granted to the executive in the field of foreign relations, which he regards as convincing.[240] This merits a critical reflection:[241]

The conceptual mirror of a wide sphere of discretion is the idea of 'judicial self-restraint' in areas of foreign policy.[242] Yet, the picture that German constitutional law paints is more complex: Art. 19 para. 4 BL (the right to an effective judicial remedy) and Art. 1 para. 3 BL (all state authority is bound by human rights)[243] suggest that executive foreign action is not solely to be governed by politics, but is constrained by constitutional limits.[244] Fundamental rights apply when and where the German state authority acts,[245] albeit the extent of protection granted by fundamental rights may be limited in transborder constellations. The actual protective scope of fundamental rights might also depend on the relevant dimension of the fundamental right which is triggered in the specific case (duties to protect, duties to respect).[246] To employ the Court's own words: 'Under Art. 1(3) of the Basic Law, German state authority is bound by fundamental rights; this binding effect is not

237 Steinberger (n. 3), 15.

238 See n. 234.

239 FCC, order of 16 Dezember 1980, 2 BvR 419/80 – *Hess-Entscheidung*, BVerfGE 55, 349 (365).

240 Steinberger (n. 3), 15.

241 Some considerations on this matter have already been elaborated here see Starski, 'Art. 59' (n. 33), para. 117 et seq.

242 FCC, judgment of 31 July 1973, 2 BvF 1/73 – *Grundlagenvertrag Bundesrepublik Deutschland und Deutsche Demokratische Republik*, BVerfGE 36, 1 (14 et seq.).

243 Ingolf Pernice, 'Art. 59 GG' in: Horst Dreier (founder), *Grundgesetz-Kommentar* (2nd edn, Mohr Siebeck 2006), para. 53. But see Werner Heun, 'Art. 59' in: Horst Dreier (founder), *Grundgesetz-Kommentar* (3rd edn, Mohr Siebeck 2015), para. 52.

244 Christian Tomuschat, 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen', VVDStRl 36 (1978), 8-58 (49 et seq.).

245 FCC, judgment of 19 May 2020, 1 BvR 2835/17 – *BND*, BVerfGE 154, 152 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2024/10/rs20241008_1bvr174316en.html>, last access 7 August 2025), headnote 1. See also Bardo Fassbender, '§ 244 Militärische Einsätze der Bundeswehr' in: Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts*, vol. XI (3rd edn, C. F. Müller 2013), paras. 156 et seq.

246 FCC, *BND* (n. 245), headnote 1; FCC, order of 4 May 1971, 1 BvR 636/68 – *Spanier-Beschluß*, BVerfGE 31, 58 (77). Recently also FCC, order of 24 March 2021, 1 BvR 2656/18 and 1 BvR 78, 96, 288/20 – *Klimabeschluss*, BVerfGE 157, 30 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/03/rs20210324_1bvr265618.html>, last access 7 August 2025), para. 175.

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restricted to German territory. The protection afforded by individual fundamental rights within Germany can differ from that afforded abroad.'[247]

Foreign policy does not lie beyond judicial review by the FCC,[248] given that the 'act of state doctrine' is alien to the BL.[249] Yet, the FCC, despite being both competent to review state action in foreign policy matters[250] as well as to adjudicate on aspects of international law[251] (e. g. to declare what the specific substance of a norm of CIL is, see Art. 100 para. 2 BL),[252] has demonstrated sensitivity regarding the political necessities and intrinsic rationalities of state action at the international level.[253] The FCC reviews state action in the sphere of foreign policy mainly for arbitrariness.[254] This reluctance also manifests in its more recent case-law: In its judgment concerning a possible preliminary injunction against the conclusion of the Comprehensive Economic and Trade Agreement (CETA), the FCC stressed that the 'margin of discretion and of prognosis granted to the Federal Government with respect to the potential implications of a trade agreement between the European Union and its Member States and Canada on the basis of the negotiated CETA draft and its comparison to [the implications of] alternative scenarios predicting Canada's behaviour in case of the failure of CETA' would be 'only subject to a limited review by the Federal Constitutional Court'.[255] In its

247 FCC, *BND* (n. 245), headnote 1.

248 FCC, judgment of 4 May 1955, 1 BvF 1/55 – *Saarstatut*, BVerfGE 4, 157 (169); Gunnar Schuppert, *Die verfassungsgerichtliche Kontrolle der Auswärtigen Gewalt* (Nomos 1973); Kay Hailbronner, 'Kontrolle der auswärtigen Gewalt', VVDStRl 56 (1997), 7-34. From a comparative perspective Rainer Grote, 'Judicial Review' in: Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *MPECCoL* (online edn, July 2018); Lawrence Collins, 'Foreign Relations and the Judiciary', ICLQ 51 (2002), 485-510.

249 See Bernhard Kempen and Björn Schiffbauer 'Art. 59' in: Peter M. Huber and Andreas Voßkuhle (eds), *Grundgesetz Kommentar* (8th edn, C. H. Beck 2024), para. 138.

250 FCC, *Saarstatut* (n. 248), 169.

251 FCC, order of 21 October 1987, 2 BvR 373/83 – *Teso*, BVerfGE 77, 137 (167); see. Ulrich Fastenrath and Thomas Groh, 'Art. 59' in: Karl Heinrich Friauf and Wolfram Höfling (eds), *Berliner Kommentar zum Grundgesetz*, 22nd suppl. (Erich Schmidt Verlag 2007), 75, para. 118 et seq. But see FCC, *Hess-Entscheidung* (n. 239), 367 et seq.

252 'If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.' (see <https://www.gesetze-im-internet.de/englisch_gg/>, last access 7 August 2025).

253 FCC, *Saarstatut* (n. 248), 168 et seq.

254 FCC, *Atomwaffenstationierung* (n. 11) (see already headnote 3), para. 168; FCC, order of 18 April 1996, 1 BvR 1452, 1459/90 and 2031/94 – *Bodenreform II*, BVerfGE 94, 12 (35). See FCC *Hess-Entscheidung* (n. 239), 368 et seq.; FCC, *Teso* (n. 251), 167.

255 FCC, judgment of 13 October 2016, 2 BvR 1368/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16 – *Eilantrag gegen CETA*, BVerfGE 143, 65 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/10/rs20161013_2bvr136816en.html>, last access 7 August 2025), para. 47.

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OMT judgment the FCC held that '[i]n the field of foreign policy, too, it is incumbent upon the competent constitutional organs to reach duty-based political decisions and decide for themselves which measures to take. They must consider existing risks and take political responsibility for their decisions […].'[256] In its order on the *European Patent Office,* the FCC has granted 'competent [...] constitutional organs' a 'broad margin of appreciation […] also in foreign and European policy where, in principle, it falls within their discretion and responsibility to decide which measures to take. They must consider the existing risks and take political responsibility for their decisions […].' 'The same' would apply 'in principle, to the question of how they can best fulfil their duties of protection arising from fundamental rights when dealing with non-German public authority […].'[257] In its order on German participation within the multilateral operation against Islamic State of Iraq and Syria (ISIS), the FCC stressed that '[i]n foreign policy matters, the Basic Law grants the Federal Government wide latitude for autonomous decision-making in the exercise of its functions. To this extent, the role of both Parliament as the legislature and courts as the judicial authority is restricted so as to afford Germany the necessary leeway in foreign and security policy matters; otherwise, the division of state powers would not be appropriate to the respective state functions […].'[258]

This rationale has influenced the jurisprudence of other courts: The Federal Administrative Court, for example, referred to FCC case-law and showed considerable reluctance in assessing the validity of positions taken by the executive in terms of the substance of an international legal rule. It highlighted that 'courts are obliged to exercise the utmost restraint when assessing possible errors of law by these bodies that may violate international law as a

256 FCC, *OMT* (n. 59), para. 169.

257 Here and before FCC, order of 8 November 2022, 2 BvR 2480/10, 2 BvR 561/18, 2 BvR 786/15, 2 BvR 756/16, 2 BvR 421/13 – *Rechtsschutz des Europäischen Patentamts*, GRUR 125 (2023), 549 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/11/rs20221108_2bvr248010en.html>, last access 7 August 2025), para. 128.

258 FCC, order of 17 September 2019, 2 BvE 2/16 – *Anti-IS-Einsatz,* BVerfGE 152, 8 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/09/es20190917_2bve000216en.html>, last access 7 August 2025), para. 34. See also FCC, judgment of 3 July 2007, 2 BvE 2/07 – *Afghanistan-Einsatz*, BVerfGE 118, 244 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2007/07/es20070703_2bve000207en.html>, last access 7 August 2025), para. 43: 'In the area of foreign policy, the Basic Law has left the Government a broad latitude to carry out its tasks on its own responsibility. Both the role of parliament as the legislative body and also that of the judiciary are restricted in this area, in order that Germany's capacity to act in foreign and security policy is not restricted in a manner that would amount to a functionally inappropriate separation of powers […].'

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discretionary error. This would only be considered if the adoption of the legal opinion in question were to be seen as arbitrary towards the citizen, that is, if it could no longer be understood from any reasonable point of view, including foreign policy […]'.[259] The key question is, what renders foreign policy so different from other policy areas that the difference could justify limited judicial review? From the perspective of the FCC, it would be the fact that the political circumstances at the international level are dependent on various actors and unpredictable courses of action,[260] thereby limiting Germany's capacity as a subject of international law to achieve specific outcomes.[261] It would not be compatible with the openness of the BL towards the international legal sphere and its inherent 'friendliness' or 'cordiality' towards international law[262] if Germany were to become *de facto* incapable of concluding treaties and remaining a reliable member of alliances.[263] The concept of the 'Bündnisfähigkeit', the 'ability to honour [its] alliances' is now explicitly present within the BL – namely in Art. 87a para. 1a cl. 1 BL – a provision that establishes a special trust dedicated to strengthen Germany's defence capability with a view to the Russian aggression against Ukraine.

The most recent culmination point of the judicial self-restraint of the FCC has been the judgment of the FCC in the *Ramstein* case in which the FCC opted for a plausibility standard of judicial review. The *Ramstein* case concerned protective obligations on the part of Germany with regard to persons beyond the German territorial sphere affected by the actions of a third party – in the case at hand, the USA – in situations where there (possibly) exists a sufficient nexus to German state authority – *in concreto,* via the military base *Ramstein,* which plays a significant role for transferring data to operate drones in Yemen.[264] The Court acknowledged, first, that there is a general mandate ('allgemeiner Schutzauftrag') on the part of the German authorities to ensure 'that the protection of fundamental human rights and the core norms of international humanitarian law is upheld even in cases with an

259 Federal Administrative Court, judgment of 25 November 2020 – 6 C 7.19, para. 57 – *Ramstein* (BVerwGE 170, 346) (translation by the author with the assistance of DeepL).

260 See Henning Schwarz, *Die verfassungsgerichtliche Kontrolle der Außen- und Sicherheitspolitik* (Duncker & Humblot 1995), 251 et seq.; Martin Nettesheim, 'Art. 59' in: Günter Dürig, Roman Herzog and Rupert Scholz, *Grundgesetz Kommentar*, 106th suppl. (C. H. Beck 2024), para. 238; Klaus Stern, 'Außenpolitischer Gestaltungsspielraum und verfassungsgerichtliche Kontrolle – Das Bundesverfassungsgericht im Spannungsfeld zwischen Judicial Activism und Judicial Restraint', NwVBl 8 (1994), 241-249 (245 et seq.).

261 FCC, *Saarstatut* (n. 248), 168 et seq.

262 Vogel (n. 33), 33 et seq., 42.

263 FCC, order of 23 June 1981, 2 BvR 1107, 1124/77 and 195/79 – *Eurocontrol I,* BVerfGE 58, 1 (41); Schmidt-Aßmann, 'Art. 19 Abs. 4' in: Günter Dürig, Roman Herzog and Rupert Scholz, *Grundgesetz Kommentar* (C. H. Beck 2024), para. 83.

264 See FCC, *Ramstein* (n. 116), para. 115.

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international dimension'.[265] Secondly, the FCC assumed that this duty may concretise into a specific duty to protect, provided that a 'sufficient nexus' exists 'between the dangerous situation triggering the need for protection and the state authority of the Federal Republic of Germany'.[266] The FCC refrained from deciding on whether the US military base *Ramstein* qualified as a sufficient nexus (leaving the option open that the mere transfer of data could be seen as 'normatively neutral').[267] It found, however, that a specific duty to protect was not activated since the United States (US) position that its targeted killings on Yemeni soil conform with international humanitarian law (and human rights law) would be plausible, and the German government's assumption in favour of the plausibility of the US position would in itself be plausible.[268] The substantive legal questions in the case at hand concerned elements of a 'direct participation in hostilities',[269] the criteria for membership within an armed group as well as the concept of the 'continuous combat function'.[270]

While this 'double plausibility standard' appears to include a gradually stricter judicial control than a mere test for arbitrariness – the exact distinction between an arbitrariness and plausibility-test being controversial –, it remains problematic. The Court retreats from adjudicating on questions of law, and from deciding upon the state of international treaty and customary law, referring to international controversies regarding the scope and substance of certain International Humanitarian Law (IHL) rules without delving itself into a broad analysis of state practice. This stands in stark contrast to Art. 100 para. 2 BL which explicitly confirms the Court's authority to assess the existence and content of a rule of CIL.

What characterises the jurisprudence of the FCC is hence a 'trade off' between securing the legality of state action and the effectivity of fundamental rights protection in spheres of foreign policy on the one hand, and safeguarding Germany's position as a reliable 'global player' speaking with a

265 FCC, *Ramstein* (n. 116), first headnote (translation by the author with the assistance of DeepL).

266 FCC, *Ramstein* (n. 116), para. 98 (translation by the author with the assistance of DeepL).

267 FCC, *Ramstein* (n. 116), para. 119 (translation by the author with the assistance of DeepL).

268 FCC, *Ramstein* (n. 116), para. 132.

269 See generally Nils Melzer, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Committee of the Red Cross 2009, 46 et seq.; Rewi Lyall, 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Obligations of States', Melbourne Journal of International Law 9 (2008), 313-333.

270 See FCC, *Ramstein* (n. 116), para. 135 et seq.

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uniform voice on the other hand. This 'trade off' appears in sum disadvantageous to an effective fundamental rights protection and is not without constitutional tensions. On the one hand, Steinberger would, overall, based on the reasoning he presents in his piece and also along the lines of the NATO double-track decision[271] as well as the *Hess*-ruling,[272] be supportive of the FCC's *Ramstein* judgment. On the other hand, Steinberger's perspective on the role of courts in situations of processes of rule-generation points in the opposite direction.[273] We can only speculate whether his view would have evolved.

III. Conclusion: Between Progressiveness and Judicial Restraint

In the contribution analysed here, Steinberger commented on issues in the case-law of the FCC; some of them shaped by himself. Steinberger's article marks a change of professional identities – from a judge of the FCC back to merely an academic role (while the 'academic-only' phase did not last long).[274] Commenting as both a scholar and a former judge of the FCC, his piece can be read as an attempt to influence the academic narrative surrounding the judgments he shaped, while simultaneously laying out his future research interests as an MPIL director.

This ultimately leads us to the question whether Steinberger would have been pleased by the evolution of FCC jurisprudence as it presents itself today:

Beyond doubt, the FCC has proven to be a driving force behind the international and supranational legal integration of the German legal order in numerous areas, but the Court has also sharpened the constitutional limits of this 'openness' in its case-law.

In some of its more recent decisions, the FCC has shown 'courage' and 'progressiveness': It repositioned itself as a Court within the multilevel system of fundamental rights protection (evidenced by the shift of tectonics in the *Right to be Forgotten* cases)[275] and clarified that fundamental rights enshrined in the BL bind the German state authority not only extraterritorially, but also when fundamental rights are triggered in their positive dimen-

271 FCC, *Atomwaffenstationierung* (n. 11) (headnote 3).
272 FCC, *Hess-Entscheidung* (n. 239).
273 On this see n. 241 et seq. together with the accompanying text.
274 See n. 30.
275 FCC, *Recht auf Vergessen I* (n. 67); FCC, *Recht auf Vergessen II* (n. 140).

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sion as obligations to protect (*BND* case,[276] the *Climate Change* case[277] as well as the *Ramstein* case).[278]

The declaration that EU organs (European Central Bank [ECB] and the CJEU) have acted *ultra vires* in the *PSPP* case was a 'first' and sharpened its reserve control competences – an occurrence which seemed like quite a distant possibility when *Solange II* was decided.[279] As a matter of course, the activation of the *ultra vires* control and its outcome in this specific case have not been without systemic effects on the 'limbo',[280] which defines the EU's architecture as well as the judicial dialogue between the CJEU and the FCC. The successful activation of the *ultra vires* control stands in a contentious relationship with the cordiality towards EU law manifesting in the *Solange II*-ruling and the primacy of supranational law.[281] Most probably, Steinberger would have been critical of this turn in the case-law of the FCC, especially since it potentially carries the seed of a 'renationalisation'.[282]

While the FCC strengthened the significance of the ECHR and the jurisprudence of the ECtHR within the German constitutional realm, it reserved itself some leeway to deviate from ECtHR case-law.[283] In this context, the obligation to consider pronouncements of human rights bodies deserves a further judicial refinement. The FCC's judicial self-restraint in foreign affairs requires a critical reconsideration; Steinberger's perspective on it would be of particular interest.

When revisiting and reflecting upon Steinberger's contribution after all these decades, the following three points particularly stand out: First, the corpus of a court's case-law is the perfect example of path dependencies.[284] Each ruling is a further brick in the edifice of constitutional law (the *Right to be Forgotten* stands on the shoulders of, at first, cautious trends pointing towards the direct application of supranational rights). Secondly, while the legal landscape has changed in various respects and the jurisprudence of the FCC has evolved, the key – and partly unresolved – questions surrounding the 'open constitution state'[285] have not lost significance. Thirdly, the juris-

276 FCC, *BND* (n. 245).
277 FCC, *Klimabeschluss* (n. 246), para. 175.
278 FCC, *Ramstein* (n. 116), para. 85.
279 FCC, *Solange II* (n. 135).
280 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).
281 FCC, *Solange II* (n. 135).
282 See Steinberger's critical comments cited at n. 152.
283 FCC, *Streikverbot für Beamte* (n. 58).
284 On the concept of path dependence in political sciences Paul Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics', The American Political Science Review 94 (2000), 251-267.
285 See n. 33.

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prudence on the 'open constitution state'[286] displays in various respects a dialectical character, and is in constant motion.

In the current international legal landscape characterised by severe violations of and cynicism towards international law,[287] the national courts – in particular national apex courts – appear as essential counterweights to fatalism and a capitulation of the law in light of political realities and abuses of power.[288] Today, judicial 'courage' is the order of the day – not in the sense of activism or utopian endeavours, but in the sense of clearly stating what supranational and international law say and demand – even if this seems politically inconvenient. Most probably, Steinberger would have agreed with such a vision and understanding of the function of courts within an internationally and supranationally entangled constitutional state. As it is documented, his general understanding of his judicial role has been as follows: 'A judge has to be independent, not neutral.'[289]

286 See n. 33.

287 See Paulina Starski and Friedrich Arndt, 'The Russian Aggression against Ukraine – Putin and His "Legality Claims"', Max Planck UNYB 25 (2022), 756-796 (794 et seq.).

288 See Starski, 'Art. 59' (n. 33), para. 106.

289 See Cremer (n. 11), 687 (translation by the author).

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