

Fundamental rights in the EU after *Kadi* and *Al Barakaat*

N. Türküler Isiksel*

Abstract: *This article takes stock of the emerging scholarship on the European Court of Justice's 2008 Kadi decision and seeks to make sense of the court's apparent evasiveness towards international law. The article argues that Kadi is best understood as an act of civil disobedience prompted by the UN Security Council's misapplication of foundational principles of the international order. In turn, the court's forceful articulation of the stakes in this case signals a prioritisation of basic rights within the supranational constitutional architectonic. In this respect, the 'domestic' constitutional implications of Kadi are just as far reaching as its consequences for the EU's status as an actor under international law.*

I Introduction

With its 2008 *Kadi and Al Barakaat* ('*Kadi*') ruling,¹ the European Court of Justice (ECJ) has once again thrown the European legal theory community into a state of feverish activity. This is not surprising, given that the case in question packs an unusually dense assortment of grand constitutional questions, implicating, *inter alia*, the relationship between the EU legal order and international law, the status of fundamental rights norms within EU law,² the human rights obligations of the United Nations (UN) Security Council, and the way in which the predominantly economic mandate of the European Community links up with the foreign policy functions of the EU.

* Assistant Professor of Political Science, Columbia University; Jean Monnet Fellow, Robert Schuman Centre for Advanced Studies, European University Institute. I am grateful to Gráinne de Búrca for providing me with an early draft of her inspiring essay, 'The European Court of Justice and the International Legal Order after *Kadi*', and for patiently entertaining my questions and comments. I would also like to thank Rachel Cichowski, Martin Staniland and the anonymous reviewers of the *European Law Journal* for their helpful comments on drafts of this article.

¹ ECJ, Joined Cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

² At the time of writing, reference to 'EC' or 'Community law' was still current in the court's official documents as well as much of the legal theory community, even though the Community has been formally subsumed within the EU with the entry into force of the Lisbon Treaty. With this change in mind, the article refers for the most part to the 'EU', except when distinguishing between the Community and the EU becomes necessary for reasons of historical or legal accuracy, and follows the court's usage in regard to *Kadi*.

The present article is among the second wave of commentary on the ECJ's appellate ruling in *Kadi*, insofar as it engages with a few distinctive interpretations that observers have advanced in its immediate wake.³ While most studies have latched onto *Kadi*'s implications for the way in which the EU fits within the international legal order, however, I will focus on the equally profound significance of this ruling for the EU's *internal* constitutional set-up.⁴ My central claim will be that the ECJ's logic in *Kadi* signals a prioritisation of the status of fundamental rights norms within the supranational constitutional architectonic. I will argue that this is a welcome adjustment in favour of the normative aspirations of European integration over and above its market *telos*.

In making this claim, I will first address a sceptical account of the *Kadi* decision. In an influential article, Gráinne de Búrca has countered the easy triumphalism of much post-*Kadi* commentary by arguing that the ECJ's machinations about fundamental rights are peripheral to the *Kadi* ruling. In her view, the true significance of this decision lies in the strong unilateralist tenor it exposes in the court's vision of international order.⁵ In order to convince readers of *Kadi*'s salutary consequences for fundamental rights in the supranational legal order, I will begin by responding to de Búrca's cogent articulation of the null hypothesis, so to speak, according to which rights concerns were merely incidental to the court's reasoning. Against this interpretation, I hope to show that the ECJ's evasiveness towards international law in *Kadi* should be regarded not as lawless unilateralism, but as the product of a paradoxical but genuine concern for upholding the rule of law both within the EU and within the international legal order.

The argument of the article is advanced in four steps. First, I will briefly revisit the constitutional status of fundamental rights within the European legal order prior to *Kadi*, so as to provide the *ex ante* context for my claim. Second, I will present de Búrca's circumspect reading of the ruling, and show why it is not adequately addressed by any of the existing interventions in the literature. Thirdly, I will offer an alternative

³ Notable interventions directly concerning the ECJ's *Kadi* ruling include G. de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, Fordham Law Legal Studies Research Paper No 1321313 (2009); also forthcoming in 51 *Harvard International Law Journal*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321313; W. T. Eijsbouts and L. Besselink, "'The Law of Laws"—Overcoming Pluralism', (2008) 4 *European Constitutional Law Review* 395; S. Griller, 'International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in *Kadi*', (2008) 4 *European Constitutional Law Review* 528; D. Halberstam and E. Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', (2009) 46 *Common Market Law Review* 13; B. Kunoy and A. Dawes, 'Plate Tectonics in Luxembourg: The *ménage à trois* between EC law, International Law and the European Convention on Human Rights Following the UN Sanctions Cases', (2009) 46 *Common Market Law Review* 73. An equally great amount of scholarly attention has been paid to the Court of First Instance's *Kadi* and *Yusuf and Al Barakaat* rulings, virtually all of which is critical. See, notably, J. Almqvist, 'A Human Rights Critique of European Judicial Review. Counter-Terrorism Sanctions', (2008) 57 *International and Comparative Law Quarterly* 303; M. Bulterman, 'Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities', (2006) 19 *Leiden Journal of International Law* 753; C. Eckes, 'Judicial Review of European Anti-Terrorism Measures—The *Yusuf* and *Kadi* Judgments of the Court of First Instance', (2008) 14 *European Law Journal* 74; P. Eeckhout, 'Community Terrorism Listing, Fundamental Rights, and UN Security Council Resolution. In Search of the Right Fit', (2007) 3 *European Constitutional Law Review* 183; J. Hoffman, 'Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test', (2008) 15 *Constellations* 543.

⁴ This question is addressed briefly by Halberstam and Stein, *op cit* n 3 *supra*, at 62–63.

⁵ de Búrca, *op cit* n 3 *supra*.

interpretation of the ECJ's decision as a form of 'civil disobedience'. I will conclude by reviewing the constitutional implications of the ECJ's reasoning in *Kadi*.

II The Status of Fundamental Rights Prior to *Kadi*

The story of the ECJ's spontaneous 'arrogation'⁶ of a human rights mandate for itself is familiar and well documented.⁷ The Treaties which founded the three Communities did not feature a schedule of fundamental rights that would constrain the acts of the institutions they called into being, since it was understood that rights protection fell within the domain of Member State competence. Asked as early as 1959 to comment on an alleged conflict between a decision by the High Authority of the European Coal and Steel Community (ECSC) and the plaintiff's fundamental rights,⁸ in this case, Mr Stork's right under Articles 2 and 12 of the German Basic Law to human dignity and free choice of profession, the ECJ held that

'Under Article 8 of the Treaty the High Authority is only required to apply Community law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law'.⁹

In this curt response, the ECJ lumps the basic rights norms in question with the rest of 'national law': not only are they held to have no validity within the ECSC's legal order, but the court does not even note their special import among other 'provisions of national law'. Moreover, although the court construes its refusal to speak to the question of basic rights as a consequence of its own lack of competence to apply national law, the message it sought to convey in this case was that Community law was un beholden to and independent of provisions of national law. In effect, *Stork* provides one of the earliest articulations of the doctrine of the autonomy of Community law.

As is well known, the ECJ complemented this assertion of the autonomy of Community law in the 1960s and 1970s with its celebrated doctrine of supremacy, according to which Community law prevails over the laws of its Member States, including their constitutional norms,¹⁰ in the event of a conflict. The ever-expanding remit of EC law and the ECJ's claim to be its authoritative interpreter, made Member State constitutional courts particularly uneasy about what they perceived to be the lack of effective protection for basic rights at the EC level. To them, the Community's sphere of operation increasingly resembled a gaping fundamental rights loophole: given the absence of provisions of basic rights from the Treaties, Community institutions appeared to be exercising public power unsullied by rights norms. In response, in a 1974 decision which has come to be known as *Solange I*, the German Federal Constitutional

⁶ J. H. H. Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal* 2403, at 2417.

⁷ For leading versions of what we might call the 'standard account', see K. Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001), esp at 88–96; F. Mancini and D. T. Keeling, 'Democracy and the European Court of Justice', (1994) 57 *Modern Law Review* 175; A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004); J. H. H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities', (1986) 61 *Washington Law Review* 1103, esp at 1111–1119.

⁸ ECJ, Case 1/58, *Friedrich Stork and Cie v High Authority of the ECSC* [1959] ECR 17.

⁹ *ibid*, para 4(a).

¹⁰ Stone Sweet, *op cit* n7 *supra*, at 68.

Court (GFCC) reserved for German courts the right to review EC acts for their conformity with the Basic Law 'as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the [German] Constitution'.¹¹ Similarly, in its 1973 *Frontini* ruling, the Italian Constitutional Court interpreted Article 11 of the Italian Constitution, which sets out the conditions under which Italy may relinquish partial sovereignty through international agreements, as requiring that Community competences must not infringe on fundamental rights.¹²

According to this settled narrative, therefore, fundamental rights were first affirmed by the ECJ in a move to forestall a rebellion all but promised by the German and Italian Constitutional Courts. In its fascinatingly equivocal *Internationale Handelsgesellschaft (IHg)* ruling (which had prompted the GFCC's *Solange I* warning in the first place), the ECJ underscored what it had already asserted, albeit in passing, in its *Stauder* decision a year earlier:¹³ it declared itself the guardian of a patrimony of individual rights norms that derived from the 'constitutional traditions of Member States' and which, it argued, had always been an 'integral part' of Community law as 'general principles of law', even if they did not feature in the Treaties.¹⁴ In this decision, the court held that 'the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'.¹⁵ Although this assertion did not immediately impress the GFCC, the ECJ managed to allay the concerns of Member State judiciaries in the subsequent decade by reiterating its intention to hold Community acts to a sufficiently stringent standard of fundamental rights protection.¹⁶

What is important about this story for the present purposes is that the '*IHg* solution', whereby the ECJ incorporated basic rights guarantees into its legal mandate, has hitherto functioned as a patch-up rather than a constitutional overhaul. Although the court has had to accommodate fundamental rights as part of the general principles of law by which Community institutions are bound, the substantive principles at the core of the European legal order remained those related to the project of market-building and regulation. To put this differently, basic rights have entered the European legal order as overriding constitutional norms, but have neither been essential nor *foundational* to the Community's array of functions. This is not to say, as others have done,

¹¹ Case 2 BVL 52/71, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* (Decision of 29 May 1974) 37 BVerfGE 271, [1974] CMLR 540.

¹² See F. P. Ruggieri Laderchi, 'Report on Italy', in A.-M. Slaughter, A. Stone Sweet and J. Weiler (eds), *The European Courts and National Courts* (Hart Publishing, 1998).

¹³ Case 29/69, *Stauder v City of Ulm* [1969] ECR 419.

¹⁴ Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹⁵ *ibid.*, para 4.

¹⁶ See the case that has come to be known as *Solange II*, namely *Wünsche Handelsgesellschaft Bundesverfassungsgericht* 2, 197/83; [1986] 3 CMLR 225: 'As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law'.

that the ECJ fails to ‘take rights seriously’¹⁷ or that it habitually sacrifices them to economic objectives.¹⁸ Rather, it means that basic rights protection has thus far featured in the ‘new legal order’¹⁹ as an afterthought, as a judicially affixed band-aid of sorts.²⁰

The peripheral status that fundamental rights have so far occupied in the European legal order can be better appreciated when contrasted with the role that basic rights fulfil within the architecture of the conventional liberal model of constitutionalism.²¹ Under this model, the constitutional order is built from the ground up on provisions of basic rights, meaning that the system would cease to make sense if this normative basis were to be removed.²² By contrast, the European legal order would still be internally coherent if it featured no fundamental rights provisions.²³ That the court was able to pass up the opportunity to declare a human rights mandate for itself in *Stork* and later appropriate such a mandate without thereby throwing the whole existence of the Community legal order into question should make this clear.

In his critical intervention in the debate over whether human rights functions should be given a more central role in the legal and political mandate of the Community, Armin von Bogdandy drove this point home.²⁴ Specifically, he wrote that ‘[h]uman rights were gradually introduced as limits to the discretion of the supranational institutions. They did not, however, alter the aims, focus or activity of the Union’s legal order and institutions’.²⁵ The fact that the constitutional configuration of the EU centres around the project of market-building and regulation, Bogdandy argued,

¹⁷ J. Coppel and A. O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’, (1992) 12 *Legal Studies* 227, at 243. Also see J. Weiler and N. Lockhart’s justly celebrated response to Coppel and O’Neill: J. H. H. Weiler and N. J. S. Lockhart, ‘“Taking Rights Seriously” Seriously: The European Court and its Fundamental Rights Jurisprudence’ Parts I and 2, (1995) 32 *Common Market Law Review* 61 and 579.

¹⁸ M. Koskenniemi, ‘The Effect of Rights on Political Culture’, in P. Alston, M. Bustelo and J. Heenan (eds), *The EU and Human Rights* (Oxford University Press, 1999).

¹⁹ Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

²⁰ The court’s *de facto* incorporation of rights guarantees into Community law was subsequently codified in Art 6(2) of the Treaty on European Union, which holds that ‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law’.

²¹ The *locus classicus* for the rights-based theory of constitutionalism is R. Dworkin’s *Taking Rights Seriously* (Harvard University Press, 1977).

²² Bruce Ackerman prefers to call this the ‘foundationalist’ model of constitutionalism precisely because the constitution is assumed to have individual rights guarantees at its very core. See B. Ackerman, *We the People: Foundations* (Belknap Press, 1991). Robert Nozick’s famous thought experiment is an example precisely of this paradigm of a constitutionalism built from the ground-up on the principle of respect for individual rights. Nozick’s project is to show how one can move from the state of nature to the minimal state without violating the rights of any individual. See R. Nozick, *Anarchy, State and Utopia* (Basic Books, 1974).

²³ Note that ‘fundamental rights’ are used here to mean the traditional constitutional guarantees of civil and political rights. In contrast to these rights, which are rooted in values of life, liberty and human dignity, the court has from the very inception of the Communities protected a series of rights it confusingly terms ‘fundamental freedoms’, namely, the four freedoms of movement of persons, goods, services and capital. Unlike fundamental rights proper, the four freedoms *are* architectonically central to the Community legal order: were they to go unobserved, as the court repeatedly points out, the effectiveness and uniformity of the Community legal edifice would be gravely compromised.

²⁴ A. von Bogdandy, ‘The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union’, (2000) 37 *Common Market Law Review* 1307.

²⁵ *ibid.*, at 1308.

fundamentally distinguishes it from *bona fide* human rights regimes. In what follows, I will argue that although this characterisation was entirely accurate at the time, the court's construal of the role of fundamental rights under European law in *Kadi* suggests that we are moving beyond the *IHg* stage in the EU's constitutional settlement. *Kadi* raises the prospect of a new constitutional primacy for fundamental rights that exceeds their previous status as *ad hoc* constraints on the core project of economic integration. Before I can do this, however, I will first need to address the concern that *Kadi* is not genuinely about human rights at all. This will be my task in the following two sections.

III The Sceptical View of *Kadi*: The ECJ's Pluralist Vision of International Order?

The facts of the *Kadi and Al Barakaat* case are well rehearsed in the literature. The case before the ECJ concerned the validity of Council Regulation 881/02, adopted in 2002 by the Council of the EU in order to implement several UN Security Council resolutions ordering UN Member States to freeze funds available to individuals and organisations designated by the Security Council Sanctions Committee as providing financial support to Al-Qaeda and the Taliban.²⁶ The assets of Mr Kadi, a Saudi national, as well as of the Al Barakaat Foundation, a Somali charity registered in Sweden, were ordered to be frozen under EC Regulation 467/00 and, later, 881/02 which replaced it. In 2001, Mr Kadi and the Al Barakaat Foundation sued before the Court of First Instance asking that the Council Regulation be annulled on the grounds, among others, that it violated their rights to property and their rights of the defence. Taking four years to render a decision, and refusing all requests for interim relief, the Court of First Instance found against the plaintiffs in two separate cases, *Kadi*,²⁷ and *Yusuf and Al Barakaat*.²⁸ Most notably, the Court of First Instance reasoned that it had no power to review the contested Council Regulation since the Security Council had left the Community with no autonomous discretion in the implementation of Member States' obligations.²⁹ Controversially,³⁰ however, it also found that it could indirectly review acts of the Security Council for their conformity with *jus cogens* norms, that is, peremptory norms of customary international law from which no derogations are permissible. Doing so, the Court of First Instance held that Mr Kadi and Al Barakaat's treatment by the Security Council did not amount to a breach of *jus cogens*.

Mr Kadi and Al Barakaat appealed the Court of First Instance's judgment to the ECJ. In its eagerly awaited judgment, the ECJ overturned the Court of First Instance's ruling, holding that the Community judicature had no power to review, directly or indirectly, the acts of the Security Council,³¹ but that it *did* have a duty to conduct full review of the contested regulation³² in the light of fundamental rights guarantees found

²⁶ The most important of these are UN Security Council Resolutions 1267 (1999), 1333 (2000), 1390 (2002) and 1452 (2002).

²⁷ CFI, Case T-315/01, *Kadi v Council and Commission* [2005] ECR II-3649.

²⁸ CFI, Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533.

²⁹ CFI *Kadi*, n 27 *supra*, para 214, and *ibid*, para 265.

³⁰ For critiques of the Court of First Instance's ruling on *jus cogens*, see especially, Bulterman, *op cit* n 3 *supra*, at 768–769.

³¹ ECJ, *Kadi and Al Barakaat*, n 1 *supra*, para 287.

³² *ibid*, para 278.

among the general principles of Community law.³³ Reviewing the regulation, it found that the appellants' rights to be heard, their rights to property and to effective judicial review had been breached, and annulled Regulation 881/02 insofar as it concerned them.

The current academic debate on the ECJ's *Kadi* ruling is in large part fuelled by a profound irony raised by the facts of the case. As most observers agree, the UN Security Council's terrorism listing procedures fail to meet basic due process standards insofar as they leave individuals with virtually no recourse against the 'smart sanctions' that have been imposed against them.³⁴ As a consequence, although adherence to international law and respect for basic rights are usually understood to go hand in hand, the situation in *Kadi* is one where the ECJ's sensitivity to the protection of certain individual rights militated against obligations under international law. For political and legal theorists, this trade-off is highly consequential: on the one hand, the ECJ appears to have snubbed international law by hampering the implementation of a Security Council resolution binding on Member States;³⁵ on the other hand, most commentators have hailed the case as a rare and unequivocal victory for basic rights against the wide political discretion claimed by the UN Security Council under the banner of the 'war on terror'.³⁶ In what follows, I will show that while it is tempting to be swept up by the rhetoric of rights, we cannot wish away the court's strongly worded reservations about the validity of international law within the European legal order. Instead, we must make sense of the implications of the court's logic for the EU's domestic constitutional trajectory, as well as its international status.

According to Gráinne de Búrca, the ECJ's reasoning in *Kadi* represents a disquieting gesture of bad citizenship, most notably because it '[eschews] engagement in the kind of international dialogue that has generally been presented as one of the EU's strengths as a global actor'.³⁷ Situating her analysis against the background of the flourishing literature on global legal pluralism,³⁸ de Búrca argues that the ECJ has opted for 'a strong pluralist approach which presented the European Community as a separate and

³³ *ibid.*, para 281.

³⁴ For instance, Piet Eeckhout writes that 'The individual is increasingly a subject of international law, and must thus be guaranteed certain fundamental rights through effective judicial protection'. See Eeckhout, *op cit* n 3 *supra*, at 205. See also Almqvist, *op cit* n 3 *supra*, esp 307–309; Hoffman, *op cit* n 3 *supra*.

³⁵ See de Búrca, *op cit* n 3 *supra*; Halberstam and Stein, *op cit* n 3 *supra*.

³⁶ Paradigmatically, Stefan Griller writes, with certain reservations, that 'the respective Security Council resolutions and especially the mechanism of upholding the listing of individuals violate basic guarantees of a fair trial and of a judicial review mechanism, as well as the right to respect for property. Consequently, the ECJ was right in reversing the judgment of the CFI and in annulling the transposing EC regulation'. See Griller, *op cit* n 3 *supra*, at 552–553.

³⁷ de Búrca, *op cit* n 3 *supra*, at 45. In their recent analysis of the court's approach to international law obligations, Kunoy and Dawes cite a similar argument made by Martti Koskenniemi, who has described the ECJ's perspective as 'solipsistic', 'imperialistic' and smacking of 'European self-centredness': M. Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) 1 *European Journal of Legal Studies*, cited in Kunoy and Dawes, *op cit* n 3 *supra*, at 85.

³⁸ de Búrca, *ibid.*, at 6 and 36–38. See, in this connection, A. Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes', (2009) 16 *Indiana Journal of Global Legal Studies* 621; N. Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', (2008) 6 *International Journal of Constitutional Law* 373; P. Schiff Berman, 'Global Legal Pluralism', (2007) 80 *Southern California Law Review* 1155; A. Wiener, 'Contested Meanings of Norms: A Research Framework', (2007) 5 *Comparative European Politics* 1; N. Krisch, 'The Pluralism of Global Administrative Law', (2006) 17 *European Journal of International Law* 247.

self-contained system which determines its relationship to the international order in accordance with its own internal values and priorities rather than in accordance with any common principles or norms of international law'.³⁹ In her view, this 'inward-looking' attitude is regrettable not only for the EU's image as a new species of law-abiding international actor, but also for the prospects of building a global constitutionalism of shared values and principles through inter-institutional dialogue.

What kind of support does this 'pluralist reading' of *Kadi* get from the logic of the ruling? For de Búrca, the court's unilateralist approach can best be appreciated when considered in conjunction with the Court of First Instance's *Kadi* and *Yusuf and Al Barakaat* decisions, which reviewed the validity of the Security Council resolutions in the light of *jus cogens* norms held to bind the Court of First Instance and the Security Council alike.⁴⁰ Whereas the Court of First Instance acknowledged the cross-cutting nature of rights norms across different regimes under international law, including the UN and the EU,⁴¹ the ECJ brusquely dismissed this finding, holding that 'it is not . . . for the Community judicature . . . to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*',⁴² foreclosing any suggestion that the basic rights norms it was charged with protecting were equally germane to the UN Charter. For de Búrca, the ECJ's omission of any reference to the global currency of basic rights norms represents a parochial defence of the rights at stake as norms indigenous to Community law.⁴³ As such, the ECJ's view on this matter is reminiscent of Edmund Burke's famed plea in favour of 'the rights of Englishmen' over and above 'the rights of men':⁴⁴ in failing to acknowledge the universal provenance of fundamental rights, the court appears to value the rights in question because and insofar as they are the patrimony of Europeans.

De Búrca's unease over the court's apparent disinterest in contributing to the development of an international rule of law is shared by Daniel Halberstam and Eric Stein, who regret the ECJ's failure to 'engage international law indirectly by judging the legality of the Community's implementation measures (purely as a matter of Community law) by reference to the UN Charter, substantive considerations of *jus cogens*, as well as customary international human rights law'.⁴⁵ In other words, the argument is that the ECJ could just as easily have framed its judgment as rooted in a repository of values common to both the Community legal order and the UN Charter. That it chose not to do so is taken as evidence of the ECJ's provincialist understanding of Community law.

There are several other turns of logic in the ECJ's judgment which support the pluralist reading, only a couple of which I will highlight here. At paragraphs 305–308 of its *Kadi* ruling, the ECJ contemplates whether obligations under the UN Charter would be excluded from review under the general principles of EC law (including fundamental rights) if the EC were, hypothetically, a formal signatory to the Charter

³⁹ de Búrca, *ibid.*, at 44.

⁴⁰ For an erudite reconstruction of the jurisprudence behind the Court of First Instance's *jus cogens* argument, which is also the most flattering review of the Court of First Instance's ruling on this point among accounts with which I am familiar, see Halberstam and Stein, *op cit* n 3 *supra*, at 51–53 and 64–65.

⁴¹ de Búrca, *op cit* n 3 *supra*, at 22.

⁴² ECJ, *Kadi and Al Barakaat*, n 1 *supra*, para 287 (emphasis added).

⁴³ de Búrca, *op cit* n 3 *supra*, at 46.

⁴⁴ E. Burke, *Reflections on the Revolution in France [1790]*, in C. C. O'Brien (ed) (Penguin, 2004), at 118.

⁴⁵ Halberstam and Stein, *op cit* n 3 *supra*, at 64.

pursuant to Article 300 EC. The court finds that *even if* the Community were to accede to the UN Charter and assume its full obligations, ‘that primacy at the level of Community law would not . . . extend to primary law, in particular to the general principles of which fundamental rights form part’.⁴⁶ In case this hypothetical exercise leaves any room for doubt, the court reiterates that ‘the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty’, among which it lists respect for fundamental rights. Here, the court appears to predicate the validity of international obligations on their conformity with the basic and inalienable norms which sustain the Community legal order. This move, in turn, is strongly reminiscent of the traditional dualist construction of the relationship between municipal and international law.⁴⁷

The court’s apparent resort to dualist logic to delineate the Community’s obligations under international law gives rise to a historical irony: the ECJ itself has deeply and repeatedly challenged versions of precisely this dualist assumption when invoked by Member States in the context of disputes over the supremacy of EC law.⁴⁸ In such cases as *IHg*,⁴⁹ *Simmenthal II*⁵⁰ and *Foto-Frost*,⁵¹ the ECJ refused to concede that the validity of Community obligations could be made subject to any domestic norm, including a Member State’s most basic constitutional norms. In other words, it would appear that having gradually imposed the monist blueprint on Member States in order to maximise

⁴⁶ ECJ, *Kadi and Al Barakaat*, n 1 *supra*, at para 308.

⁴⁷ Interestingly, this construction is similar to the way in which many EU Member State constitutions delineate the authority of EU law within their legal systems, namely by means of a special provision which prohibits the signing away of certain guarantees by acceding an international organisation. The most famous expression of this position is the GFCC’s *Brunner* decision, where the GFCC held: ‘[T]he Federal Constitutional Court will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them’: *Brunner v the European Union Treaty* (1994) 33 ILM 388, para 49. Other examples include Art 20 of the Danish Constitution (Danish Supreme Court, *Carlsen and Others v Rasmussen* [1999] 3 CMLR 854), Art 11 of the Italian Constitution as interpreted by the Italian Constitutional Court (see *Frontini v Ministero delle Finanze*, 27 December 1973; and *S.p.a. Fragn v Amministrazione delle Finanze*, 21 April 1989); Art 93 of the Spanish Constitution, interpreted by the Spanish Constitutional Court as allowing for the transfer of powers to an international organisation (in this case the EU) ‘only . . . to the extent that European law is compatible with the fundamental principles of the social and democratic State, subject to the rule of law, established by the national Constitution’: DTC 1/2004, 13 December 2004. For reflections on the difficulties of applying the terminology of monism and dualism to the complex landscape of European law, see A. von Bogdandy, ‘Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law’, (2008) 6 *International Journal of Constitutional Law* 397, at 397–398.

⁴⁸ But see Samantha Besson’s judicious warning against fully analogising the relationship between EU law and international law with that between EU law and Member State law: S. Besson, ‘European Legal Pluralism after *Kadi*’, (2009), 5 *European Constitutional Law Review* 237, particularly 239–240.

⁴⁹ ECJ, *Internationale Handelsgesellschaft*, n 14 *supra*.

⁵⁰ In *Simmenthal II*, the court found the Italian constitutional prohibition on judicial review of statute by ordinary courts to be incompatible with Community law. It held: ‘Accordingly *any* provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law’: Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, at para 22 (emphasis added).

⁵¹ In *Foto-Frost*, the ECJ held in this connection that ‘national courts have no jurisdiction themselves to declare that measures taken by Community institutions are invalid’: Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

the effectiveness and uniformity of EC law,⁵² the ECJ is unwilling to submit to its own standard, as attested to by its apparent refusal to grant even the hypothetical possibility that international obligations may prevail over primary Community law.

The problem identified by de Búrca goes beyond considerations of dualism and bad international citizenship, however.⁵³ The more sombre consequence of this argument is that the court appears to have instrumentalised the strong currency of fundamental rights to wrest more authority for the EU legal order, and to shore up its own status as the gatekeeper of that order. Certainly, de Búrca herself does not go so far as to accuse the court of manipulating rights discourse, but this stronger argument is only a short logical step away. For if *Kadi* is really about the ECJ's delineation of the EU legal order from the demands made on it by international law, then the basic rights issues raised by the case begin to look like mere fodder for the ECJ's cannon.

In turn, this critique of *Kadi* taps into an enduring vein of court scepticism, according to which the ECJ resorts to the hallowed language of fundamental rights to widen its own authority. Previous critics, including Jason Coppel and Aidan O'Neill, and Martti Koskeniemi, have picked up on the court's description of free movement rights as 'fundamental' rights, charging that the court draws normative equivalence between these market freedoms and more weighty rights such as those enshrined in Member State constitutions and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR).⁵⁴ According to critics, the court's goal in equating market freedoms with basic rights is to leverage greater jurisdictional turf for Community law. While the controversial question about the hierarchy between economic rights and civil and political rights does not arise in the context of *Kadi* (since Mr Kadi's rights of both categories were violated equally!), de Búrca's logic suggests a similar charge, namely that Mr Kadi's rights were merely incidental to this titanic struggle between the EC legal order and international law, and, further, that the court is morally suspect because it has deployed human rights instrumentally in order to fortify EU law against subordination in an international legal hierarchy.

Reacting to these changes other observers have defended *Kadi* as continuing a venerable judicial tradition inaugurated by the GFCC. As recalled briefly above, the 1974 '*Solange I*' decision of the GFCC reserved domestic courts the right to review EC acts for their conformity with the German Basic Law where the ECJ's standards of rights protection fell below those assured by the GFCC.⁵⁵ Many scholars have approvingly interpreted *Kadi* as using the *Solange* approach as a special type of judicial defiance that can serve to step up rights protection across all tiers in a multi-levelled and non-hierarchical legal environment.⁵⁶ In Ernst-Ulrich Petersmann's words, "the

⁵² See Stone Sweet, *op cit n 7 supra*, at 84–85; also M. de S.-O.-l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press, 2004), at 225.

⁵³ For the idea of 'international citizenship', good and bad, see J. Williams, 'Good International Citizenship', in N. Dowers and J. Williams (eds), *Global Citizenship: A Critical Introduction* (Taylor and Francis, 2002).

⁵⁴ Coppel and O'Neill, *op cit n 17 supra*, at 243. But see Weiler and Lockhart's response, *op cit n 17 supra*.

⁵⁵ See n 11 *supra*. A comprehensive historical analysis of the '*Solange* method' is given in N. Lavranos, 'Towards a *Solange*-Method between International Courts and Tribunals?', in T. Broude and Y. Shany (eds), *The Shifting Allocation of Authority in International Law* (Hart Publishing, 2008).

⁵⁶ See, for instance, Halberstam and Stein, *op cit n 3 supra*, at 68.

Solange-principle,” conditioning respect for competing jurisdictions on respect of constitutional principles of human rights and rule of law . . . should serve as a model for “conditional cooperation” among international courts and national courts’ in cases such as *Kadi*.⁵⁷

On its face, the facts and logic of *Kadi* bear striking parallels to *Solange I*. For one thing, Mr Kadi invoked the *Solange* ‘formula’ in order to persuade the court that ‘[s]o long as the law of the United Nations offers no adequate protection for those whose claim that their fundamental rights have been infringed, there must be a review of the measures adopted by the Community in order to give effect to resolutions of the Security Council’.⁵⁸ Advocate General Maduro, for his part, also followed the GFCC’s approach, arguing that since there is no ‘genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations . . . the Community institutions cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order’.⁵⁹ Lastly, the ECJ followed a similar logic in its judgment without employing the ‘formula’ verbatim, finding the Sanctions Committee’s guarantees of the right to a fair hearing to be deficient, and therefore in need of being remedied at the level of the implementing measure.

Far from confirming the court’s universalist motivation, however, this parallel seems to give further credence to the pluralist reading, since *Solange I*, quite apart from its virtuous consequences for the development of rights protection within the Community as a whole, predicated the validity of Germany’s obligations under Community law on German Basic Law, a patently dualist move. Indeed, Karen Alter extensively records the hostility with which the original *Solange* decision was greeted by contemporary Europhiles, including dissenting justices on the GFCC itself, who regarded the ruling as ‘mainly a power-grab’ by the GFCC.⁶⁰ To put it differently, long before later developments brought the *Solange* confrontation to a salutary conclusion as far as the coexistence of EC and Member State law was concerned, the implications of *Solange* logic seemed threateningly centrifugal indeed. What is more, in its recent decision on the Lisbon Treaty, the GFCC highlighted the pluralist implications of *Kadi* insofar as it continued the GFCC’s *Solange* logic.⁶¹ The GFCC reasoned, along the same lines as de Búrca, that by ‘[asserting] its own identity as a legal community above’ its commitment to international law, the ECJ had adopted a view of the multi-levelled international order as lacking ‘a strict hierarchy’.⁶² As a consequence, likening the ECJ’s approach to *Solange* seems equally to confirm, rather than disprove, de Búrca’s fear that *Kadi* reflects a dualist approach to international law on the part of the ECJ. Piet Eeckhout, who endorses the *Solange* approach to protecting individual rights against

⁵⁷ E.-U. Petersmann, ‘Do Judges Meet their Constitutional Obligations to Settle Disputes in Conformity with “Principles of Justice and International Law”?’ (2007) 1 *European Journal of Legal Studies* 1, at 34 and 21. He expresses this view in an earlier article; see E.-U. Petersmann, ‘Limits of WTO Jurisprudence: Comments from an International Law and Human Rights Perspective’, in T. Cottier and P. C. Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (University of Michigan Press, 2003), at 83.

⁵⁸ ECJ, *Kadi and Al Barakaat*, n 1 *supra*, para 256.

⁵⁹ Opinion of Advocate General Poiares Maduro, Case C-402/05P, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, delivered 16 January 2008, at 54.

⁶⁰ Alter, *op cit* n 7 *supra*, at 91.

⁶¹ Decision BVerfG, 2 BvE 2/08 of 30 June 2009, para 240.

⁶² *ibid*, para 240.

encroachment by international law, recognises as much when he observes that the prospect of ‘municipal courts . . . step[ping] into the breach by applying domestic constitutional standards of protection of fundamental rights’ remains ‘a second-best solution’, since ‘it puts in jeopardy the uniform implementation of UN Resolutions’.⁶³

Foreseeing just such an objection, W. T. Eijsbouts and Leonard Besselink point out that the dissociative logic of the *Solange* method is counterbalanced by a crucial integrative or dialogic element.⁶⁴ According to their restatement of the *Solange* formula:

A judge or another public authority may qualify the validity, in his own jurisdiction, of a rule of more general circumscription than his own and binding on him. *He shall do so not by mere reference to the autonomy or the supremacy of his own legal order, nor by reference to a legal hierarchy. He shall do so by reference to fundamental substantive norms valid in the wider circumscription also, or by putting forward such substantive norms that he holds to be applicable also there.*⁶⁵

The crucial element of this ‘maxim’ is that it authorises a judge to suspend the supremacy of external legal obligations not out of some solipsistic regard for her domestic legal order, but ‘in the perspective of reciprocity and agreement between legal orders as to substance’.⁶⁶ In other words, for Eijsbouts and Besselink, the hallmark of the *Solange* formula is its paradoxical suspension of the permeability between legal orders in order to protect such permeability in the longer term.⁶⁷ On this view, it is inaccurate to view *Solange*-type judicial defiance as threatening to the coherence of international order.

However, this argument also fails to respond adequately to de Búrca’s critique. In her view, the ECJ’s logic in *Kadi* is remarkable precisely for having jettisoned the dialogic element of the *Solange* method. Whereas the GFCC emphasised ‘a mutually disciplining logic’ between the two legal systems in question,⁶⁸ the ECJ foreclosed the possibility for this kind of dialogue, according to de Búrca, by refusing to admit that the conflict could be resolved with reference to a set of basic rights standards common to both the Community and the UN Charter. Moreover, whereas the GFCC justified its *Solange* intervention not only in terms of the rights of German citizens, but also with

⁶³ Eeckhout, *op cit* n 3 *supra*, at 205.

⁶⁴ Eijsbouts and Besselink, *op cit* n 3 *supra*.

⁶⁵ *ibid.*, at 397 (emphasis added).

⁶⁶ *ibid.*, 398.

⁶⁷ In a prominent 1986 study, German jurist J. A. Frowein foresaw a ‘dialectical development’ among three legal orders, namely, Member States, the EC and the ECHR, as a consequence of fundamental rights adjudication. For Frowein, *Solange I* was definitely an instance of such dialectical development but by no means the sole possible one. Rather than confine his focus to liminal or meta-constitutional confrontations, as much of the contemporary literature on the relationship between different judicial levels tends to do, Frowein studied more mundane but more prevalent aspects of judicial cross-pollination, and the collaborative and gradual evolution of particular norms and constitutional principles. See J. Abr. Frowein, ‘Fundamental Human Rights as a Vehicle of Legal Integration in Europe’, in M. Cappelletti, M. Seccombe and J. Weiler (eds), *Integration through Law. Europe and the American Federal Experience*, Vol I (Walter de Gruyter, 1986), at 302.

⁶⁸ As evidence of the GFCC’s invitation to dialogue, de Búrca cites a neglected passage of *Solange I*: ‘The binding of the Federal Republic of Germany (and of all Member States) by the Treaty is not, according to the meaning and spirit of the Treaties, one-sided, but also binds the Community which they establish to carry out its part in order to resolve the conflict here assumed, that is, to seek a system which is compatible with an entrenched precept of the constitutional law of the Federal Republic of Germany. *Invoking such a conflict is, therefore, not in itself a violation of the Treaty, but sets in motion inside the European organs the Treaty mechanism which resolves the conflict on a political level*’; cited in de Búrca, *op cit* n 3 *supra*, at 47 (emphasis added).

reference to the interests of ‘the Community and Community law’, de Búrca argues that the ECJ’s emphasis was on insulating the Community legal order from potential encroachment by international law, without so much as recognising the special status of the UN Charter in the international legal order.

No matter which way we cut it, therefore, we are hard pressed to find any licence under international law, any method of interpretation or constitutional meta-norm that can reconcile the ECJ’s inward-looking reasoning in *Kadi* with the requirements of good citizenship under international law. The existing commentaries, I have sought to show, fall short of meeting the powerful challenge posed by de Búrca’s interpretation. In the next section, I will propose an alternative way of reading *Kadi* in order to show that it does not reflect a pluralist logic as de Búrca fears. I will argue that the best way to characterise the court’s position in *Kadi* is as an act of civil disobedience to international law that is nevertheless loyal to the principles which underpin international law. To clarify, my claim is not that the court *understood itself* to be engaging in civil disobedience, but rather that civil disobedience provides an appropriate conceptual framework with which to make sense of the court’s reasoning in *Kadi*.

Having proposed this alternative explanation, I will conclude the article by returning to my original, more ambitious claim that *Kadi* implies a shift in the constitutional status of fundamental rights in the Community legal order.

IV An Alternative Reading: *Kadi* as Civil Disobedience by the ECJ

The notion of ‘civil disobedience’ is internally fraught. On the one hand, it entails the breaking of a law. On the other, the lawbreaking is carried out in the name of justice, that is, in order to defend weighty or fundamental principles that underpin the law itself. To put it differently, we speak of acts of civil disobedience when a gap opens up between what is legal and what is legitimate as perceived by those who are bound by the law. That being said, however, the work that the ‘civil’ qualifier does is crucial, since the term is neither value-neutral nor purely subjective. We tend to distinguish an act of ‘civil’ disobedience from vulgar criminality when two general conditions are met.⁶⁹ First, the act of disobedience must not be self-serving: actors must be able to plead with their peers and publicly justify their reasons for breaking the law in terms that all could, in principle, agree to.⁷⁰ Second, in order to be understood as ‘civil’, the acts in question must not throw into jeopardy the very foundation of legal order, as might be the case with acts of disobedience involving violence, for example.

de Búrca’s pluralist reading of *Kadi* construes the ECJ as having contravened both of these provisos. First, the ECJ is accused of misusing the normative weight of rights in order to consolidate its authority *vis-à-vis* international law. As such, its motivation

⁶⁹ Consider political philosopher Christian Bay on civil disobedience, which he uses to ‘refer to any act or process of public defiance of a law or policy enforced by established governmental authorities, insofar as the action is premeditated, understood by the actor(s) to be illegal or of contested legality, carried out and persisted in for *limited public ends*, and by way of *carefully chosen and limited means*’. By ‘public ends’, I take Bay to mean ends that are not tailored solely to the advantage of the disobedient, but have at least a *prima facie* claim to fairness. See C. Bay, ‘Civil Disobedience: Prerequisite for Democracy in Mass Society’, in J. G. Murphy (ed.), *Civil Disobedience and Violence* (Wadsworth Publishing Company, 1971), at 76.

⁷⁰ The requirement that reasons be expressed in a manner that all could potentially agree to draws on Habermas’s discursive theory of moral argumentation. For an overview, see J. Habermas, *Moral Consciousness and Communicative Action* (trans. C. Lenhardt and S. W. Nicholsen) (MIT Press, 1990).

appears to fall foul of the condition that civil disobedience be undertaken in the name of principle rather than expediency. Second, the court is charged with sabotaging the constitutional coherence and effectiveness of international law by hampering the implementation of Security Council obligations and refusing to acknowledge the special legal force of the UN Charter. In what follows, I will show that the ECJ's decision, in fact, accords the criteria of civil disobedience. First, I will argue that the court's decision to step up to the plate is not self-serving, but is the sole justifiable reaction to be expected from a responsible constitutional court. Second, I will show that the court's refusal to give effect to UN obligations does not threaten the legal structure of the international order. Quite the contrary, it protects the norms that are at the foundation of the edifice of international law from being casually jettisoned by another international body, the Security Council.

The First Proviso: Seeking Out the Court's Motives

As I suggested earlier, a significant obstacle to using the *Solange* analogy to explain the court's apparent hostility to the binding force of international law is de Búrca's argument that the ECJ, in a significant departure from the GFCC's approach, chose to ignore international law rather than invite a long-term 'constitutional conversation'⁷¹ with the UN concerning the requirements of fundamental rights protection. For de Búrca, this is evidence of the ECJ's disinterest in the development of a shared set of principles and norms at the international level and of its blinkered concern with insulating the EU legal order from competing norms of international law.

While the parallel between *Kadi* and *Solange I* is appropriate and instructive, however, it is nevertheless fundamentally incomplete insofar as the institutional actors involved in each of the two sets of confrontations are different: whereas the GFCC was addressing the ECJ, there is only a very limited sense in which the ECJ can 'address' the UN Security Council. Moreover, whereas the original *Solange* dispute pitted two kindred institutions, the ECJ and the GFCC, both of which were constitutional courts bound by proximate standards of justice, the ECJ's interlocutor in *Kadi* was an alliance of security-minded states acting in their capacity as the UN's policing organ. Because of this institutional asymmetry, the logic of accommodation and flexibility inherent in *Solange I* cannot transfer to the circumstances of *Kadi*. To the contrary, there are good reasons why *Kadi* warrants a different response than *Solange I*, even though the desired outcome of both confrontations is an improvement of the standard of rights protection in a multi-level system. Because the GFCC delivered its warning to a fellow court with whose members it had regular personal exchanges, it could count on the ECJ's institutional sensibility and ultimate normative commitments as being significantly similar to its own.⁷² By contrast, in *Kadi*, the ECJ did not find a similarly acculturated partner

⁷¹ I am using this concept in the sense developed by Joseph Weiler. See J. H. H. Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order', in R. Bellamy and D. Castiglione (eds), *Constitutionalism in Transformation* (Blackwell Publishers, 1996), at 120.

⁷² Advocate General Maduro gave a recent account of this constitutional dialogue in Case C-127/07, *Société Arcelor Atlantique et Lorraine v Premier Ministre*, opinion delivered on 21 May 2008, at para 17. For an enlightening account of the kinds of dialogue that the ECJ enjoys with other courts, tribunals and adjudicative bodies, see A. Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', (2007) 1 *European Journal of Legal Studies*, available at <http://www.ejls.eu/24UK.pdf>.

on the other side of its confrontation, and, indeed, the case itself had been brought precisely *because* the Sanctions Committee procedures denied all the safeguards germane to judicial fora. As a result, while the relationship between the ECJ and the GFCC was characterised by the logic of judicial comity among two courts ensconced within a shared legal edifice, that between the ECJ and the Security Council is more accurately viewed as the dynamic of judicial review of executive acts.

This notable difference, in turn, has important consequences for the way in which the ECJ's inflexibility toward the demands of the UN Charter should be interpreted. While the dynamic of judicial comity is much more likely to bear fruit when parties remain mutually receptive, judicial review of executive acts is permeated, appropriately, by a more adversarial tone, especially where fundamental rights standards are at stake. In the *Solange* context, the GFCC is likely to have reasoned that a strong warning shot, accompanied by an invitation to dialogue and an acknowledgment of the general supremacy of Community law would be most likely to secure a more satisfactory standard of rights protection in the Community. By contrast, the ECJ had no partner in *Kadi* who might be similarly receptive to a conciliatory approach. As the court noted in its ruling, the Security Council's function is to ensure international peace and security,⁷³ an observation which is then implicitly contrasted with the 'Community judicature's' function of reviewing 'the lawfulness of Community measures as regards their consistency with those fundamental rights'.⁷⁴ Furthermore, since the Security Council does not exist in a long-term institutional relationship with the ECJ or any other court under any encompassing legal regime, it could not be expected to respond to their gestures for collaborative constitutional bricolage in the same way that the GFCC could rightly anticipate *vis-à-vis* the ECJ.

As a result, *Kadi* is more accurately construed as a story of checks and balances among different kinds of institutional actors charged with fulfilling different functions and ends, rather than as an instance of frustrated constitutional dialogue. The court's self-positioning as a wedge between the opaque decrees of the Security Council, on the one hand, and Member State executives gathered in the Council, on the other, is in keeping with the court's distinctive institutional role. In fact, the court is carrying out the precise function that *should* be expected of it as a *bona fide* constitutional adjudicator charged with the role of guaranteeing the observance of fundamental rights within the EU legal order.⁷⁵ On this reading, the ECJ's departure from international law is not a bending of the rules in its own favour; rather, it is underpinned by an institutional responsibility to uphold the basic principles which it has been commissioned to protect.

This argument appears to be borne out even more strongly by the nature of the measures at stake. Mr Kadi's predicament exemplifies the flipside of the legal sea change which contemporary cosmopolitan democrats celebrate as the post-World War II rights revolution,⁷⁶ namely, the emerging status of individuals as subjects of international law in their own right. Borrowing a concept used by Miguel Maduro in the EU context, we might call this the gradual 'subjectivation' of international law.⁷⁷

⁷³ ECJ, *Kadi and Al Barakaat*, n 1 *supra*, para 294.

⁷⁴ *ibid*, para 304.

⁷⁵ See n 20 *supra*.

⁷⁶ See, among others, A. Linklater, *The Transformation of Political Community* (University of South Carolina Press, 1998); N. Dower, 'The Idea of Global Citizenship—A Sympathetic Assessment', (2000) 4 *Global Society* 553; S. Benhabib, *Another Cosmopolitanism* (Oxford University Press, 2006).

⁷⁷ M. P. Maduro, *We The Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998), at 9.

Ironically, however, whereas subjectivation is most often associated with the emergence of a universal canopy of legal protection for individuals, in the present case, the Security Council resolutions in question addressed specific individuals in order to do precisely the opposite; namely, to smoke them out of any haven of national judicial protection, and to bring to bear the full force of the collective security system against them. Both the Court of First Instance and the ECJ acknowledged this dark side of subjectivation when they noted, respectively, that the Security Council measures in question were “‘smart” sanctions of a new kind, a feature of which is that there is nothing at all to link the sanctions to the territory or the governing regime of a third country’.⁷⁸ Not only did this ‘feature’ make certain provisions of the EC Treaty anachronistic and difficult to apply in implementing the Security Council resolutions,⁷⁹ it also exposed unaccountability of the institutions commanding them.⁸⁰

Let us pause here and recall the core meaning of constitutionalism, the system which constitutional courts are charged with protecting. Perhaps no other idea comes as close to this core as the rule of law, which entails that the law’s reach must be seamless and comprehensive, such that all exercise of political power is subject to the law.⁸¹ The ECJ recalls precisely this idea in its famous *Les Verts* holding, cited in *Kadi*, that ‘the EC Treaty [establishes] a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions’ such that ‘neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty’.⁸² Given this standard, the court rightly recognised that the absence of any recourse against the sanctions brought against Mr Kadi and his co-listees at the Security Council and Community levels would amount to allowing Community institutions to exercise public power beyond the scrutiny of the law.⁸³ Now, if we assume that the ECJ is sincere in its assertion that Community law provides a ‘complete system of legal remedies’, it could not, without contradicting itself, exempt the Council’s measures, whatever their origin, from constitutional review. To put this another way, the review in question seems to be not only warranted but *required* by the comprehensiveness germane to the idea of constitutionalism.

What does this mean for de Búrca’s argument that the court was more concerned with protecting Community law from encroachment by international law than it was with protecting fundamental rights? It means that *Kadi* does not provide very satisfactory evidence for the pluralist interpretation, since the facts of the case make it very difficult to tell whether the ECJ’s refusal of international obligations originated from its

⁷⁸ ECJ, *Kadi and Al Barakaat*, n 1 *supra*, para 60.

⁷⁹ See paras 51–68 and 158–236 of the ECJ’s *Kadi and Al Barakaat* judgment, n 1 *supra*, where the court grapples with the question of whether the Community had the competence to adopt the contested measures given that Arts 60 and 301 EC authorise the adoption of sanctions against third countries, but not explicitly against individuals.

⁸⁰ See n 34 *supra*.

⁸¹ This was precisely what the court had in mind when it held, in its famous *Les Verts* ruling, that ‘The European Economic Community is a community based on the rule of law, *inasmuch as neither its Member States nor its institutions can avoid a review of the question of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty* . . . Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Art 173 of the Treaty’: Case 294/83, *Partie Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 01339, para 23.

⁸² ECJ, *Kadi and Al Barakaat*, n 1 *supra*, para 281 (emphasis added).

⁸³ *ibid*, para 334.

duties as a *bona fide* constitutional court, or from a less laudable posture of institutional chauvinism. The court's seemingly dualist assertion that the Community's obligations under international law cannot, under any circumstances, take precedence over certain provisions of primary EC law seems to be supported by *both* the self-serving explanation *and* by the rule of law premise.⁸⁴ Put differently, the ECJ's holding that international obligations cannot override primary EC law can be read as something that a unilateralist court would say. However, it also happens to be exactly the position that a mature constitutional court should be expected to take.

The Second Proviso: Does Kadi Threaten the Fabric of International Law?

So far, I have shown that the court's attitude accords with the first of the two criteria which distinguish 'civil' disobedience from common lawbreaking or, in de Búrca's terms, bad citizenship. To recall, the first criterion requires that the disobedient's 'ostensible aim cannot . . . be a private or business advantage; it must have *some* reference to a conception of justice or the common good'.⁸⁵ I argued that the court's insistence on the Community's internal rights standards is explicable with reference to, indeed compelled by, its status as the lone gatekeeper of fundamental rights against encroachment by the Community legislator. What I remain to show is that the court's stance is beneficial for the building of the international legal order in the long term, rather than corrosive of the cohesiveness and the effectiveness of that order. This brings us to the second proviso of the normatively demanding 'civil disobedience' standard I posed above, which is that the aberrant act of breaking the law in the name of more fundamental standards of justice should stop short of jeopardising the basic conditions that make legality possible. That is to say, the civil disobedient may challenge a particular law, but must not threaten the very fabric of law.

In the case of the ECJ's *Kadi* decision, this second proviso would be violated if the court were to refuse to accord validity to international obligations *any time* a conflict arose between its requirements and the fundamental norms of Community law. The pluralist interpretation of *Kadi* accuses the court of having done precisely this: for instance, de Búrca writes that the court depicted 'international law as a separate and parallel order whose normative demands do not penetrate the domestic (EC) legal order'.⁸⁶ By refusing to recognise the UN Charter's supremacy over Community law, the court threw into question the applicability of international law. If the two orders are 'separate', 'parallel' and sealed off from one another, this implies that the Community legal order creates a breach that is inimical to the assumed seamlessness of the rule of international law.

In response, I would like to parse several points in the *Kadi* ruling which undermine this interpretation. First, the ECJ pointedly refrained from using the Advocate General's description of the Community legal order as a 'municipal' legal order in relation to international law. The fact that this word is conspicuously absent from the ECJ's judgment is evidence that the court does not wish to construe the EC legal order in simple dualist terms that minimise the general binding force of international law. Rather, the ECJ is hanging onto its venerable old 'new legal order' conception,⁸⁷

⁸⁴ *ibid.*, paras 305–309.

⁸⁵ Bay, *op cit* n 69 *supra*, at 78.

⁸⁶ de Búrca, *op cit* n 3 *supra*, at 27.

⁸⁷ See n 19 *supra*.

according to which the Community legal order can neither be shoehorned into a straightforward municipal or dualist blueprint like the sovereign state under international law, nor viewed as a wholly pliant treaty regime with no traction of its own *vis-à-vis* an international legal hierarchy topped by the UN Charter. The court seems to want to remain in conversation with the international legal order, but not at the cost of forfeiting the universal applicability of basic rights norms whose guarantorship it assumed a full four decades ago.⁸⁸

Second, the court takes evident pains, in paragraphs 290–297 of the ruling, to stress that the Community's obligations under international law remain valid except in a small subset of cases where a special set of primary Community law is thrown into doubt. To put this another way, the court's bold assertion that Article 307 EC, which in certain cases can 'allow derogations even from primary law',⁸⁹ 'may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order'⁹⁰ does not mean that the court will therefore *always* deny the validity of international law. On the contrary, where international obligations are backed up by rigorous rights guarantees at the level at which they originate (say, if the rights guarantees afforded by the Security Council had been more convincing), the court might take a page out of decisions such as *Solange II*⁹¹ or *Bosphorus*,⁹² where the GFCC and the European Court of Human Rights (ECtHR), respectively, satisfied themselves with the EC's general standard of rights protection and declared that they would refrain from reviewing Community measures as long as that general standard was kept up. However, by refusing to give legal effect to international obligations where these fall foul of the Community's rights standards, the ECJ re-emphasises the special importance of basic rights, rather than assert blanket supremacy for Community law.⁹³ The court's refusal to recognise the effect of international law is not arbitrary or whimsical; it is conditioned and required by the principle of the rule of law and substantive entitlements of basic rights.

The civil disobedience interpretation I am putting forward here with regard to the ECJ's *Kadi* decision stands or falls with the court's use of basic rights. In other words, if the 'constitutional principles' which the court is invoking to qualify the Community's obligations under Chapter VII were anything other than those relating to fundamental rights, the civil disobedience argument would not make sense, and we would have to accept de Búrca's pluralist hypothesis. This is because what distinguishes civil disobedience from mere lawlessness is the disobedient's appeal to the higher norms of justice which underpin the errant legal regime. As the court recognised in paragraph 3 of its judgment, basic rights qualify as precisely such higher norms under Article 1(3) of the UN Charter and the Community's own 'constitutional charter'. Nor do fundamental rights furnish the fundamental premises of both orders only as a matter of law. Conceptually, too, it is inherent in the universal scope of fundamental rights standards that they cannot be hijacked as the preserve of this or that particular legal order.

⁸⁸ See n 13 *supra*.

⁸⁹ ECJ, *Kadi and Al Barakaat*, n 1 *supra*, para 301.

⁹⁰ *ibid*, para 304.

⁹¹ GFCC, *Wünsche Handelsgesellschaft*, n 16 *supra*.

⁹² ECtHR, Application No 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Sirketi v Ireland*, 30 June 2005, *Reports of Judgments and Decisions* 2005-VI.

⁹³ Note that the ECJ has claimed unconditional supremacy for Community law *vis-à-vis* the laws of Member States. By contrast, its assertion of the supremacy of the 'constitutional principles' of Community law *vis-à-vis* international law is remarkably restrained.

Accordingly, the ECJ could not ‘municipalise’ fundamental rights as norms exclusive to the European legal order even if it were motivated to do so (and I argued that it was not). Departing from international law in order to protect basic rights, therefore, can *only* be classified as civil disobedience, as breaking with international law to uphold its basic principles.

Finally, the civil disobedience interpretation makes sense in the light of the non-existence of other, systemic remedies to patch up the human rights loophole created by the Security Council’s use of smart sanctions. The ECtHR itself opted not to step into the breach in the *Behrami*⁹⁴ and *Saramati*⁹⁵ cases, the differing circumstances of those cases notwithstanding. Member States, for their part, regard themselves as unconditionally bound by the Security Council resolutions as evidenced by their arguments in *Kadi*. Lastly, each permanent member of the Security Council has its own reasons for joining the broad church of the ‘war on terror’. In other words, the ECJ’s taking human rights law into its own hands is also accounted for by its lone position of being ‘willing and able’ (*sic*) to uphold that key premise of modern international law.

V *Kadi’s* ‘Domestic’ Constitutional Implications

I will conclude this article by going back to the theme with which I started, namely the consequences of the *Kadi* ruling for the status of fundamental rights within the EU’s constitutional order. I will first explain why the unintended consequences of *Kadi* may be bad news for the court’s authority in the European legal space. Second, I will argue that even prudent observers can view *Kadi* as a sure step in the long journey beyond the market constitutionalism of the Treaty of Rome system towards a European constitutionalism of basic rights.

The Downside of Civil Disobedience: Careful, the National Courts Are Watching

Bold as it may be, the court’s civil disobedience approach leaves it vulnerable to a number of difficulties. Most importantly, it may encourage national courts, especially those of last instance, to engage in similar acts of civil disobedience against the ECJ’s own authority when circumstances similar to *Kadi* arise. The standing rules of the EU judiciary afford a better chance for private parties to contest acts directly infringing their basic interests compared to the meagre remedies made available by the Sanctions Committee, but only just. It remains to be seen how far the ECJ will be prepared to relax its criteria for standing in line with the Treaty of Lisbon.⁹⁶ In the meantime, the restrictiveness of EU standing rules, combined with the unpredictability of whether

⁹⁴ ECtHR, Application No 71412/01, *Behrami and Behrami v France*, 2 May 2007.

⁹⁵ ECtHR, Application No 78166/01, *Saramati v France, Germany and Norway* 2 May 2007.

⁹⁶ The Treaty of Lisbon removes the criterion of ‘individual concern’ contained in Art 230 EC which the ECJ has interpreted extremely narrowly, with the effect of dooming virtually all attempts to enable individual access to supranational judiciary (see especially Case 25/62, *Plaumann and Co v Commission of the European Economic Community* [1962] ECR 126). Accordingly, whereas the old Art 230 EC required that a regulatory act be of ‘individual concern’ to applicants so as to give them standing to challenge it, the new Art 263 TFEU removes that phrase and will only require that an applicant be ‘directly concerned’ and that the legislation in question require no implementing measures. See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, [2007] OJ C306/42, Art 2, para 214.

claims raised before a national court will be translated into a preliminary reference to the ECJ, means that the odds are still stacked against private parties wishing to raise fundamental rights claims against the EU.⁹⁷ Moreover, the ECJ has an infamously limited record of finding European measures in breach of fundamental rights. Against this background, what I have described as the ECJ's civil disobedience approach in *Kadi* may undermine its own authority *vis-à-vis* national courts. At the very least, the ECJ has shown by its example that it is acceptable for a court to remedy extreme denials of justice in another legal system by taking the law into its own hands. In fact, the GFCC's Lisbon Treaty decision was quick to latch onto this example: in that decision, the GFCC pointed to *Kadi* as illustrating what would be permissible for national constitutional courts to do 'in borderline cases'. It argued that 'under special and narrow conditions', such as those which obtained in *Kadi vis-à-vis* fundamental rights, the GFCC (and, one presumes, other fellow constitutional courts) could '[declare] European Union law inapplicable' within their own jurisdiction.⁹⁸

As European constitutional lawyers well know, this is not a hypothetical difficulty. In fact, many of these issues have come to a head in the simmering controversy over national measures implementing the Framework Directive for a European Arrest Warrant (EAW).⁹⁹ A handful of Member State courts¹⁰⁰ have now contested the constitutionality of such measures, partly on the grounds that they allow for criminal detention without adequate safeguards for basic rights.¹⁰¹ In view of the fact that many of these robust challenges have been posed by the constitutional courts of new Member States, one might speculate that the tradition of 'constitutional tolerance'¹⁰² so painstakingly cultivated between the courts of the original Member States and the ECJ has yet to take root in the new Member States.¹⁰³ However, the more persuasive (not to mention less patronising) explanation is that the EU has only itself to blame for these challenges, insofar as executive Union competence in criminal justice matters should

⁹⁷ Paul Craig and Gráinne de Búrca criticise the court's test of standing in unusually strong terms, arguing that 'The "possibility" of *locus standi* is like a mirage in the desert, ever receding and never capable of being grasped': P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 4th edn, 2008), at 512. Remarkably, Advocate General Jacobs gave a comprehensive critique of the ECJ's standing doctrine and an equally comprehensive blueprint for broadening it. In *Unión de Pequeños Agricultores v Council*, he urged the court to relax the standard of 'individual concern' contained in Art 230 EC so as to grant standing to individuals where a Community measure 'has, or is liable to have, a substantial adverse effect on his interests'. His recommendation was not adopted by the court. See Opinion of Advocate General Jacobs delivered on 21 March 2002, Case C-50/00P, *Unión de Pequeños Agricultores v Council of the European Union*, para 102.

⁹⁸ See n 61 *supra*, para 240.

⁹⁹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L190/1.

¹⁰⁰ For a diligent overview of each of these challenges, see J. Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"', (2007) 44 *Common Market Law Review* 9.

¹⁰¹ It should be noted that many of these decisions were coloured by concerns over national and constitutional sovereignty, in addition to regard for the protection of basic rights.

¹⁰² J. H. H. Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*', in J. H. H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003), at 15. A forbear of the principle of constitutional tolerance in Weiler's thought is the idea of a 'constitutional conversation'; see Weiler, *op cit* n 71, *supra*, at 120.

¹⁰³ For a comprehensive analysis of the gusto with which the constitutional courts of some of the new Member States have taken up the *Solange* rhetoric, see W. Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe', (2008) 14 *European Law Journal* 1.

have been accompanied by the shoring up of countervailing judicial safeguards at the supranational level.¹⁰⁴

On the other hand, the centrifugal threat which the ECJ's example of civil disobedience poses can be exaggerated. After all, even though national courts have had the *Solange* formula at their disposal for 35 years, this route of dissenting from the ECJ's judgments has not caused the European legal order to disintegrate. This is in part because the ECJ was able to make a credible and earnest commitment to protect rights, and in part because national courts did not overexploit the *Solange* option. After *Kadi*, however, there is an acute need for the ECJ and national courts to renew their vows.¹⁰⁵ In what follows, I will conclude this article by arguing that the ECJ for its part has taken an important step in *Kadi* to reaffirm its commitment to rights.

On the Upside: Basic Rights Get Promoted

As I recalled in part II of this article, up until *Kadi*, fundamental rights norms had been peripheral to the Community legal order, having been brought within its scope out of a sense of expediency. It was assumed that affording basic rights protection was a task for Member States' domestic constitutional mechanisms, supplemented by the ECtHR. I would like to argue that, in contrast to the Community's initial, auxiliary mode of rights protection, the court's logic in *Kadi* signals an incipient re-centring of the supranational legal order around basic rights, which may in time engender the institutional prioritisation of rights protection within the EU's array of functions.¹⁰⁶

In *Kadi*, this claim is borne out by the ECJ's reasoning at paragraphs 301–304, in which the court works out with unprecedented clarity the complex and conditional hierarchy among the three levels of law under consideration, namely: international law, Member State law and Community law. In particular, the court recognises that the EC Treaty leaves unaffected Member States' international commitments dating before its

¹⁰⁴ In this connection, see S. Alegre and M. Marisa. Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—The European Arrest Warrant', (2004) 10 *European Law Journal* 200. In its long-awaited but underwhelming response to the misgivings of national courts, the ECJ disappointed many by curtly dismissing any notion that the European Arrest Warrant might give rise to fundamental rights concerns. See Case C-303/05, *Advocaten voor de Wereld VZW v Ledem van de Ministerraad* [2007] ECR I-03633. Critical initial evaluations include F. Geyer, 'Case Note: European Arrest Warrant', (2008) 4 *European Constitutional Law Review* 149. Even more critical is D. Sarmiento, 'The European Arrest Warrant and the Quest for Constitutional Coherence', (2008) 6 *International Journal of Constitutional Law* 171. That said, there have been notable attempts to shore up fundamental rights safeguards in connection with the EU's growing involvement in justice and criminal law matters. Most important in this regard is the Commission's 2003 Green Paper on 'Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union', which presents a thorough-going assessment of the minimum standards that should be adopted in this area. Brussels, COM (2003) 75 final (19 February 2003).

¹⁰⁵ For insider's wisdom on rekindling a three-way dialogue between the national constitutional courts, the ECJ, and the ECtHR, see L. Garlicki, 'The Cooperation of Courts. The Role of Supranational Jurisdictions in Europe', (2008) 6 *International Journal of Constitutional Law* 509.

¹⁰⁶ The protection of fundamental rights has already found a niche in the EU's institutional structure besides the judiciary in the form of the newly minted Agency for Fundamental Rights. Established further to Art 308, it has legal personality and is charged with the task of roviding Union institutions and Member States 'with information, assistance and expertise on fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights'. Like the Charter, the Agency is supposed to 'act only within the scope of application of Community law'. See Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1.

entry into force, and cites a previous case, *Centro-Com* to that effect.¹⁰⁷ In *Centro-Com*, the court had found that pursuant to ex-Article 234 (now Article 307), Member States could derogate from their obligations under primary Community law ‘if [such national measures] are necessary to ensure that the Member State concerned performs its obligations towards non-member countries under an agreement concluded prior to entry into force of the Treaty or prior to accession by that Member State’.¹⁰⁸ In other words, the court had held that international obligations could take precedence even where fundamental objectives of the Community were at stake. Importantly, in *Centro-Com*, the objective in question was common commercial policy as set out in Article 133 (ex-Article 113) EC which, in Piet Eeckhout’s words, furnishes ‘part of the essential arrangement of the European (Economic) Community’.¹⁰⁹

My argument is that *Kadi* signals a move away from that core insofar as the court drew a novel distinction *internal* to primary Community law. It held, in effect, that Article 307 could authorise derogations from some, but not all, primary Community law. In particular, ‘Article 307 EC may in no circumstances permit any challenge to the principles that form part of the *very foundations* of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights’.¹¹⁰

When considered in contrast with the *Centro-Com* decision, *Kadi* appears to upgrade the status of fundamental rights *vis-à-vis* other constitutional principles of the Community. Specifically, whereas *Centro-Com* permitted derogations from common commercial policy on the basis of international law, in *Kadi*, the court rules out such derogations where the conflicting constitutional norms are fundamental rights guarantees. In effect, the court declares some primary Community law to be more primary than others. Most importantly, whereas one of the foundational economic objectives of the Community (common commercial policy) may be abridged, the protection of fundamental rights, which are *not* part of the Community’s original objectives, may not. This places respect for fundamental rights in a super-ordinate position compared to other objectives of the Community, most notably the economic objectives that had hitherto furnished its centre of gravity.¹¹¹

¹⁰⁷ ECJ, Case C-124/95, *The Queen ex parte Centro-Com Srl v HM Treasury and the Bank of England* [1997] ECR I-114.

¹⁰⁸ *ibid*, para 61.

¹⁰⁹ P. Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations* (Oxford University Press, 2004), at 347.

¹¹⁰ ECJ, *Kadi and Al Barakaat*, n 1 *supra*, para 304 (emphasis added).

¹¹¹ Importantly, the argument that fundamental rights have climbed to a higher rung of constitutional paramountcy in comparison to market rules has to be qualified to allow for the diversity of the entitlements bundled into the category of fundamental rights. Most importantly, although the comparison between *Kadi* and *Centro-Com* suggests that the ECJ construes classic civil rights as being more fundamental to the supranational legal order than market objectives, the recent *Laval* and *Viking* decisions of the ECJ give the impression that the court is more willing to qualify *social* rights in the event of a clash with market freedoms. These decisions have drawn justifiable criticism for privileging supranational market freedoms at the expense of the solidaristic institutions of Member States. See, among many others, N. Reich, ‘Free Movement v. Social Rights in an Enlarged Union: The *Laval* and *Viking* Cases before the ECJ’, (2008) 9 *German Law Journal* 125; C. Joerges and F. Rödl, ‘Informal Politics and Formalised Law: Reflections after the Judgments of the ECJ in *Viking* and *Laval*’, (2009) 15 *European Law Journal* 1, at 17–18; A. Hinarejos, ‘*Laval* and *Viking*: The Right to Collective Action versus EU Fundamental Freedoms’, (2008), 8 *Human Rights Law Review* 714.

From the point of a conventional, domestic constitutionalism of rights, there is nothing terribly interesting about this ordering of priorities. As I argued in part II, however, because economic objectives and free movement rights have furnished the foundation of the supranational constitutional structure, the new constitutional emphasis given to fundamental rights represents a new departure for European law. Particularly when viewed in conjunction with *Centro-Com*, the court now appears to construe human rights, rather than market freedoms, as occupying the top rung of the supranational hierarchy of norms. In other words, *Kadi* strongly suggests a paradigm shift towards a supranational constitutionalism grounded not in the ideal of economic prosperity, but basic rights protection.¹¹²

It would certainly be overambitious to argue that *Kadi* single-handedly heralds a constitutional shift. However, there are several reasons to think that the new constitutional primacy which the court has accorded fundamental rights norms takes the European legal order beyond its early, market-centred model of constitutionalism, which was merely stop-gapped by an *ad hoc* commitment to basic rights. For one thing, the impact of pivotal decisions by the ECJ on the EC/EU's ever-evolving 'normative structure' have consistently exceeded expectations.¹¹³ As observers of European legal integration have shown with reference to multiple areas of supranational activity, once the court recognises wide-reaching interpretations of European rights, litigation tends to extend the scope of those rights at the expense of conflicting provisions of Member State law.¹¹⁴ From this angle, *Kadi* could provide the beachhead for individual claims that pit the newly non-derogable primary law of the EU (fundamental rights) against the Union's economic objectives and international obligations.

Moreover, while *Kadi* provides the clearest signal of an impending reordering of the EU's constitutional priorities, several other developments suggest a renewed emphasis on fundamental rights in comparison to market norms in the supranational legal order. In the relatively recent *Schmidberger*¹¹⁵ and *Omega*¹¹⁶ decisions, market freedoms vied against the public interest in protecting traditional fundamental rights, with the ECJ deciding in favour of the latter.¹¹⁷ In *Schmidberger*, the court found that the temporary restrictions placed by Austria on the movement of goods so as to enable the exercise of basic rights of expression and assembly were justified under Community law. In *Omega*, it found that German authorities were within their public policy discretion when they barred the import of gaming equipment from Britain on the grounds that the recreational simulation of homicide was offensive to the principle of human dignity. Most importantly, the ECJ observed in the abstract that 'the protection of [fundamental] rights is a legitimate interest which, in principle, justifies a restriction of the

¹¹² For a full account of the concept of market constitutionalism, see C. Joerges, *What is Left of the European Economic Constitution?*, EUI Working Papers, Law No 13 (2004). Also, Maduro, *op cit* n 77 *supra*.

¹¹³ Stone Sweet, *op cit* n 7 *supra*.

¹¹⁴ Among the leading accounts of this course of development are E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', (1981) 75 *American Journal of International Law* 1; Joseph. H. H. Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal* 2403; A.-M. Burley and W. Mattli, 'Europe Before the Court', (1993) 47 *International Organisation* 41; W. Sandholtz and A. Stone Sweet, *European Integration and Supranational Governance* (Oxford University Press, 1998); Stone Sweet, *op cit* n 7 *supra*; R. A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization, and Governance* (Cambridge University Press, 2007); D. Kelemen, 'The Americanisation of European Law? Adversarial Legalism à la européenne', (2008) 7 *European Political Science* 32.

¹¹⁵ ECJ, Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659, para 77.

¹¹⁶ ECJ, Case C-36/02, *Omega* [2004] ECR I-9609.

¹¹⁷ See para 77 of the *Schmidberger* decision for a clear articulation of this direct conflict.

obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services'.¹¹⁸ Nevertheless, neither case underlined fundamental rights as forcefully as *Kadi*, insofar as the court refrained from treating fundamental rights as overriding by default, and instead insisted on considering each particular conflict between fundamental freedoms and public policy interests on its own merits. In *Omega*, this took the form of evaluating whether the German measure at stake was necessary for protecting the cited principle of human dignity and whether that same objective could not be attained in a manner less prejudicial to the freedom to provide services.¹¹⁹ Similarly, in *Schmidberger*, the ECJ repeated its customary view that the fundamental rights at stake were not absolute, but should rather be considered in the light of their broader 'social purpose'.¹²⁰

In his opinion in the *Centro Europa 7* case, Advocate General Maduro urged the court to go further, and set out his vision for a decisive shift in favour of fundamental rights in the EU legal order.¹²¹ In a counterpoint to von Bogdandy's classic challenge that fundamental rights fall beyond 'the Core of the European Union',¹²² Maduro construed the '[p]rotection of the "common code" of fundamental rights' as 'an *existential requirement* for the EU legal order'.¹²³ This characterisation sharply echoes the standard we set earlier for a liberal constitutionalism of rights, as distinct from market constitutionalism: the former, unlike the latter, is built from the ground up on basic rights guarantees and ceases to make sense in their absence. In this vein, Maduro interpreted the fundamental rights guarantees enshrined in Article 6 EU as meaning that 'the very existence of the European Union is predicated on respect for fundamental rights'.¹²⁴ While Maduro's reasoning was not taken up in the *Centro Europa 7* decision, as an on-the-record statement by an officer of the court, it nevertheless takes its place in the official catalogue of constitutional options for the EU.¹²⁵ In turn, the Advocate General's construal of fundamental rights not merely as a condition of the validity of EU law but its 'existential requirement' underlines the claim made here that the European legal order is moving beyond its erstwhile market constitutionalism.

Finally, that claim is also encouraged by the entry into force of the Charter of Fundamental Rights.¹²⁶ Legally, the Charter has been carefully crafted to preclude a spontaneous constitutional shift of the kind being considered here. Rather than giving the EU a new human rights competence, its intended purpose is to provide a more

¹¹⁸ ECJ, *Omega*, n 116 *supra*, para 35.

¹¹⁹ *ibid*, para 36.

¹²⁰ ECJ, *Schmidberger*, n 115 *supra*, para 80.

¹²¹ Opinion of Advocate General Poiares Maduro, Case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorita per le Garanzie nelle Comunicazioni*, delivered on 12 September 2007, paras 18–21.

¹²² von Bogdandy, *op cit* n 24 *supra*,

¹²³ Maduro, n 121 *supra*, para 19.

¹²⁴ *ibid*, para 19.

¹²⁵ And indeed, Advocate General Maduro presented his model as descended from the vision Advocate General Jacobs expressed in *Konstantinidis*, in which Jacobs famously urged the court towards a capacious understanding of the status and rights of Member State nationals not just as market actors but as European citizens. See Opinion of Advocate General Jacobs, Case C-168/91, *Christos Konstantinidis v Stadt Altensteig-Standesamt* [1993] ECR I-1191. On this point, see L. Besselink and J.-H. Reestman, 'The Relative Autonomy of the EU Human Rights Standard', (2008), 4 *European Constitutional Law Review* 199, at 202; J. Shaw, *The Transformation of Citizenship in the European Union* (Cambridge University Press, 2007), at 46.

¹²⁶ [2000] OJ C364/01.

explicit and comprehensive list of rights to replace the vague schedule compiled by the ECJ in the light of the traditions of the Member States, the ECHR and other international human rights documents. Its legal effect is supposed to extend only to the acts of supranational institutions, and can be used against Member States only when their acts fall within the scope of EU law.¹²⁷

Despite the conservative framing of its legal effects, however, the rights enumerated in the Charter are remarkably far-reaching. On the one hand, it is difficult to envision a situation where an EU measure or a Member State act or derogation within the scope of EU law *could* infringe on the right to life, the prohibitions against torture, eugenics and so on. This mismatch between the Charter's wide-ranging substantive provisions and its limited scope of application may be taken as an indication of its cosmetic function. On the other hand, as the facts of the *Kadi* case aptly illustrate, thanks to the EU's ever-expanding roster of competences and governance mechanisms, these rights may not be irrelevant for long. The inclusion in the Charter of rights provisions which far outstrip the EU's scope of competences could equally be interpreted as attesting to the central role which human rights are set to assume within the supranational polity's range of objectives.¹²⁸ Moreover, past experience of supranational judicialisation gives good reasons to think that once rights are granted, lawyers and judges find creative ways not only to breathe life into them, but to extend their impact beyond all previously envisaged proportions.¹²⁹

Even if none of these eventualities comes to pass, the symbolic power of rights documents should not be underestimated. The Declaration of the Rights of Man and the Citizen and the US Bill of Rights took generations to consolidate their status as law and to live up to the promise of protecting the rights of every citizen. Even where they do not gain immediate legal tender, therefore, rights documents open up a new horizon of political legitimacy and provide a language for generations of progressive struggles. The value of the Charter of Fundamental Rights, too, should be understood in this way. On the one hand, insofar as it keeps pace with new societal and technological expediencies, the Charter represents the state of the art in contemporary schedules of rights. On the other, it will ride on the shoulders of the most advanced and effective supranational legal system to date. As an artefact of twenty-first century basic rights thinking, therefore, the Charter can offer just the right resource if the ECJ is indeed

¹²⁷ See Title VII, Art 51: '(1) The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. (2) The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. Additionally, Art 276 TFEU pointedly excludes the acts of the police and law enforcement agencies of Member States from the scope of review of the ECJ.

¹²⁸ S. Besson, 'The European Union and Human Rights: Towards a Post-National Human Rights Institution?', (2006) 6 *Human Rights Law Review* 323. Miguel Maduro also recognises the indeterminacy of the Charter's purpose, pointing out that 'The intellectual and political project was to write a Charter of Fundamental Rights and not simply a document with the set of rights necessary for the protection of individuals vis à vis the powers of the EU': M. P. Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union', in T. K. Hervey and J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights—A Legal Perspective* (Hart Publishing, 2003), at 290.

¹²⁹ See n 114 *supra*.

sincere about shifting the European legal order's centre of gravity away from the market and towards a supranationalism of basic rights.

Faced with this incipient reordering of constitutional priorities, it is useful to ask: what next? Most importantly, in the Lisbon era, we may have renewed use for the decade-old debate about whether the EU could or should function 'as a human rights organisation'.¹³⁰ As scholars including Samantha Besson,¹³¹ Marta Cartabia¹³² and Ernst-Ulrich Petersmann¹³³ have noted in this connection, supranational law offers a particularly opportune locus for reinforcing basic rights guarantees and extending them across state boundaries. On the other hand, restyling the EU to fulfil the functions of a fully fledged human rights regime would entail serious legal and political complications, not least the indeterminacy of what a 'human rights regime' would mean in this context.¹³⁴

Perhaps the thorniest of these questions has to do with the issue of 'incorporation'.¹³⁵ Will a constitutional prioritisation of fundamental rights in the EU mean subjecting Member State acts *outside* the scope of EU law to the ECJ's scrutiny on questions of fundamental rights? *Centro Europa 7* raised the question of whether the ECJ would review Italian measures in the light of fundamental rights norms even though the dispute entailed no intra-EU dimension. As Advocate General Maduro implicitly recognised, if the protection of fundamental rights is an essential condition of the coherence of the EU legal order, then the ECJ cannot, without forfeiting its own status as a rule of law court, ignore widespread violations of those rights by Member States in situations falling outside the substantive scope of EU law.¹³⁶ In other words, without some degree of incorporation, the EU cannot transition out of the world of the market constitution, while even small steps toward incorporation would threaten to upset the delicate demarcation of competences between the EU and Member States. These momentous questions must wait for another occasion. Suffice it to observe that while *Kadi* reopens the debate on the EU as a human rights organisation, it is far from concluding it.

Having allowed me my fair share of sweeping claims in this article, I ask the reader to indulge a final, normative claim, which I make in the hope of contributing to the debate about the values and principles on which the EU rests. In the immediate post-war period, European federalists conceived of supranationalism not merely as a way of generating wealth, but as a new way of organising political power so as to safeguard human dignity and individual rights against the arbitrary exercise of power

¹³⁰ von Bogdandy, *op cit* n 24 *supra*.

¹³¹ Besson, *op cit* n 128 *supra*; P. Alston and J. H. H. Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', in P. Alston (ed), *The EU and Human Rights* (Oxford University Press, 1999).

¹³² M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously', (2009) 5 *European Constitutional Law Review* 5, at 20.

¹³³ E.-U. Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration', (2001) 13 *European Journal of International Law* 621.

¹³⁴ von Bogdandy, *op cit* n 24 *supra*. Other sceptical interventions include Maduro, *op cit* n 128 *supra*. As always, Joseph Weiler was one of the earliest to observe the constitutional difficulties associated with an expansion of the EU's human rights functions, although he has come to advocate just such an expansion. See Weiler, *op cit* n 7 *supra*, at 1136–1137. Compare with Alston and Weiler, *op cit* n 131 *supra*.

¹³⁵ Weiler, *op cit* n 7 *supra*, at 1136–1137; Maduro, *op cit* n 128 *supra*, at 290.

¹³⁶ Maduro's cognizance of this problem leads him to propose a halfway-house solution, namely that the ECJ should keep an eye out for systemic violations of fundamental rights that may impair a Member State's overall ability to fulfil their supranational obligations. See Opinion of the Advocate General, Case C-380/05, *Centro Europa 7* [2008] ECR I-349, delivered 12 September 2007, para 20.

by sovereign states.¹³⁷ For much of the EC's history, however, that aspiration has largely and intentionally been eclipsed by the technocratic project of market building. This is precisely why the prioritisation of the status of fundamental rights within the supranational architectonic is something to be welcomed. Spurred by the Security Council's unaccountable, wanton use of sanctions directed towards individuals, the ECJ appears at long last to be groping towards the capacious constitutional ambition of the original integration project.

¹³⁷ As Joseph Weiler expressed it in his classic essay, 'Fin-de-Siècle Europe', '[a] central plank of the project of European integration may be seen, then, as an attempt to control the excesses of the modern nation-state in Europe, especially, but not only, its propensity to violent conflict and the inability of the international system to constrain that propensity': J. H. H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), at 250. Joerges and Neyer have framed this point in constitutional terms: 'the legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its *limits*. If and because democracies presuppose and represent collective identities, they have very few mechanisms ensuring that "foreign" identities and their interests be taken into account within their decision-making processes . . . Thus, the non-discrimination guarantee of Article 6 can be read as aiming at compensating the particularism of national basic rights . . . The constitutionalisation of such principles is in line with the ideals embodied in democratic constitutions and legal supranationalism can thus be understood as complementing common features of national constitutionalist traditions': C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', (1997) 3 *European Law Journal* 273, at 294.