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**Breaking the law to fix it:  
Human rights in the EU after *Kadi and Al Barakaat*<sup>1</sup>**

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With its recent *Kadi and Al Barakaat* (“*Kadi*”) ruling, the Court of Justice of the European Communities (ECJ) has once again thrown the European legal theory community into a state of feverish activity.<sup>2</sup> 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 Community legal order and international law, the role of fundamental rights norms within the primary law of the Community, the human rights obligations of the 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 European Union.

The present paper 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 the immediate wake of this ruling.<sup>3</sup> However, while many of

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<sup>1</sup> I am grateful to Prof. Gráinne de Búrca for providing me with an early draft of her paper, “The European Court of Justice and the International Legal Order after *Kadi*,” and for the opportunity to discuss it with her at length. I take care to refer to the published version of her paper here.

<sup>2</sup> European Court of Justice, Joined Cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat v. Council of the EU & EC Commission*, 3 September 2008.

<sup>3</sup> Notable interventions directly concerning the ECJ’s *Kadi* ruling include Gráinne de Búrca, “The European Court of Justice and the International Legal Order after *Kadi*,” Fordham Law Legal Studies

these studies have latched onto *Kadi*'s implications for the way in which the Community fits within the international legal order, my central claim concerns the equally profound significance of this ruling for the *internal* constitutional set-up of the Community.<sup>4</sup>

Viewed from this angle, I will argue, *Kadi* is useful for shedding new light on a series of seminal debates concerning fundamental in the Community. The first of these debates concerns whether or not the EU can or should function as a genuine “human rights organization”<sup>5</sup> given that that its legal mandate and institutional functions center around economic activity. A second, related debate, which dates to the mid-1990s, examines the equivocal way in which the ECJ has deployed fundamental rights discourse in its case

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An equally great amount of scholarly attention has been paid to the CFI’s *Kadi* and *Yusuf and Al Barakaat* rulings, virtually all of which is critical. See, notably, Jessica Almqvist, “A Human Rights Critique of European Judicial Review. Counter-Terrorism Sanctions,” *International & Comparative Law Quarterly*, vol.57 (2008), no.2, pp.303-331; Mielle 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,” *Leiden Journal of International Law*, vol.19 (2006), pp.753-772; Christina Eckes, “Judicial Review of European Anti-Terrorism Measures—The *Yusuf* and *Kadi* Judgments of the Court of First Instance,” *European Law Journal*, vol.14 (2008), no.1, pp.74-92; Piet Eeckhout, “Community Terrorism Listing, Fundamental Rights, and UN Security Council Resolution. In Search of the Right Fit,” *European Constitutional Law Review*, vol.3 (2007), pp. 183-207; Julia Hoffman, “Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test,” *Constellations*, vol.15 (2008), no.4, pp.543-560 (authored prior to the publication of the ECJ ruling).

<sup>4</sup> This question is addressed briefly by Halberstam and Stein “The United Nations, the European Union, and the King of Sweden,” at pp. 62-63

<sup>5</sup> Armin von Bogdandy, “The European Union as a Human Rights Organization? Human Rights and the Core of the European Union”, *Common Market Law Review*, vol.37 (2000), pp.1307-1338. Other notable contributions include Samantha Besson, “The European Union and Human Rights: Towards a Post-National Human Rights Institution?,” *Human Rights Law Review*, vol.6 (2006), no.2, pp.323-360; Philip Alston and J.H.H. Weiler, “An ‘Ever Closer Union’ in need of a human rights policy: the European Union and human rights,” in Philip Alston (ed), *The EU and Human Rights* (Oxford: Oxford University Press, 1999). For more on this debate, see section IV of this paper.

law.<sup>6</sup> The present paper aims to update these seminal debates with reference to the ECJ's *Kadi* ruling.

Substantively, my central claim will be that *Kadi* has reprioritized the status of fundamental rights norms within the Community's constitutional architectonic. I will argue that this is a welcome readjustment, and promises to restore the normative objectives of supranationalism over and above its pragmatic, market-accented *telos*.

In order to make this claim, however, I will need to address a contrasting, skeptical account of the *Kadi* decision which questions the significance of this decision for rights-protection. Reacting to the easy triumphalism of much post-*Kadi* commentary, Gráinne de Búrca has advanced a characteristically cogent case that the ECJ's machinations about fundamental rights are peripheral to the *Kadi* ruling, and that the true significance of this decision lies in the strong unilateralist tenor it exposes in the Court's vision of international order.<sup>7</sup> In order, therefore, to convince readers of my strong thesis about *Kadi*'s salutary consequences for fundamental rights in the Community legal order, I will begin by responding to de Búrca's articulation of the null hypothesis, so to speak, according to which rights concerns should be seen as merely incidental to the Court's reasoning in *Kadi*. Against de Búrca's interpretation, I will seek to show that the ECJ's refusal to observe the Community's international legal obligations should be regarded not as a kind of lawless unilateralism, but as an act of civil disobedience motivated by a

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<sup>6</sup> Jason Coppel and Aidan O'Neill, "The European Court of Justice: Taking Rights Seriously?," *Legal Studies*, vol.12 (1992), no.2, pp.227-239, 243; Martti Koskenniemi, "The Effect of Rights on Political Culture" in Philip Alston, Mara Bustelo, James Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999). Also see Weiler & Lockhart's justly celebrated response to Coppel and O'Neill: J.H.H. Weiler and Nicolas J.S. Lockhart, "'Taking Rights Seriously' Seriously: The European Court and its fundamental rights jurisprudence" Parts I & 2, *Common Market Law Review*, vol.32 (1995), pp. 61-94 and pp. 579-627

<sup>7</sup> de Búrca, "The European Court of Justice and the International Legal Order after *Kadi*"

paradoxical but genuine concern for upholding the rule of law both within the Community and within the international legal order.

The argument of the paper is advanced in four stages. First, I will briefly revisit the constitutional status of fundamental rights within the Community legal order prior to *Kadi*, so as to provide the *ex ante* context for my claim about a fundamental shift. 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 give my alternative interpretation of civil disobedience. I will conclude by reviewing the nature and extent of the constitutional shift initiated by the ECJ's reasoning in *Kadi*.

#### **I. The status of fundamental rights prior to *Kadi***

The story of the ECJ's spontaneous "arrogation"<sup>8</sup> of a human rights mandate for itself is familiar and well-documented.<sup>9</sup> 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 the Member States. Asked as early as 1959 to comment on an alleged conflict between an ECSC High Authority decision and the

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<sup>8</sup> Joseph H.H. Weiler, "The Transformation of Europe," *Yale Law Journal*, Vol.100 (1991), pp.2403-2483, at 2417

<sup>9</sup> For similar iterations of what we might call the 'standard account,' see Karen Alter, *Establishing the Supremacy of European Law* (Oxford: Oxford University Press, 2001), esp. pp.88-96; Federico Mancini and David T. Keeling, "Democracy and the European Court of Justice," *Modern Law Review*, vol.57 (1994), no.2, pp.175-190; Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004); Joseph 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," *Washington Law Review*, vol.61 (1986), pp.1103-1142, esp. 1111-1119

plaintiff's fundamental rights,<sup>10</sup> 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.”<sup>11</sup>

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 supranational 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 apply the human rights norms as a consequence of its own lack of competence to apply national law, the message it sought to convey in *Stork* was that Community law was unbound to and independent of provisions of national law. In effect, *Stork* provides one of the earliest articulations of the idea of the autonomy of Community law.

As we know from the more or less standard account of European legal integration, the ECJ complemented this assertion of the autonomy of Community law in the 1960s and 70s by establishing and consolidating its celebrated doctrine of supremacy, according to which Community law prevails over the laws of its Member States, including their constitutional norms (cite Stone Sweet, *Simmenthal II*), in the event of a conflict. Consequently, during this time the Community's sphere of operation began to look more and more like a fundamental rights loophole writ large: in the absence of provisions of basic rights from the Treaties, Community institutions appeared to be exercising public power unsullied by rights constraints. The ever-expanding remit of EC law and the ECJ's

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<sup>10</sup> Case 1/58, *Stork v High Authority of the ECSC* [1958] 1959 ECR 17

<sup>11</sup> *Ibid.* para. 4(a)

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. In the 1974 case which came to be known as *Solange I*, the German Federal Constitutional 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.”<sup>12</sup> Similarly, in its 1973 *Frontini* decision,<sup>12</sup> the Italian Constitutional Court interpreted Art 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.<sup>13</sup>

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 (the 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 the *Stauder* ruling a year earlier:<sup>14</sup> it declared itself the guardian of a patrimony of individual rights norms derived from Member State constitutions which, it argued, had always been an “integral part” of Community law as “general principles of law,” even if they were not featured in the Treaties. It held that “the protection of such

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<sup>12</sup> *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, (Decision of May 29 1974) Case 2 BVL 52/71, 37 BVerfGE 271, [1974] CMLR 540.

<sup>13</sup> See Francesco P. Ruggieri Laderchi, “Report on Italy,” in Anne-Marie Slaughter, Alec Stone Sweet, and Joseph Weiler (eds), *The European Courts and National Courts* (Oxford: Hart Publishing, 1998)

<sup>14</sup> Case 29/69 *Stauder v. City of Ulm*, [1969] ECR 419

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.”<sup>15</sup> Although this assertion did not quite satisfy the GFCC at the time, the ECJ subsequently managed to allay the concerns of Member State judiciaries by reiterating its seriousness about holding Community acts to a sufficiently stringent standard of fundamental rights protection.<sup>16</sup>

What is important about this story for the present purposes is that the ‘*IHg* solution,’ whereby the ECJ arrogated basic rights guarantees into its legal mandate, has hitherto provided a constitutional patch-up rather than a systemic 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 constituting the EU’s constitutional center of gravity relate to the project of market-building and regulation. To put this differently, fundamental rights have so far constituted overriding but *non-essential* checks on the supranational institutions: they are fundamental, but not *foundational* legal norms. This is not to say, as others have done,<sup>17</sup> that the ECJ fails to accord proper normative weight to basic rights or that it habitually sacrifices them to economic objectives. Rather, it means that basic rights protection has so far featured in the “new legal order” as an afterthought, as a judicially affixed band-aid of sorts.

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<sup>15</sup> Case 11/70, *Internationale Handelsgesellschaft* [1970], ECR 1125

<sup>16</sup> See the case that has come to be known as *Solange II*, namely, *Wünsche Handelsgesellschaft* Bundesverfassungsgericht 2, 197/83; [1986] 1987 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 safe-guard 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.”

<sup>17</sup> Coppel and O’Neill, “The European Court of Justice: Taking Rights Seriously?”; Koskenniemi, “The Effect of Rights on Political Culture”

The peripheral status that fundamental rights have so far occupied in the EU's constitutional order is better appreciated when viewed in contrast with the role that basic rights are assigned within the architecture of a conventional liberal model of constitutionalism.<sup>18</sup> Under the liberal 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 central normative core were to be cut out.<sup>19</sup> By contrast, the European legal order would still be internally coherent if it featured no fundamental rights provisions.<sup>20</sup> 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 abundantly clear.

This point was driven home by Armin von Bogdandy in his critical intervention in the debate over whether human rights functions should be integrated into the legal and political mandate of the Community in a more full-blooded fashion. In 2000, Bogdandy stated memorably 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."<sup>21</sup> The fact that the constitutional configuration of the EU centers around the project of market-building and regulation,

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<sup>18</sup> The *locus classicus* for the rights-based theory of constitutionalism is Ronald Dworkin's *Taking Rights Seriously* (Cambridge, MA: Harvard UP, 1977).

<sup>19</sup> 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 Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

<sup>20</sup> 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.

<sup>21</sup> von Bogdandy, "The European Union as a Human Rights Organization?", at 1308

Bogdandy argued, fundamentally distinguishes it from *bona fide* human rights regimes. As I have argued above, I regard this characterization of Community law to be entirely accurate in describing the pre-*Kadi* period. In what follows, however, I will argue that the Court's construal of the role of fundamental rights under Community law in *Kadi* has concluded the *IHg* stage in the EU's constitutional settlement, where fundamental rights figured as auxiliary constraints. Below, I will argue that with *Kadi*, human rights can no longer be regarded as falling beyond "the Core of the European Union,"<sup>22</sup> and that what this ruling produces is a new architectonic primacy for fundamental rights. Before I can do this, however, I need to show that, contrary to what has recently been argued, *Kadi* is, fundamentally, a decision about human rights rather than a decision in which human rights discourse is used as a tool in a jurisdictional turf war between the ECJ and the law of the United Nations. This will be my task in the following two sections.

## **II. The skeptical view of *Kadi*: the ECJ's pluralist vision of international order?**

Even though the decision was rendered relatively recently, the facts of the *Kadi and Al Barakaat* case are already 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 European Union in order to implement several United Nations Security Council resolutions ordering UN Member States to freeze funds available to individuals and organizations designated by the Security Council Sanctions Committee as providing

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<sup>22</sup> *Ibid.*, 1307

financial support to Al-Qaeda and the Taliban.<sup>23</sup> The assets of Mr. Kadi, a Saudi national, as well as of the Al Barakaat Foundation, a Somali charity based 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 (CFI) asking that the Council regulation be annulled on the grounds, among others, that it violated their rights to property and their rights of the defense. Taking four years to render a decision, and refusing all requests for interim relief, the CFI found against the plaintiffs in two separate cases, *Kadi*,<sup>24</sup> and *Yusuf and Al Barakaat*.<sup>25</sup> Most notably, the CFI 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.<sup>26</sup> Controversially,<sup>27</sup> 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 in principle. Doing so, it held that Mr. Kadi and Al Barakaat's treatment by the Security Council did not amount to a breach of *jus cogens* norms.

Mr. Kadi and Al Barakaat appealed the CFI's judgment to the European Court of Justice. In its eagerly awaited judgment, the ECJ overturned the CFI's ruling, holding that the Community judicature had no power to review, directly or indirectly, the acts of the

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<sup>23</sup> The most important of these are UN Security Council Resolutions 1267 (1999), 1333 (2000), 1390 (2002), 1452 (2002)

<sup>24</sup> Court of First Instance Case T-315/01, *Kadi v Council and Commission* [2005] ECR II-3649

<sup>25</sup> Court of First Instance Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533

<sup>26</sup> CFI *Kadi*, para. 214, and CFI *Yusuf and Al Barakaat*, para. 265

<sup>27</sup> For critiques of the CFI's ruling on *jus cogens*, see especially, Mielle Bulterman, "Fundamental Rights and the United Nations Financial Sanction Regime," at 768-9

Security Council,<sup>28</sup> but that it *did* have a duty to conduct full review of the contested regulation<sup>29</sup> in the light of fundamental rights guarantees found among the general principles of Community law.<sup>30</sup> Reviewing the contested regulation, it found that the appellants' rights to be heard, rights to property, and rights 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 virtually all observers agree, the UN Security Council's listing procedures fail to observe basic due process standards insofar as they leave individuals with virtually no recourse against the "smart sanctions" that have been imposed against them.<sup>31</sup> Ultimately, this finding informed the ECJ's refusal to uphold the contested Council regulation adopted pursuant to the Security Council's freezing order. As a consequence, although adherence to international law and the basic rights protection are usually understood to go hand-in-hand, the situation in *Kadi* is one where the EC's sensitivity to the protection of certain basic individual rights militated against its obligations under international law. For political and legal theorists, this trade-off is highly consequential: on the one hand, as observers have been keen to note, the ECJ appears to have snubbed international law by hampering the implementation of a Security Council resolution.<sup>32</sup> On the other hand, most commentators have hailed the case as a rare and unequivocal victory for basic rights against the seemingly limitless political authority

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<sup>28</sup> ECJ, *Kadi & Al Barakaat*, para. 287

<sup>29</sup> *Ibid.*, para. 278

<sup>30</sup> *Ibid.*, para. 281

<sup>31</sup> 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, "Community Terrorism Listing," at 205. See also, Almqvist, "A Human Rights Critique of European Judicial Review," esp. 307-309; Hoffman, "Terrorism Blacklisting."

<sup>32</sup> See de Búrca, "The European Court of Justice and the International Legal Order"; Halberstam and Stein, "The United Nations, the European Union, and the King of Sweden"

claimed by the UN Security Council and by the most powerful UN Member States under the capacious banner of the “war on terror.”<sup>33</sup> In what follows, I will argue that while it is tempting to be swept up by the rhetoric of vindicating basic rights, we cannot simply wish away the Court’s strongly-worded reservations about the validity of international law within the Community legal order. In this section of the paper, I will review Gráinne de Búrca’s compelling critique of the *Kadi* decision as a manifestation of the ECJ’s “robustly pluralist” attitude towards international law in order to explain why those of us who are not EU-chauvinists ought to be troubled by the ECJ’s language.<sup>34</sup> Afterwards, I will venture an alternative explanation of the Court’s unmistakably disengaging tone as reflecting something akin to civil disobedience to the UN Security Council, motivated by a genuine concern for rights protection not only within the Community legal order but also under international law.

According to de Búrca, the ECJ’s reasoning in *Kadi* represents a disquieting gesture of bad citizenship<sup>35</sup> mainly because it amounts to an all-too-easy unilateral departure from an international law obligation.<sup>36</sup> Whatever the gains for procedural rights in the short term from *Kadi*, de Búrca argues, the ECJ has heralded a regrettably “inward-looking” attitude toward international law “which eschewed engagement in the kind of international dialogue that has generally been presented as one of the EU’s strengths as a

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<sup>33</sup> 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, “International Law, Human Rights and the European Community’s Autonomous Legal Order: Notes on the European Court of Justice Decision in *Kadi*,” *European Constitutional Law Review*, vol.4 (2008), pp.528-553, at 552-3.

<sup>34</sup> de Búrca, “The European Court of Justice and the International Legal Order,” 36

<sup>35</sup> For the idea of “international citizenship,” good and bad, see John Williams, “Good International Citizenship” in Nigel Dowers and John Williams, *Global Citizenship: A Critical Introduction* (London: Taylor and Francis, 2002)

<sup>36</sup> Búrca, “The European Court of Justice and the International Legal Order”

global actor.”<sup>37</sup> Situating her analysis against the background of the flourishing literature on global legal pluralism,<sup>38</sup> de Búrca describes the ECJ as having opted for “a strong pluralist approach which presented the European Community as a separate and 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.”<sup>39</sup> For her, this 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 the “pluralist reading” get from the logic of the ruling itself? For de Búrca, the Court’s pluralist approach can best be appreciated when considered in conjunction with similar decisions rendered respectively by the Court of First Instance (CFI) and the European Court of Human Rights (ECtHR). Both the CFI in *Kadi and Yusuf*, and the ECtHR for its part in *Behrami*<sup>40</sup> and *Saramati*<sup>41</sup> cases had to address the question of the reviewability of Security Council obligations under the basic

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<sup>37</sup> Ibid., 45

In their recent analysis of the Court’s approach to international law obligations, Kunoy and Dawes identify a similar argument made by Martti Koskenniemi, who has described the ECJ’s perspective as “solipsistic,” “imperialistic,” and smacking of “European self-centeredness.” Koskenniemi, “International Law: Constitutionalism, Managerialism and the Ethos of Legal Education”, *European Journal of Legal Studies*, vol.1 (2007), cited in Bjørn Kunoy and Anthony 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, *Common Market Law Review*, vol.46(2009), pp.73-104, at 85

<sup>38</sup> de Búrca, “The ECJ and the International Legal Order,” at 6, 36-38. See, in this connection, Neil Walker, “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders”, *International Journal of Constitutional Law*, vol.6 (2008), no.3-4, pp. 373-396; Paul Schiff Berman, “Global Legal Pluralism”, *Southern California Law Review*, vol.80 (2007), no.6, pp.1155-1238; Antje Wiener, “Contested Meanings of Norms: A Research Framework,” *Comparative European Politics*, vol. 5 (2007), no. 1, pp. 1-17; Nico Krisch, “The Pluralism of Global Administrative Law”, *European Journal of International Law*, vol. 17 (2006), no.1, pp. 247-288

<sup>39</sup> Ibid., 44

<sup>40</sup> European Court of Human Rights, *Behrami and Behrami v. France* (application no. 71412/01), of 2 May 2007

<sup>41</sup> European Court of Human Rights, *Saramati v. France, Germany and Norway* (no. 78166/01) of 2 May 2007

rights guarantees of their respective regional legal systems. In doing so, de Búrca argues, the CFI and the ECtHR operated under a hierarchical constitutional vision of their relationship to the UN Charter as a superordinate source of law, issuing decisions that “presuppose and are premised upon the existence of a common international system and an international community of which they – as different kinds of regional court – are a part.”<sup>42</sup> The ECJ, by contrast, set forth a vision where “the UN Charter and UN SC Resolutions, just like any other international law, exist on a separate plane and cannot call into question or affect the nature, meaning or primacy of fundamental principles of EC law.”<sup>43</sup>

According to de Búrca, this contrast is borne out by the respective sources of law drawn upon by the CFI and ECJ respectively in framing the question of whether or not basic rights had been infringed.<sup>44</sup> The ECJ refused to draw upon “basic principles of due process and human rights protection under international law” and to take account of their global normative currency, instead presenting fundamental rights as particular and indigenous to the general principles of Community law.<sup>45</sup> 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 worry that the ECJ passed up the opportunity 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 *ius cogens*, as well as

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<sup>42</sup> de Búrca, “The ECJ and the International Legal Order,” 33

<sup>43</sup> *Ibid.*, 28

<sup>44</sup> I have opted to exclude the ECtHR decisions from the scope of this paper so as to be able to focus more exclusively on *Kadi*’s significance on the EC legal order itself.

<sup>45</sup> de Búrca, “The ECJ and the International Legal Order,” 46

customary international human rights law.”<sup>46</sup> In other words, the argument is that the ECJ could just as easily have framed its judgment as drawing from and rooted in a repository of rights values common to both the Community legal order and the UN Charter, whereby it would have contributed to the development of that shared repository as an incipient form of what de Búrca calls “soft constitutionalism” in the international order.<sup>47</sup> That it chose not to do so is taken as evidence of the ECJ’s provincialist vision of Community law.

In contradistinction to the ECJ, argues de Búrca, the Court of First Instance’s judgment reflects a stronger view of the obligations imposed on the Community by the Security Council. More importantly, the CFI reached for *jus cogens* norms of universal scope which, it found somewhat clumsily, bind the CFI and the Security Council alike.<sup>48</sup> In other words, rather than invoking the Community’s internal standards of rights, and thereby construing the latter as a hermetically sealed system from the UN and its organs, the CFI acknowledged the cross-cutting nature of international rights norms.<sup>49</sup> The ECJ, in turn, 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*,”<sup>50</sup> foreclosing any suggestion that the basic rights norms it sought to protect were equally germane to the UN Charter. In sum, the ECJ’s view on this matter is reminiscent of Edmund Burke’s famed defense of “the rights of Englishmen”

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<sup>46</sup> Halberstam and Stein, “The United Nations, the European Union, and the King of Sweden,” 64

<sup>47</sup> de Búrca, “The ECJ and the International Legal Order,” 46

<sup>48</sup> For an erudite reconstruction of the jurisprudence behind the CFI’s *jus cogens* argument, which is also the most flattering review of the CFI’s ruling on this point among accounts with which I am familiar, see Halberstam and Stein, at 51-53, 64-65

<sup>49</sup> de Búrca, “The ECJ and the International Legal Order,” 22

<sup>50</sup> ECJ, *Kadi & Al Barakaat*, para. 287, emphasis added.

over and above “the rights of men”:<sup>51</sup> in failing to acknowledge the universal provenance of fundamental rights, the Court appears to mount a Burkean defense of rights insofar as they are the rights of Europeans.

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 recitals 305 through 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 pursuant to Art 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.”<sup>52</sup> 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 respects for fundamental rights. Here, the Court predicates the validity of international obligations on their conformity with the basic and inalienable norms which sustain the Community legal order, which is strongly reminiscent of the traditional dualist construction of the relationship between municipal and international law,<sup>53</sup>

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<sup>51</sup> Edmund Burke, *Reflections on the Revolution in France* [1790], ed. Conor Cruise O’Brien (London: Penguin, 2004), at 118

<sup>52</sup> ECJ, *Kadi & Al Barakaat*, para. 308

<sup>53</sup> It is also interesting to note that this construction is very similar to the way in which many EU Member State constitutions delineate the authority of EC law within their legal systems, namely by means of a special provision which prohibit the signing away of certain guarantees by acceding an international organization. Of course, the most famous expression of this position is the German Federal Constitutional Court’s Maastricht 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*,

notwithstanding the attendant difficulties of applying the terminology of monism and dualism to the complex landscape of European law.<sup>54</sup>

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 as invoked by Member States in the context of disputes over the supremacy of EC law. In such cases as *IHg*,<sup>55</sup> *Simmenthal II*,<sup>56</sup> and *Foto-Frost*,<sup>57</sup> the ECJ refused to concede that the validity of Community obligations can be subjected to any domestic norm, including a Member State's most basic constitutional procedures and norms. In other words, it would appear that having gradually imposed the monist blueprint on Member States in order to maximize the effectiveness and uniformity of EC law,<sup>58</sup> the ECJ is unwilling to submit to its own standard, as attested to by its apparent refusal to grant even the hypothetical

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33 I.L.M. 388 [1994], 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 organization (in this case, the EU) "only acceptable to the extent that European law is compatible with the fundamental principles of the social and democratic State, subject to the rule of law, established by the national Constitution." DTC 1/2004, 13 December 2004

<sup>54</sup> For an argument as to why these terms are no longer adequate, see Armin von Bogdandy, "Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law," *International Journal of Constitutional Law*, vol.6 (2008), no.3-4, pp. 397-413, at 397-8

<sup>55</sup> ECJ, *Internationale Handelsgesellschaft*

<sup>56</sup> 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 S.p.A.* [1978] ECR 629, at para.22, emphasis added.

<sup>57</sup> 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

<sup>58</sup> See Stone Sweet, *Judicial Construction*, pp.84-85; also, Mitchel de S. -O. -l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford: Oxford University Press, 2004), 225

possibility that international obligations may prevail over the constitutional norms of Community law.

The problem identified by de Búrca goes beyond considerations of dualism and bad international citizenship, however. The more somber implication of her argument, and that which distinguishes it from lighter notes of skepticism raised by other observers, is that it depicts the Court as instrumentalizing the normative currency of fundamental rights to reaffirm the autonomy of the Community legal order, and its own status as the authoritative gatekeeper of that order. To be sure, de Búrca herself does not take the critique so far as to accuse the Court of strategically manipulating rights discourse, but I believe that this is the irresistible logical conclusion of her argument. If this ruling is really about the ECJ's delineation of the Community legal order from the demands made on it by international law, then the substantive values of basic rights raised in the case begin to look like mere fodder for the ECJ's cannon.

Viewed in this way, there exists an unmistakable family resemblance between this critique of *Kadi* and an enduring vein of Court-skepticism, according to which the ECJ disingenuously deploys the hallowed language of fundamental rights to enlarge its own interpretive authority.<sup>59</sup> Previous critics, including Jason Coppel and Aidan O'Neill, and Martti Koskenniemi, have picked up on the Court's description of free movement rights as "fundamental" rights, charging that the Court has drawn normative equivalence between these and other, normatively more weighty rights such as those enshrined in Member State constitutions and the ECHR,<sup>60</sup> and that it has habitually downplayed such basic rights as those relating to asylum, racial discrimination, and environmental

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<sup>59</sup> See n.????????/ above.

<sup>60</sup> Coppel and O'Neill, "Taking Rights Seriously?", 243. But see Weiler & Lockhart's response in "'Taking Rights Seriously' Seriously" Parts I & 2

protection.<sup>61</sup> Coppel and O’Neill in particular have argued that behind this move lies the aim of leveraging 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 in 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 the Community legal order against subordination in an international legal hierarchy.

Other observers, by contrast, have noted that far from threatening to cut the Community legal order adrift from international law, the logic used by the ECJ in *Kadi* recalls an integrative judicial method used to salutary effect by the German Federal Constitutional Court. In its 1974 “*Solange I*” decision, the German Federal Constitutional Court reserved for 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 that assured by the GFCC.<sup>62</sup> Many commentators have endorsed the *Solange* approach as a special type of judicial defiance whose effect is to augment the level of rights protection across all tiers in a multi-leveled and non-hierarchical legal environment.<sup>63</sup> In Ernst-Ulrich Petersmann’s words, “‘the *Solange*-principle’, conditioning respect for competing jurisdictions on respect of constitutional principles of human rights and rule of law”

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<sup>61</sup> Koskenniemi, “The Effect of Rights on Political Culture”

<sup>62</sup> See n.???????? above. A comprehensive historical analysis of the “*Solange* method” is given in Nikolaos Lavranos, “Towards a *Solange*-Method between international courts and tribunals?”, in Tomer Broude and Yuval Shany (eds), *The Shifting Allocation of Authority in International Law* (Oxford: Hart Publishing, 2008)

<sup>63</sup> See, for instance, Halberstam and Stein, “The United Nations, the European Union, and the King of Sweden,” at 68

“should serve as a model for ‘conditional cooperation’ among international courts and national courts” in cases such as *Kadi* and beyond.<sup>64</sup>

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.”<sup>65</sup> Advocate-General Maduro, for his part, also followed the GFCC’s logic, 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.”<sup>66</sup> Lastly, the ECJ followed a similar logic in its judgment, although without directly employing the doctrinal ‘formula,’ 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, the parallel with *Solange* seems to give further credence to de Búrca’s 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

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<sup>64</sup> Ernst-Ulrich Petersmann, “Do Judges Meet their Constitutional Obligations to Settle Disputes in Conformity with ‘Principles of Justice and International Law?’,” *European Journal of Legal Studies*, vol.1 (2007), no.2, pp. 1-38, at 34, 21. He expresses this view in an earlier article; see Ernst-Ulrich Petersmann, “Limits of WTO Jurisprudence: Comments from an international law and human rights perspective,” in Thomas Cottier and Petros C. Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and lessons for the WTO* (Ann Arbor: University of Michigan Press, 2003), at 83

<sup>65</sup> ECJ, *Kadi & Al Barakaat*, para. 256

<sup>66</sup> Opinion of Advocate-General Poiares Maduro, Case C-402/05 P, delivered on 16 January 2008, at 54

obligations under Community law on German Basic Law, a patently dualist notion. Indeed, Karen Alter brilliantly documents the hostility with which the original *Solange* decision was greeted by pro-integrationist lawyers who regarded the ruling as “mainly a power-grab” by the GFCC, including dissenting justices on the GFCC itself.<sup>67</sup> To put it differently, long before later developments brought the *Solange* confrontation to a salutary end as far as the coexistence of EC and Member State law was concerned, the implications of *Solange*-logic seemed threateningly centrifugal indeed. As a consequence, likening the ECJ’s approach to *Solange* seem 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 the individual’s rights against encroachment by international law, recognizes 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.”<sup>68</sup>

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.<sup>69</sup> According to their restatement of the *Solange* formula, intentionally framed in the language of the Decalogue:

“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*

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<sup>67</sup> Alter, “Establishing the supremacy,” at 91

<sup>68</sup> Eeckhout, “Community Terrorism Listing,” at 205

<sup>69</sup> Eijsbouts and Besselink, “‘The Law of Laws’ – Overcoming Pluralism”

*norms valid in the wider circumscription also, or by putting forward such substantive norms that he holds to be applicable also there.*<sup>70</sup>

It should be evident that the crucial element of this “maxim” is that it authorizes a judge to suspend the supremacy of external legal obligations not out of some solipsistic concern for her domestic legal order, but “in the perspective of reciprocity and agreement between legal orders as to substance.”<sup>71</sup> 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.<sup>72</sup> 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 of the ECJ. In her view, the ECJ’s logic in *Kadi* is remarkable precisely for having jettisoned the dialogic element of the *Solange* method. To make her point, de Búrca draws on a neglected passage from *Solange I* to show how the GFCC, for its part, intended ultimately to open the door for an ongoing dialogue between EC and national institutions to ensure that rights would receive comprehensive protection at both levels:

“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

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<sup>70</sup> Ibid, 397, emphasis added

<sup>71</sup> Ibid, 398

<sup>72</sup> 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 Jochen Abr. Frowein, “Fundamental Human Rights as a Vehicle of Legal Integration in Europe,” in Mauro Cappelletti, Monica Seccombe, Joseph Weiler (eds), *Integration through Law. Europe and the American Federal Experience*, Vol. I (Berlin: Walter de Gruyter, 1986), at 302.

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.”<sup>73</sup>

Accordingly, rather than conceive of the German and EC legal orders as two separate and insulated legal contexts, de Búrca claims, the GFCC emphasized “a mutually disciplining logic” between the two legal systems.<sup>74</sup> By contrast, 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 reference to the interests of “the Community and Community law,” de Búrca argues that the ECJ’s emphasis was on proofing the Community legal order against being corroded from the outside in by international obligations, without so much as recognizing the special status of the UN Charter in the international legal order or the possibility of improving the rights standards of the international order as well as the EC legal order through dialogue.<sup>75</sup> Viewed in this way, the ECJ’s ruling smacks of an unpalatable unilateralism and exceptionalism that ill fits the EU’s self-professed image as a good citizen of international law.<sup>76</sup> In sum, the *Solange* justification which many observers resorted to with relation to the *Kadi* saga is misguided, according to de Búrca, because the GFCC’s 1974 ruling was much more receptive to dialogue and mutual learning among the two legal orders (EC and German) in comparison with the relatively impermeable barrier set up by the ECJ in *Kadi* against encroachment by international law.

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<sup>73</sup> de Búrca, “The ECJ and the International Legal Order,” cited at 47

<sup>74</sup> *Ibid.*, 47

<sup>75</sup> *Ibid.*, 47

<sup>76</sup> *Ibid.*, 44

No matter which way we cut it, therefore, we are hard pressed to find any license under international law, any method of interpretation, any constitutional meta-norm, that can reconcile the ECJ's inward-looking reasoning in refusing to honor international obligations with the requirements of good citizenship under international law. The *Solange* principle, the reference point for most *apologia* concerning the Court's departure from international law, fails to take account of the Court's apparent disinterest in the kind of dialogue implied by this approach. The existing commentaries, I have argued, 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* which I hope will remedy this. Descriptively, I will seek to show that the *Kadi* ruling does not fit with the pluralist model as well as de Búrca fears; and normatively, that the Court's turning away from international law is in keeping with the global constitutionalist project thanks to its prioritization of basic rights. In particular, I will argue that the best way to describe the Court's position in *Kadi* is as an act of civil, rather than vulgar, disobedience to international law. My claim is not that the Court understood itself to be engaging in civil disobedience, but rather that civil disobedience provides the most adequate conceptual framework within which to accommodate the Court's reasoning in *Kadi*, and the most appropriate point of departure for calibrating our normative evaluation of that reasoning.

Having proposed this alternative explanation, I will conclude the paper 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.

### **III. 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; while on the other, the lawbreaking is carried out in the name of justice, that is, in order to defend the weightier or more fundamental principles underpinning the law. To put it differently, we speak of acts of civil disobedience when a gap opens up between what is legal and what is legitimate or just 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.<sup>77</sup> First, the act of disobedience cannot 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. 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.

It should be clear from the foregoing that de Búrca’s pluralist reading of *Kadi* views the ECJ as having contravened both of these provisos: first, the ECJ appears to have instrumentalized the valuable currency of rights to consolidate its authority vis-à-vis the Security Council and international law as a whole. As such, its motivation appears to fall afoul of the condition that civil disobedience be undertaken in the name of principle rather than expediency. Second, the Court is accused of sabotaging the constitutional coherence and effectiveness of international law by denying the EC’s obligations and

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<sup>77</sup> 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*.” I take Bay to mean by “public ends” to mean ends that are not tailored solely to the advantage of the disobedient, but have at least a *prima facie* claim to fairness and of disadvantaging none. See Christian Bay, “Civil Disobedience: Prerequisite for Democracy in Mass Society,” in Jeffrie G. Murphy (ed.), *Civil Disobedience and Violence* (Belmont, CA: Wadsworth Publishing Company, Inc., 1971), 76

refusing to acknowledge the special legal force of the UN Charter. This means that the effects of *Kadi* pose a threat to legality itself, rather than authorizing an *ad hoc* departure from the law. In what follows, I will show that the ECJ's decision, in fact, accords with both of these criteria, taking up each criterion in order. 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 burgeoning constitutional architectonic of the international order. Quite the contrary, it protects the norms that are at the foundation of the edifice of international law (i.e. fundamental rights) from being casually jettisoned by another international body, the Security Council.

*The first proviso: The ambiguity of the Court's motives*

As I suggested above, 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"<sup>78</sup> with the UN about the requirements of fundamental rights protection. For de Búrca, this is evidence that the ECJ's aloofness towards the development of a shared set of principles and norms at the international level, and that it cannot see past proofing the EC legal order against infiltration by competing norms of international law.

However, while the parallel between *Kadi* and *Solange I* is appropriate and instructive, it is nevertheless fundamentally incomplete insofar as the institutional actors

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<sup>78</sup> 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 Richard Bellamy & Dario Castiglione (eds), *Constitutionalism in Transformation* (Oxford: Blackwell Publishers, 1996), at 120

involved in each of the two sets of confrontations are distinct: whereas the GFCC is addressing the ECJ, there is only a very limited sense in which the ECJ can ‘address’ the UN Security Council. Specifically, whereas the original *Solange* case pitted two kindred institutions, the ECJ and the GFCC, which were both were constitutional courts bound by proximate standards of justice, the ECJ’s interlocutor in *Kadi* was an alliance of expedience among security-minded sovereign states acting as the Security Council, the UN’s policing organ. Because of this institutional asymmetry, the logic of accommodation and flexibility inherent in *Solange I* gets lost in translation. In particular, 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. Because the original *Solange* warning was delivered by the GFCC to a fellow court with whose members it had regular personal exchanges, the GFCC could count on the ECJ’s institutional sensibility and ultimate normative commitments as being significantly similar to its own.<sup>79</sup> By contrast, in *Kadi*, the ECJ did not find a similarly acculturated partner 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 characterized 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.

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<sup>79</sup> For an enlightening account of the kinds of dialogue that the ECJ enjoys with other courts, tribunals, and adjudicative bodies, see Allan Rosas, “The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue,” *European Journal of Legal Studies*, vol.1 (2007), no.2, available at <http://www.ejls.eu/2/24UK.pdf>

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, as exemplified by the tactful passage de Búrca highlights from the GFCC's ruling, judicial review of executive acts is permeated, appropriately, by an adversarial tone, especially where fundamental rights standards are at stake. It would not be too far-fetched to assume that in when calibrating their respective responses, the courts in question were careful to calculate whether a more dialogic or confrontational approach would be most likely to secure basic rights protection in the future. In the *Solange* context, the GFCC may have predicted that a strong warning shot, accompanied by an invitation to dialogue, and an acknowledgment of the general supremacy of Community law in the spirit of positive comity would be most likely to secure a more satisfactory standard of rights protection over Community acts in the future. By contrast, the ECJ had no such partner in *Kadi* who might be receptive to similarly a conciliatory approach. As the Court noted in the ruling, the Security Council's function is to ensure international peace and security;<sup>80</sup> 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."<sup>81</sup> 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 cannot 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.

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<sup>80</sup> ECJ, *Kadi & Al Barakaat*, para. 294

<sup>81</sup> *Ibid*, para.304

Therefore, the most consequential flaw in applying the *Solange* analogy to *Kadi* is the qualitative differences among the institutions involved in each confrontation. A more accurate way to construe *Kadi* is 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 juridical dialogue. Seen from this angle, the Court's self-positioning as a wedge between the opaque and unaccountable decrees of the Security Council on the one hand, and security-minded Member State executives gathered in the Council on the other, appears justified considering the Court's distinctive institutional role. In fact, the Court is carrying out the precise institutional function that should be expected of it as a *bona fide* constitutional court charged with the role of guaranteeing the observance of fundamental rights within the Community legal order.<sup>82</sup> On this reading, the ECJ's departure from international law is not a bending of the rules in its own favor; 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 to which the ECJ, *qua* constitutional court, is reacting. 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,<sup>83</sup> namely, the newly-minted ability of international law to directly address individuals as subjects in their own

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<sup>82</sup> Recall that even though this role was initially self-appointed, it is now enshrined in Article 6(2) of the Treaty on European Union, which provides 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."

<sup>83</sup> See, among others, Andrew Linklater, *The Transformation of Political Community* (Columbia: University of South Carolina Press, 1998); Nigel Dower, "The Idea of Global Citizenship - A Sympathetic Assessment," *Global Society*, Vol. 14 (2000), No. 4, pp.553-567; Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford UP, 2006)

right. Borrowing a concept developed by Miguel Maduro in the EC context, we might call this the gradual “subjectivation” of international law.<sup>84</sup> Ironically, however, whereas subjectivation is most often associated with the prospect of a universal canopy of legal protection for individuals, in the present case, the Security Council resolution 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 the full force of the collective security system on their shoulders. Both the CFI and the ECJ acknowledged this ‘dark side’ of subjectivation when they noted respectively that the SC 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.”<sup>85</sup> Not only did this “feature” make certain provisions of the EC Treaty anachronistic and difficult to apply in implementing the Security Council resolutions,<sup>86</sup> but it exposed the lack of responsiveness and unaccountability of the institutions commanding them to any existing jurisdiction. In other words, as most commentators on the Security Council’s use of terror sanctions have noted, the consequence of “smart sanctions” is to create black holes of accountability as far as the rights of individuals are concerned.<sup>87</sup>

Let us pause here and recall the core meaning of constitutionalism, understood as the system which a constitutional court is charged with protecting. Perhaps no other idea comes as close to capturing the conceptual kernel of constitutionalism as that of the rule of law; which entails that law’s reach must be seamless and comprehensive, such that no

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<sup>84</sup> Miguel Poiars Maduro, *We The Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998), 9

<sup>85</sup> ECJ, *Kadi & Al Barakaat*, para.60

<sup>86</sup> See paragraphs 51-68 and 158-236 of the ECJ’s *Kadi and Al Barakaat* judgment, 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 authorize the adoption of sanctions against third countries, but not explicitly against individuals.

<sup>87</sup> See n?????????/ above

exercise of political authority can escape its scrutiny.<sup>88</sup> The ECJ recalls precisely this concept 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.”<sup>89</sup> Given this standard, the Court rightly recognized that the virtual 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 remit of the law.<sup>90</sup> Now, if we assume that the ECJ is to be consistent 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 provenance, from constitutional review. To put this another way, the review in question seems to be not only warranted but *required* by the comprehensiveness inherent in the concept of constitutionalism alluded to above, and which the Court has adopted for the Community legal order.

What does this mean for de Búrca’s argument that the Court was concerned more 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 perspective, since the facts of the case make it very difficult to

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<sup>88</sup> 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

<sup>89</sup> ECJ, *Kadi & Al Barakaat*, para.281, emphasis added.

<sup>90</sup> *Ibid.*, para.334

tell whether the ECJ's refusal of international obligations originated from its duties as a *bona fide* constitutional court, or from a less laudable motive we might call 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.<sup>91</sup> To use social science lingo, it is difficult to identify the explanatory variable because the outcome (ECJ's refusal to give effect to international law) is observationally equivalent between the two competing motives. Put less cryptically, the ECJ's assertion that international obligations cannot override primary EC law can be read as something that a dualist or 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: a universalism-compatible reading of Kadi*

So far, I have shown that the Court's attitude fulfils 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."<sup>92</sup> 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 sole gatekeeper of fundamental rights against encroachment by the Community legislator. What I remain to show is that the Court's

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<sup>91</sup> Ibid, para. 305-309

<sup>92</sup> Bay, "Civil Disobedience," 78

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 act of breaking the law in the name of more fundamental standards of justice should stop short of jeopardizing the basic conditions that make legality possible. In other words, the civil disobedient must be careful to act in accordance with more abstract and general fundamental standards of justice in her aberrant moment of law-breaking. This constitutes the second parameter or limit of the category of the ‘civil,’ which extends to breaking the law in order to fix it, but cannot include within its remit acts that have the intent or consequence of breaking the law in a way that destroys its very fabric. As a result, there is at least a *prima facie* case for viewing limited and constructive departure from the law as essentially different from an act of bad citizenship.

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. If I understand her correctly, de Búrca’s argument is that this is precisely what the Court’s dualist logic implies. For instance, she writes that the Court depicted “international law as a separate and parallel order whose normative demands do not penetrate the domestic (EC) legal order”<sup>93</sup> and, by refusing to recognize its supremacy over Community law, threw into question the applicability of international law. If the two orders are “separate,” “parallel,” and sealed off from one another, this has the implication that the Community

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<sup>93</sup> de Búrca, “The ECJ and the International Legal Order,” 27

legal order creates an alien mass disrupting the supposed continuity and seamlessness of international law itself.

In response, I would like to point to several turns of reasoning in the ECJ's *Kadi* ruling which undermine this dualist interpretation. First, the ECJ conspicuously refused to use 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 pointedly absent from the ECJ's judgment is evidence that the Court does not wish to construe the EC legal order in simple dualist terms which minimize the general binding force of international law. Rather, the ECJ seems to want to hang onto its venerable old "new legal order" conception,<sup>94</sup> whereby the Community legal order can neither be shoehorned into a straightforward municipal blueprint like the conventional 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. Instead, I believe that the ECJ wishes 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 voluntarily assumed a full four decades ago.<sup>95</sup>

Secondly, 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 Art 307 EC, which in certain cases can "allow derogations even from primary law"<sup>96</sup> "may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community

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<sup>94</sup> Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I

<sup>95</sup> Case 29/69 *Stauder v City of Ulm*, [1969] ECR 419

<sup>96</sup> ECJ, *Kadi & Al Barakaat*, para. 301

legal order, of which is the protection of fundamental rights<sup>97</sup> does need not mean that the Court will therefore *always* hold international obligations to be suspect from the point of view of EC law. On the contrary, where the international obligations at stake 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*<sup>98</sup> or *Bosphorus*,<sup>99</sup> where the GFCC and the 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 when these fall afoul of the Community's rights standards, the ECJ has re-emphasized the special importance of basic rights standards, rather than assert an all-encompassing supremacy for Community law.<sup>100</sup> The Court's refusal to recognize 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 which it has long recognized.

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

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<sup>97</sup> *Ibid.*, para. 304

<sup>98</sup> German Federal Constitutional Court, *Wünsche Handelsgesellschaft*, 2 197/83; [1986]

<sup>99</sup> European Court of Human Rights, *Bosphorus Hava Yollari Turizm Ve Ticaret Sirketi v. Ireland* of 30 June 2005, Application No. 45036/98, Reports of Judgments and Decisions 2005-VI

<sup>100</sup> 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.

accept de Búrca's pluralist hypothesis. This is because what distinguishes civil disobedience from mere lawlessness is the disobedient's appeal to higher norms of justice which underpin the errant legal regime. As the Court recognized 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. Accordingly, the ECJ could not 'municipalize' fundamental rights as the exclusive domain of the Community legal order even if it was motivated to do so (and I hope to have shown that it was not.) An appeal to basic rights in departing from international law, therefore, as long as it actually ends up improving existing standards of rights protection, can *only* be classified as civil disobedience, as breaking international law to fix its underlying premises.

Lastly, the civil disobedience thesis is also supported by the non-existence of other, systemic remedies to patch up the human rights loophole created by the Security Council's use of smart sanctions. Recall that the ECtHR itself opted not to step into the breach in the *Behrami*<sup>101</sup> and *Saramati*<sup>102</sup> cases, the differing circumstances of those cases notwithstanding. Member States, on the other hand, regard themselves as unconditionally bound by the Security Council resolutions and in any event do not appear to have raised any objections to the anti-terrorism measures. The US has (or had, until the

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<sup>101</sup> European Court of Human Rights, *Behrami and Behrami v. France* (application no. 71412/01), of 2 May 2007

<sup>102</sup> European Court of Human Rights, *Saramati v. France, Germany and Norway* (no. 78166/01) of 2 May 2007

end of the previous administration) unequivocally abandoned any interest in playing a leading role in global human rights protection, and does not harbor any compunctions about inflicting collateral damage in its pursuit of the financiers of terrorism. Lastly, each state on the Security Council, including veto-wielders such as Russia and China, has its own reasons for subscribing to the broad church of the “war on terror.” In other words, the ECJ’s taking human rights law into its own hands is also partially explained by its lone position of being ‘willing and able’ (*sic*) to uphold that key premise of modern international law.

#### **IV. *Kadi*’s ‘domestic’ constitutional implications**

I will conclude this essay 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 Community’s internal hierarchy of norms, as well as for the debate over considering the EU “as a human rights organization.”<sup>103</sup> As I explained in Part I of this paper, up until *Kadi*, fundamental rights norms had operated within the Community legal system in a kind of auxiliary mode, having been brought within the scope of Community law out of a sense of expediency. During this time, Member States’ domestic constitutional mechanisms were supposed to provide the bulk of basic rights protection in Europe, supplemented by the ECtHR. In contrast to this pragmatic mode of rights protection, I will argue that the Court’s logic in *Kadi* indicates the prioritization of human rights as legal norms central to the Community’s constitutional order, which might also lead to an

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<sup>103</sup> von Bogdandy, “The EU as a Human Rights Organization?”

institutional prioritization of rights protection within the European Union's array of functions.

I believe that this claim is borne out by the ECJ's reasoning at paragraphs 301 through 304 of the *Kadi* ruling, where 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 recognizes that Art 307 EC leaves unaffected Member States' international commitments dating before the entry into force of the EC Treaty, and cites a previous case, *Centro-Com*, where it held that Art 307 could authorize derogations from primary EC law. In this ruling, the Court had found that Member States could derogate from their obligations under primary Community "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."<sup>104</sup> In other words, Community law allowed international obligations to take precedence even over such fundamental Community objectives as common commercial policy as set out in Art 133 (ex-113) EC.

After recalling this holding in *Kadi*, however, the Court makes a further distinction *internal* to primary Community law, which is normally understood to comprise the Treaties and the general principles of law that inform them. In contrast to *Centro-Com*, the Court goes on to establish a key limitation to the derogations which are permissible under Art 307 EC, holding that:

"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

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<sup>104</sup> European Court of Justice Case C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997], ECR I-81, R.6

of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.”<sup>105</sup>

The significance of the Court’s privileging of the constitutional principles of Community law over the Member States’ (and in consequence, the Community’s)<sup>106</sup> obligations under international law has been discussed at length. Here, however, I would like to note that when considered in contrast with the *Centro-Com* decision, *Kadi* appears to upgrade the status of fundamental rights vis-à-vis other constitutional principles. Specifically, whereas *Centro-Com* permitted derogations from common commercial policy on the basis of international law, in *Kadi*, the Court rules out any possibility of such precedence for international law where the endangered constitutional norms are fundamental rights guarantees. In effect, the Court declares that some primary Community law is more primary than others. More importantly, this places respect for fundamental rights in a superordinate position compared to other objectives of the Community, most notably the economic objectives which had hitherto furnished its center of gravity.

From the point of a conventional, domestic constitutionalism of rights, there is nothing terribly interesting about this prioritization of fundamental rights. As I argued in Part I, however, because economic objectives and free movement rights have traditionally furnished the foundation of the supranational constitutional structure, the new constitutional emphasis given to fundamental rights represents a new departure. The Court had already begun to shift from this original ordering in such recent cases as

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<sup>105</sup> ECJ, *Kadi and Al Barakaat*, 304

<sup>106</sup> European Court of Justice, *International Fruit Company and Others*: Joined Cases 21/72 to 24/72 [1972] ECR 1219. The CFI’s *Kadi* and *Yusuf and Al Barakaat* rulings, paragraphs 203 and 253 respectively, state: “in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community.” The ECJ did not contest this finding.

*Schmidberger* and *Omega*,<sup>107</sup> where free movement rights guaranteed by the Community and repeatedly described by the Court as “fundamental rights”<sup>108</sup> and “fundamental objectives” came into apparent conflict with traditional “fundamental rights” including the freedoms of assembly and expression and the right to human dignity. In both of these cases, the Court, albeit not unequivocally, acknowledged that fundamental rights were normatively weightier than free movement rights guaranteed by the Community. However, *Kadi* gives more forceful evidence of a constitutional reordering in favor of fundamental rights especially viewed in conjunction with *Centro-Com*, showing that the Court now construes human rights, rather than market freedoms, as occupying the top rung of the Community’s 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.<sup>109</sup>

Methodologically, the argument presented in this final part of the paper is overambitious. It predicates a constitutional shift on an oblique and partial reading of the case law. At the same time, the impact of pivotal decisions in shaping the EC/EU’s ever-evolving “normative structure” have consistently exceeded expectations.<sup>110</sup>

Neofunctionalist accounts of have convincingly shown that once the Court recognizes wide-reaching interpretations of Community rights protections, litigation tends to extend the scope of those supranational provisions such that supranational institutions can begin

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<sup>107</sup> European Court of Justice, Case C-112/00, *Schmidberger v Austria* [2003] ECR I-05659 para. 77; and European Court of Justice, Case C-36/02 *Omega* [2004] ECR I-9609

<sup>108</sup> For free movement of persons and the right of establishment as a “fundamental right conferred by the Treaty on Community subjects,” see case 340/89 *Vlassopoulou v. Ministerium für Justiz, Bundes und Europaangelegenheiten Baden-Württemberg* [1991] ECR 2357, para.22. For the freedom of movement of capital as a “fundamental freedom,” see for instance Case 203/80 *Casati* [1981] ECR 02595, para.8

<sup>109</sup> For a full account of the concept of market constitutionalism, see Christian Joerges, “What is left of the European economic constitution?” (Florence: EUI Working Papers, Law No.13, 2004). Also, Maduro, *We the Court*.

<sup>110</sup> Stone Sweet, *Judicial Construction*.

to exert an autonomous, liberalizing force on fundamental rights protections in Member States as well as under Community law.<sup>111</sup> Combined with a possible future development, such as the entry into force of the Charter of Fundamental Rights and an interpretation by the ECJ of the Charter's constitutional Article 53<sup>112</sup> as a tool for raising the standard of human rights in Member States could effect just such a shift.

In the light of this argument, it is necessary to revisit the debate concerning the EU's prospects "as a human rights organization,"<sup>113</sup> which was spurred by the EU's adoption of a bolder political mandate in the 1990s as well as the drafting of the Charter of Fundamental Rights. On the one hand, observers such as Samantha Besson<sup>114</sup> and Ernst-Ulrich Petersmann<sup>115</sup> have observed that the supranational nature of Community law offers a novel and particularly opportune framework for extending basic rights guarantees across state boundaries. Others, however, cast grave doubts on whether, as a legal or political matter, the EU can be restyled to fulfill the functions of a fully-fledged

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<sup>111</sup> Among the leading accounts of this course of development are: Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," *American Journal of International Law*, Vol.75 (1981), pp.1-27; Joseph H.H. Weiler, "The Transformation of Europe," *Yale Law Journal*, Vol.100 (1991), pp.2403-2483; Anne-Marie Burley and Walter Mattli, "Europe Before the Court," *International Organization*, Vol.47, No.1, 1993, pp. 41-76; Wayne Sandholtz and Alec Stone Sweet, *European Integration and Supranational Governance* (Oxford: Oxford University Press, 1998); Stone Sweet, *Judicial Construction*.

<sup>112</sup> Art 53 reads: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions." Jonas Liisberg has argued that this is a fundamentally indeterminate provision whose interpretation by the Court could take various forms. Liisberg himself argues against such a "maximalist" reading of Art 53 as a "fountain of rights." See Jonas Bering Liisberg, "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?", Harvard Jean Monnet Working Paper 4/01 (2001), pp.43-6

<sup>113</sup> von Bogdandy, "The EU as a Human Rights Organization?"

<sup>114</sup> Besson, "The European Union and Human Rights: Towards a Post-National Human Rights Institution?"; Alston and Weiler, "An 'Ever Closer Union' in need of a human rights policy"

<sup>115</sup> Ernst-Ulrich Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration", *European Journal of International Law* 13 (2002), 621-650

human rights regime.<sup>116</sup> If the constitutional shift I described is indeed taking place, and the ECJ is re-styling the Community legal order as a platform for the protection of the fundamental rights of all those who fall within its jurisdiction, the case for considering the EU as, *inter alia*, a human rights organization, has been given a new, stronger legal foothold.

Having allowed me my fair share of sweeping claims in this paper, I ask the reader to indulge a final, normative claim, which I make in the hope of contributing to the debate about the EU's 'values and ethos.' In the immediate postwar period, European federalists conceived of supranationalism not merely as a way of generating wealth, but as a new way of organizing political power so as to safeguard human dignity and individual rights against the arbitrary exercise of power by sovereign states. For much of the EC's history, however, that aspiration has been overshadowed by the technocratic project of market-building. This is precisely why the prioritization of the status of fundamental rights within the supranational architectonic in the manner described above 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.

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<sup>116</sup> Bodgandy, "EU as a human rights organization." Other skeptical interventions include Miguel Poiars Maduro, "The double constitutional life of the Charter of Fundamental Rights of the European Union," in Tamara K. Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights—A Legal Perspective* (Oxford: Hart Publishing, 2003). 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, "Eurocracy and Distrust," at 1136-7. Compare with Alston and Weiler, "An 'Ever Closer Union' in need of a human rights policy"