The South African Constitutional Court did not ignore the prohibition of torture under the African Charter on Human and Peoples' Rights and the commitments that the Southern African Development Community has made to the protection of human rights and mutual legal assistance in investigations (para. 39 & n.45). These citations to regional and subregional law and to the decisions of the African Commission on Human and Peoples' Rights are an important way of weaving together international, regional, and subregional norms to imbue them with legitimacy and relevance to the context. The Court's reference to overlapping international and regional norms also demonstrates that the duty to investigate extraterritorial allegations of torture by and against non–South Africans has a regional and subregional international legal basis—that it is not simply required by a "distant" international law without African roots. Moreover, by turning to case law from other jurisdictions and rules of customary and general international law, as well as regional and subregional rules of international law as anchored by the South African Constitution, the Court exemplified the ability of national courts to nudge governments into complying with their international legal obligations.

The South African Constitutional Court did not, however, stop at binding legal instruments to support its legal conclusions. In the very first paragraph of the judgment, it alluded to Nelson Mandela's 1993 article in *Foreign Affairs* declaring that, with the end of apartheid, South Africa's foreign policy would be based on the "belief that human rights should be the core concern of international relations" and that in future South Africa would mobilize its resources and commitments to meet this objective (para. 1).[14] Other similar references cite resolutions of the UN General Assembly and regional resolutions of the African Commission (para. 39 n.45). These citations of soft law instruments further enrich the Court's judgment.

JAMES THUO GATHII
Of the Board of Editors

Status of treaties in domestic law—priority of federal statutory law over international treaties—parliamentary competence to override treaty provisions—constitutional openness to international law—double taxation treaties

"TREATY OVERRIDE." 2 BvL 1/12. *At* http://www.bverfg.de/e/ls20151215_2bvl000112.html. Federal Constitutional Court of Germany, December 15, 2015.

In a decision rendered on December 15, 2015, the Second Senate of the Federal Constitutional Court (Bundesverfassungsgericht or Court) held that the derogation of an international treaty by national statutory law is permissible under the German Basic Law (Grundgesetz or Constitution).[1] In so holding, the Court confirmed that the Constitution ranks

individual human rights complaints. Its operations were suspended in 2010. *See* Karen J. Alter, James Thuo Gathii, & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. (forthcoming 2016), *available at* http://ssrn.com/abstract=2591837.

[14] Quoting Nelson Mandela, *South Africa's Future Foreign Policy*, FOREIGN AFF., Nov.–Dec. 1993, at 86, 97.

[1] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvL 1/23, Dec. 15, 2015, *at* http://www.bverfg.de/e/ls20151215_2bvl000112.html [hereinafter Order]. For an English summary of the facts of the case, including the procedural history and the key considerations of the Court, see Press Release No. 9/2016, BVerfG, Treaty Overrides by National Statutory Law Are Permissible Under the Constitution (Feb. 12, 2016), *at* http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-009.html. Translations of the Order below are by the author.

international treaties as equal to federal statutory law and therefore (under the *lex posterior* rule) subject to amendment or displacement by subsequent federal statutory legislation (treaty override). The Court expressly rejected the position that the constitutional principle of "openness to international law" (*Völkerrechtsfreundlichkeit*) required continuing legislative adherence to prior treaty obligations entered into by Germany. That principle had traditionally been interpreted to mean that the Constitution as a whole, through its provisions dealing with international law, subjects the national legal order to the influence of international law and requires state organs, as far as possible, to bring their actions into line with international law to avoid conflicts between domestic and international obligations.

The case concerned the 2004 tax bill of a married couple, which covered income earned by the husband in both Germany and Turkey. Both of them were permanent residents of Germany and were jointly assessed under German tax law. According to the Income Tax Act (Einkommensteuergesetz or ITA), residents of Germany are fully liable to taxation under federal tax law. Taxable income under the ITA is defined as all income from salaried employment, regardless of where the income was earned.[2] In principle, revenue offices may tax all permanent residents of Germany on the basis of their global income, which can result in double taxation if they are subject to taxation under the laws of the foreign state where they also earned income.

In 1985, Turkey and Germany concluded a bilateral agreement on double taxation to deal with such a situation.[3] The agreement provided that income earned by persons on Turkish soil who were also fully liable to taxation in Germany would not be added to the basis of assessment of the income subject to German taxation. In 2003, the federal legislature amended the ITA and introduced a new provision of section 50d, paragraph 8.[4] Under this provision, the exemption

> will only be granted, irrespective of the applicable [double taxation] treaty, if the citizen liable for taxation shows that the state entitled under the treaty to exercise the right of taxation has waived this right or that the taxes assessed by this state on the basis of the income in question have been paid.[5]

This rather technical amendment resulted in the present litigation. The husband in the case failed to provide evidence that he had paid taxes in Turkey or that Turkey had waived its tax claim. Thus, the relevant German revenue office included his earnings in Turkey in its assessment of taxable income for 2004, prompting the couple to file an action for annulment in the competent tax court. After that suit was dismissed,[6] they turned to the Federal Finance Court, as court of appeal in tax cases, which suspended the appellate proceedings in January 2012 and requested a preliminary decision by the Federal Constitutional Court on the constitutionality of section 50d, paragraph 8 of the ITA.[7]

[2] Einkommensteuergesetz [EStG] [Income Tax Act], Oct. 16, 1934, BUNDESGESETZBLATT [BGBL] I at 3366, §§50d(8), 1(1)(1), 2(1)(1)(4).

[3] Doppelbesteuerungsabkommen Deutschland-Türkei [Double Taxation Treaty, Ger.-Turk.], Apr. 16, 1985, BGBL II 867.

[4] Zweites Gesetz zur Änderung steuerlicher Vorschriften [Steueränderungsgesetz 2003] [StÄndG 2003], Dec. 15, 2003, BGBL I 2645, §50d.

[5] *Quoted in* Order, para. 6, *translated in* Press Release 9/2016, *supra* note 1.

[6] Finanzgericht Rheinland-Pfalz [FG] [tax court of Rhineland-Palatinate], June 30, 2009, 6 K 1415/09.

[7] Bundesfinanzhof [BFH] [Federal Finance Court], Jan. 12, 2012, I R 66/09, 236 SAMLUNG DER ENTSCHEIDUNGEN UND GUTACHTEN DES BUNDESFINANZHOFS [BFHE] 304.

Under the German Constitution, a regular court of justice—unlike United States courts in a decentralized system of judicial review—may not disregard otherwise applicable statutory law duly enacted by the parliament, even if the court considers the statute unconstitutional. Instead, under the centralized judicial review system, the court must refer the issue to the Federal Constitutional Court.[8] In this instance, the Federal Finance Court concluded that the restrictions in ITA section 50d, paragraph 8 were in fact incompatible with the 1985 double taxation treaty, which exempted income earned in Turkey from German taxation without further requirements. Until this case, that court had always taken the view that subsequent statutory legislation could "override" an international treaty in conformity with the Constitution.[9] Surprisingly, however, the court abandoned its traditional position in this instance. It argued that a breach of an international treaty obligation by later-enacted statutory law must be qualified as a violation of the Constitution, since the Federal Constitutional Court had previously formulated the general obligation of all state organs to comply with binding norms of international law, as far as "methodologically justifiable."[10] According to the interpretation of the Federal Finance Court, supported by references to academic literature,[11] this obligation would necessarily bind the legislator constitutionally to international treaties as well.

In fact, treaty overrides had been the subject of earlier constitutional jurisprudence dealing with postwar problems of legal transformation and continuity. In the highly controversial case concerning the concordat between the Reich and the Apostolic See of July 1933, the Court stated that the international openness of the Constitution did not bind the parliament to international treaties.[12] Nonetheless, it was far from clear—indeed, rather doubtful—that the Court would uphold this almost sixty-year-old doctrine without substantial modification.[13]

First, one had to take into consideration the historical context of the concordat decision. The Reich ratified the treaty under Hitler's National Socialist regime. Against this background, it would have been difficult to argue in 1957 that the Constitution required a democratically elected parliament to comply with pre-democratic law. Second, and more important, recent constitutional jurisprudence—carefully cited by the Federal Finance Court—had repeatedly strengthened the dedication to international law and relied on the rather abstract idea of openness to international law enshrined in the Constitution.[14]

[8] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law], May 23, 1949, BGBL I, Art. 100, §1, *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html.

[9] *See* BFH, July 13, 1994, I R 120/93, 175 BFHE 351, 352; BFH, May 17, 1995, I B 183/94, 178 BFHE 59, 61; BFH, Nov. 28, 2001, I B 169/00, §10; BFH, Mar. 20, 2002, I R 38/00, 198 BFHE 514, 521.

[10] BVerfG, Oct. 14, 2004, 2 BvR 1481/04, 111 BVERFGE 307 ("Görgülü"); BVerfG, Oct. 26, 2004, 2 BvR 955/00, 1038/01, 112 BVERFGE 1; BVerfG, May 4, 2011, 2 BvR 2365/09, 2 BvR 571/10, 2 BvR 1152/10, 2 BvR 2233/08, 2 BvR 740/10, 128 BVERFGE 326.

[11] For a deeper analysis with further references, see, for example, Oliver Fehrenbacher & Nicolas Traut, *Völkerrechtliche Verträge und nationale "Treaty Overrides," in* GRENZÜBERSCHREITENDES RECHT—CROSSING FRONTIERS 569, 573–81 (Georg Jochum, Wolfgang Fritzemeyer, & Marcel Kau eds., 2013); Tobias Hofmann, *Zur Verfassungsmäßigkeit des Treaty Override*, 128 DEUTSCHES VERWALTUNGSBLATT 215 (2013).

[12] BVerfG, Mar. 26, 1957, 2 BvG 1/55, 6 BVERFGE 309, 363.

[13] In a (nonbinding) chamber decision from 1996, the Court (declaring a constitutional complaint inadmissible) summarily stated that not just any international treaty entered into by Germany would trigger constitutional compliance obligations. BVerfG Kammer [Chamber], Dec. 22, 2006, 2 BvR 1526/04, KAMMERENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGK] 10, 116 (124).

[14] The federal government advanced the argument before the Constitutional Court that invoking an abstract idea of international openness "was unfit to entail legal consequences." *See* Order, para. 18.

Nevertheless, the Federal Constitutional Court rejected the position of the Federal Finance Court and clarified that a statutory treaty override is constitutional. The Court noted that the Constitution determines, within the German legal order, the rank and quality of an international treaty (para. 34). Pursuant to the constitutional provisions dealing with international law, only general principles of public international law (which include rules of customary law and general principles of international law)[15] rank above federal statutory law (but, importantly, below the Constitution) by virtue of the explicit constitutional order (para. 41).[16] Moreover, the German Constitution, in contrast to some other European constitutions, does not generally privilege international law over national law (para. 42).[17]

According to Article 59, paragraph 2 of the Constitution, "regular" international treaties are integrated into the legal order through the enactment of statutory assent by the federal parliament (Deutscher Bundestag).[18] The requirement of parliamentary approval protects the legislative branch from external binding effects that would force it to transform international obligations into national legislation without prior consent (para. 44). International treaties consequently enjoy the rank of federal statutory law within the German legal order (paras. 45–56), as the Federal Constitutional Court had already clarified in a long chain of decisions.[19] Even though *pacta sunt servanda* is a general principle of international law, which ranks above national statutory legislation, that principle neither determines the internal rank of international treaties nor raises the status of any treaty to a general rule of international law (para. 47). As a result, within the German legal order concluded treaties are subject to abrogation by later federal legislation (*lex posterior derogat legi priori*) (para. 49).

Furthermore, the Federal Constitutional Court rejected the position that the first sentence of Article 59, paragraph 2 of the Constitution bars the federal legislator from amending statutory law that transforms a ratified international treaty into national law. The Court emphasized that this position was

> contrary to the principle of democracy (Article 20 para. 1 and para. 2 [of the Constitution]) and the principle of parliamentary discontinuity. Democracy is temporary sovereignty [*Herrschaft auf Zeit*]. This implies that later legislators—owing to the will of the people expressed by election—shall be able, within the provisions of the Constitution, to revise prior legislation. It would be incompatible with this requirement if a parliament could bind the legislators of later parliamentary sessions and restrict their ability to abrogate or

[15] *See, e.g.*, BVerfG, May 8, 2007, 2 BvM 1/03, 118 BVERFGE 124, 135.

[16] Article 25 of the Constitution provides: "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory." GG, *supra* note 8, Art. 25.

[17] The Court referred to the constitutions of France and Luxembourg (para. 42). For a comparative analysis, see Luzius Wildhaber & Stephan Breitenmoser, *The Relationship Between Customary International Law and Municipal Law in Western European Countries,* 48 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 163 (1988).

[18] Article 59, paragraph 2 of the Constitution provides in pertinent part: "Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law." GG, *supra* note 8, Art. 59(2).

[19] *E.g.*, BVerfG, Mar. 26, 1987, 2 BvR 589/79, 2 BvR 750/81, 2 BvR 284/85, 74 BVERFGE 358, 370; 111 BVERFGE 307, *supra* note 10, at 317; 128 BVERFGE 326, *supra* note 10, at 367; *see also* BVerfG, May 29, 1990, 2 BvR 254/88, 2 BvR 1343/88, 82 BVERFGE 106, 120 (the European Convention on Human Rights as a helpful tool in interpreting analogous constitutional rights).

> correct legislative decisions of the past, because this would permanently codify current political positions. (Para. 53, citations omitted)

If a treaty by its terms cannot be terminated, the Court concluded, the federal parliament must be able to enact statutory law and derogate from subsisting treaty obligations (para. 55).

The Court unavoidably referred to the *Görgülü* case,[20] in which it had earlier shaped the doctrine that all state organs, when interpreting and applying national law, must comply with international law to the extent possible. It now further clarified that this established doctrine does not predetermine specific legal consequences if the parliament as legislator enacts statutory law incompatible with international treaties. The legislative branch must take international law into account and consider it seriously within the legislative process. But failing to do so cannot invalidate statutory law (para. 59).

The Court also pointed out that international law itself does not invalidate national law within the national legal order even if the domestic norm in question violates international obligations. Instead, international law leaves to states the determination of how to respond to a breach of international law within their national legal orders (para. 61).

Finally, the Court rejected the position that the general constitutional principle of openness to international law requires the invalidation of statutory law that contravenes the state's international treaty obligations (para. 64). Although the Constitution obliges all state organs to comply with international law and to avoid discrepancies between international obligations and national law (para. 66), the constitutional priority of international law within the national legal order does not require unlimited compliance with every international legal norm, in particular, if compliance would bring the organ into conflict with its national legal obligations (para. 69).

The Constitution defines the scope of openness of the national legal order to the sphere of international law. The principle of openness does not transcend the detailed constitutional provisions regulating the legal treatment of international law. The Court reiterated that the Constitution places regular treaties on the same level as federal statutes, whereas general rules of international law reside on the level above.[21] It would contradict this constitutional arrangement if the general principle of openness to international law were interpreted to place federal statutory legislation below any norm arising from an international treaty commitment of Germany (para. 74). Consequently, holding statutory law incompatible with international treaties does not violate the constitutional guarantee of the rule of law (paras. 78–91).[22]

Remarkably, Justice Doris König dissented from the majority opinion of the seven other Second Senate justices. She argued that in the globalized world today, marked by international cooperation and coordination, the principle of democracy, on the one hand, and the rule of law together with openness to international law, on the other hand, should be rebalanced. She criticized the majority opinion as one-sidedly giving priority to democracy over the rule of law. She proposed an interest-balancing approach where derogation of an international treaty by

[20] 111 BVERFGE 307, *supra* note 10.

[21] GG Arts. 25 & 59(2), *supra* notes 16 & 18, respectively.

[22] The rule of law is enshrined in GG Art. 20(3). The Court also discussed, apart from the questions of international law, whether ITA section 50d, paragraph 8 violated the equal protection clause in GG Article 3, paragraph 1 because, as the plaintiffs asserted, it subjected taxpayers to arbitrary taxation. The Court concluded that the provision is justified.

later statutory law must be justified by higher interests. It is worth mentioning that as a professor of public international law, Justice König was the only international lawyer on the bench of the Court's Senate.

* * * *

Designing the procedures for democratic legitimation so that the will of the people can be heard, which necessarily includes options for legal change, presents a challenge if institutional stability is to be maintained at the same time.[23] From this perspective, democracy and the rule of law can be seen as competing principles. Thus, the current decision is principally about the temporality of rule making, a conflict between past and future, and less about the relationship between international and national legislation. The only specific problem from the international perspective is that the conclusion of an international treaty partly externalizes the democratic conflict so that rule making is placed outside the mechanisms of democratic control, legitimation, and revision.

The workings of international law in a national legal system are always complicated and cannot be adequately assessed without scrutiny of the national constitutional system in general.[24] While the Court's majority view in this case represents the classic approach to resolving conflict through the lens of normative hierarchy and identifying a stable center of accountability, the dissenting opinion of Justice König reflects modern approaches, which—inspired by international relations theory—try to supersede the normative pyramid with horizontal networks of cooperation, transnational legal pluralism, and disaggregated legal communication.[25]

German constitutional doctrine has always been amenable to international cooperation and lawmaking. Nonetheless, openness can never mean substantive indifference and, in a democracy, even international rule making inevitably must have inherent limits. In a parliamentary system—like the German constitutional order—where the linchpin of legitimation rests with the legislature (and its enacted statutes), giving international law general precedence over national law would be a rather radical approach and could threaten to undermine the functioning of the democratic formation of will, as derived from the people, and the self-determined evolution of the legal order. Some constitutions explicitly address the question of the rank of international law within the national legal order. The model that accords only general rules of international law (and not treaties) priority over national statutory law is common in Europe. The Federal Constitutional Court convincingly deduces the consequences of that differentiated ranking inherent in the Constitution.

Even if the Court's approach comes as no surprise, the decision marks a turning point in German constitutional jurisprudence regarding the domestic status of international law. Over the past two decades, the Court might have overstressed the abstract concept of openness to international law. All the leading cases in which the Court elaborated its doctrine that all state

[23] Famously expressed by Thomas Jefferson, "The Earth Belongs to the Living," Letter from Jefferson to James Madison (Sept. 6, 1789), *in* JEFFERSON WRITINGS 959 (Merrill D. Peterson ed., 1984).

[24] CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 333 (2d ed. 2015).

[25] See, in particular, ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–103 (2004); Anne-Marie Slaughter, *Judicial Globalization,* 40 VA. J. INT'L L. 1103 (2000); Anne-Marie Slaughter, *The Real New World Order,* FOREIGN AFF., Sept.–Oct. 1997, at 183; LARS VIELLECHNER, TRANSNATIONALISIERUNG DES RECHTS 265–301 (2013) (on German transnational legal theory).

organs must, as far as legally possible, comply with international obligations affected the relation between constitutional fundamental rights and human rights under the European Convention on the Protection of Human Rights and Fundamental Freedoms.[26] Of course, the body of human rights within Europe rests on relatively homogeneous concepts of effective protection of the individual. If the interpretation of constitutional and international treaty rights is harmonized through the genuine efforts of the different European courts, the potential for escalation of conflict will remain low. In this respect, the jurisprudence of the Federal Constitutional Court in these cases was more about delimiting the competences and spheres of jurisdiction between competing courts than about conflicts of substantive law.

This relative harmony is broken when the lid is removed from the tight institutional protection of human rights within Europe. Thus, the Court in the carefully worded and thoroughly reasoned decision discussed here installs some democratic safeguards to bind the final responsibility for the development of the national legal order to the national institutions, which remain the only players that can create democratic accountability.

Although the case at hand seemingly affects a peripheral and technical problem of income taxation, the decision is fundamental to the further course of the constitutional framing of international law. The decision stands as a liberating act from the legalism that can stifle the body politic with an ever-tighter web of regulation, adopted without recourse to the democratic process, which petrifies political decisions of the past. In an interconnected and rapidly globalizing legal order, such interwoven preexisting obligations can hamper the maneuverability of democratic legislators.

From time to time, in a parliamentary system like Germany's, a current government, supported by a sufficient majority in the legislative branch, may even try to immunize current legislation against future amendment by internationalizing the issue. Binding Germany internationally circumvents the internal temporal limitations of statutory legislation inherent in the democratic process. Besides terminating treaties, if and to the extent a treaty permits termination, the democratic will of the people cannot escape the grip of past international lawmaking. In a globalized atmosphere, the constitutional option to violate international law by nationally valid legislation becomes the final argument for reinstating democratic self-determination and allowing the democratic process enough air to breathe.

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[26] *See* cases cited *supra* note 10; *see also* 82 BVERFGE 106, 120, *supra* note 19.

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