
RECENT CASES

EUROPEAN UNION LAW — RIGHT OF FREE MOVEMENT — EUROPEAN COURT OF JUSTICE HOLDS THAT THE SLOVAK REPUBLIC DID NOT VIOLATE EU LAW IN BANNING THE PRESIDENT OF HUNGARY FROM ENTERING ITS TERRITORY. — Case C-364/10, *Hungary v. Slovak Republic*, 2012 ECJ EUR-Lex LEXIS 2465 (Oct. 16, 2012).

Scholars and jurists have long debated the interaction between national and international legal systems: some endorse a monist view that international law is directly incorporated into a state's domestic legal order, and others take a dualist approach, arguing that the two legal systems are separate and distinct.¹ The European Union (EU), which was created by treaty but operates in many ways as a single entity,² has struggled to find its place between these two poles. In the 2008 decision *Kadi v. Council*,³ the European Court of Justice (ECJ) embraced the view that the EU and international law systems were distinct.⁴ Recently, in *Hungary v. Slovak Republic*,⁵ the ECJ held that the Slovak Republic's decision to ban the President of Hungary from entering its territory did not violate EU law.⁶ In so doing, it directly incorporated international law in a way that indicated that international and European law were intertwined and thus suggested limitations on the bright dualist line espoused in *Kadi*. While *Hungary* might be distinguished away as an aberrant case in the movement toward dualism, its reasoning could signal a broader monist role for international law in the EU.

¹ See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864–65 (1987); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 & n.10, 2397 (1991). In 2008, the U.S. Supreme Court addressed this issue in deciding whether the Vienna Convention on Consular Relations was self-executing — that is, directly incorporated into U.S. law. *Medellín v. Texas*, 552 U.S. 491 (2008). The Court concluded that it was not. *Id.* at 498–99.

² See Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451, 456 (2001) (“[T]he European Union . . . [is an] international organization[] created by treaty, but the European Union accords rights to individuals, grants them standing in enforcing member state obligations, and gives them voice (albeit a limited one) through the directly elected European Parliament. These features make the European Union more like a federal state than a traditional international organization.”).

³ Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council*, 2008 E.C.R. I-6351.

⁴ In *Kadi*, the ECJ annulled measures implementing a U.N. Security Council resolution because it determined that such measures violated fundamental EU rights. See *id.* ¶¶ 4–5, at I-6356–58.

⁵ Case C-364/10, *Hungary v. Slovak Republic*, 2012 ECJ EUR-Lex LEXIS 2465 (Oct. 16, 2012).

⁶ *Id.* ¶ 72.

Hungarian President László Sólyom was scheduled to travel on August 21, 2009, to the Slovakian town of Komárno, where he was to help inaugurate a statue of Saint Stephen, founder and first king of the Hungarian State.⁷ The timing of the trip was notable for both countries. In Hungary, August 20 is a national holiday celebrating Saint Stephen, while in Slovakia, August 21 is considered a “sensitive date” because on August 21, 1968, Czechoslovakia was invaded by five Warsaw Pact countries, including Hungary.⁸ The planned visit led to diplomatic tensions between the two countries.⁹ After diplomatic discussions,¹⁰ the Slovakian government formally refused the Hungarian President entry into its country, citing the public security exception to Directive 2004/38,¹¹ an EU law granting EU citizens the right to move and reside freely within the EU’s member states.¹² President Sólyom complied.¹³

The visit’s cancellation did not end the dispute. In a note issued on August 24, 2009, Hungary argued that the public security exception to EU Directive 2004/38 did not form a “valid legal basis” to ban the President from entry.¹⁴ Unsurprisingly, the Slovak Republic disagreed.¹⁵ At that point, Hungary brought the matter to the attention of the European Commission and requested its opinion on whether there

⁷ *Id.* ¶¶ 5–6. President Sólyom was invited by a civil association based in Slovakia. *Id.* ¶ 5.

⁸ *Id.* ¶ 6; see also KIERAN WILLIAMS, *THE PRAGUE SPRING AND ITS AFTERMATH* 112 (1997).

⁹ Relations between Hungary and the Slovak Republic had been cool for some time. See *Frost Bite*, *ECONOMIST*, Aug. 27, 2009, at 34, available at <http://www.economist.com/node/14313687>.

¹⁰ Press Release, Court of Justice of the Eur. Union, According to Advocate General Bot, the Slovak Republic Did Not Infringe EU Law When It Refused to Allow Mr. Sólyom, the Hungarian President, to Enter Its Territory (Mar. 6, 2012), available at http://europa.eu/rapid/press-release_CJE-12-21_en.pdf. The three highest-ranking Slovakian officials — the President, Prime Minister, and President of the Parliament — signed a joint declaration condemning President Sólyom’s planned visit as “inappropriate.” *Id.* Prime Minister Robert Fico further called the visit a “provocation.” *Slovakia Blocks Hungarian Visit*, *BBC NEWS* (Aug. 21, 2009), <http://news.bbc.co.uk/2/hi/europe/8215220.stm>.

¹¹ Directive 2004/38/EC, 2004 O.J. (L 158) 77 [hereinafter Directive 2004/38].

¹² *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465, ¶ 7. In prohibiting President Sólyom’s visit, the Slovak Republic “relied on [EU] Directive 2004/38 as well as on provisions of domestic law governing, first, the stay of foreign nationals and, second, the national police force.” *Id.* Directive 2004/38 invokes the precursor to Article 21 of the Treaty on the Functioning of the European Union (TFEU), Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU]. See Directive 2004/38, *supra* note 11, at 77. Article 21 empowers the European Parliament and the European Council to adopt provisions in order to guarantee that “[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member states.” TFEU, *supra*, art. 21, ¶ 1, at 57. The TFEU and the Treaty on European Union, Consolidated Version of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU], together establish the constitutional framework of the European Union. See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW* 26–27 (5th ed. 2011).

¹³ *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465, ¶ 8.

¹⁴ *Id.* ¶ 9.

¹⁵ *Id.* ¶ 11.

had been a violation of EU law.¹⁶ The Commission announced in an informal letter issued on December 11, 2009, that it could find no violation, as EU law does not apply to official visits by foreign heads of state.¹⁷ Not satisfied with this response, Hungary formally brought the question to the Commission on March 30, 2010.¹⁸ After briefing, the Commission issued a reasoned opinion, finding that the treaty does not apply to heads of state and thus that there was no breach of EU law.¹⁹

Still unsatisfied, Hungary filed an action against Slovakia in the European Court of Justice, only the sixth time in the court's history that one member state had brought a direct action against another.²⁰ Hungary argued that the Slovak Republic had violated the terms of Directive 2004/38 by prohibiting President Sólyom from entering its territory.²¹ Next, it stated that the EU's freedom of movement laws were not subject to the rules of international law, contending "that if the European Parliament and the Council of the European Union had wished to make the exercise of freedom of movement subject to rules of international law," they would have done so explicitly, but they had not.²² Hungary further argued that the Slovak Republic had not met Directive 2004/38's narrow exception criteria.²³ The Slovak Republic,

¹⁶ *Id.* ¶¶ 15–17. Hungary asked for the Commission's judgment on "whether it was appropriate to initiate infringement proceedings against the Slovak Republic under Article 258 TFEU for breach of Article 21 TFEU and Directive 2004/38." *Id.* ¶ 14. The European Commission is the executive authority of the EU, tasked with, inter alia, "oversee[ing] the application of Union law" as well as "execut[ing] the budget and manag[ing] programmes." TEU, *supra* note 12, art. 17, ¶ 1, at 25; see also CRAIG & DE BÚRCA, *supra* note 12, at 38. The Commission also plays a limited adjudicatory role in informally reviewing interstate disputes before they are submitted to the European Court of Justice for formal resolution. See TFEU, *supra* note 12, art. 259, at 161; Jeffrey Michael Smith, *Three Models of Judicial Institutions in International Organizations: The European Union, the United Nations, and the World Trade Organization*, 10 TULSA J. COMP. & INT'L L. 115, 124 (2002).

¹⁷ *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465, ¶¶ 15–16 ("[T]he Commission pointed out that 'under international law, the Member States reserve the right to control the access of a foreign Head of State to their territory, regardless of whether that Head of State is a Union citizen.'").

¹⁸ *Id.* ¶ 18. Under Article 259 TFEU, "[a] Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union," but only after "bring[ing] the matter before the Commission." TFEU, *supra* note 12, art. 259, at 161.

¹⁹ *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465, ¶ 19; Press Release, Eur. Comm'n, Reasoned Opinion — Article 259 TFEU — Hungary/Slovakia (June 24, 2010), available at http://europa.eu/rapid/press-release_IP-10-827_en.pdf.

²⁰ See Press Release, Court of Justice of the Eur. Union, *supra* note 10, n.2.

²¹ *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465, ¶ 1.

²² *Id.* ¶ 29.

²³ *Id.* ¶¶ 31–32. Under Article 27(2) of Directive 2004/38, Hungary argued, restrictions on movement can take effect only "if the conduct of the person concerned represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." *Id.* ¶ 31. Hungary stated that President Sólyom was not such a threat and that, even if he was, the Slovak Republic had not followed the proper procedures by failing to notify him of such a determination. *Id.* ¶ 32.

supported by the Commission, argued that President Sólyom was not visiting as a private citizen but as a head of state, and that the EU does not cover the regulation of diplomatic relations between states.²⁴

Advocate General Bot recommended that the case against the Slovak Republic be dismissed.²⁵ He argued that EU law “does not apply to visits to Member States by Heads of State.”²⁶ In his Opinion, he laid out two arguments: First, he noted that Article 5(2) of the Treaty on European Union²⁷ (TEU) states that “the Union shall act only within the limits of the competences conferred upon it by the Member States,” and that all other competences “remain with the Member States.”²⁸ Because head-of-state access is not mentioned in EU treaties, he concluded that jurisdiction over such questions remains with the member states.²⁹ Second, Advocate General Bot rejected Hungary’s argument that Sólyom’s status as a European citizen, which provided a right to travel under Directive 2004/38, “should prevail” over his status as a head of state.³⁰ Rather, he concluded that heads of state have a “specific character” in their “capacity as the supreme organ of the State, representing, personifying and committing the State at [the] international level,”³¹ and are entitled to “special treatment concern[ing] the protection, facilities, privileges and immunity accorded them.”³² Because of this status, he concluded that visits by heads of state “depend on the consent of the host State.”³³

²⁴ See *id.* ¶ 34.

²⁵ Opinion of Advocate General Bot ¶ 66, *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465 (Oct. 16, 2012) (Case C-364/10), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CC0364:EN:NOT>. The ECJ is composed of a statutorily determined number of judges from different EU countries, see TFEU, *supra* note 12, art. 253, at 158, assisted by eight Advocates General, *id.* art. 252, at 158. Under the TFEU, an Advocate General is an officer of the court who, “acting with complete impartiality and independence, [is duty-bound] to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.” *Id.* Though nonbinding, these opinions are considered highly persuasive. See CRAIG & DE BÚRCA, *supra* note 12, at 62.

²⁶ Opinion of Advocate General Bot, *supra* note 25, ¶ 50.

²⁷ Consolidated Version of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C 83) 13. The TEU established the constitutional framework for the European Union, including setting out which policies are the responsibility of the EU and which remained with the member states. See CRAIG & DE BÚRCA, *supra* note 12, at 13–15.

²⁸ Opinion of Advocate General Bot, *supra* note 25, ¶ 51 (quoting TEU, *supra* note 12, art. 5, ¶ 2, at 18) (internal quotation mark omitted).

²⁹ *Id.*

³⁰ *Id.* ¶ 53.

³¹ *Id.* ¶ 54.

³² *Id.* ¶ 56.

³³ *Id.* ¶ 57. Advocate General Bot did note that if the Slovak Republic took diplomatic actions that “le[d] to a lasting break in diplomatic relations” between it and Hungary, that break would “constitute a barrier to the attainment of the essential objectives of the Union.” *Id.* ¶ 58. Therefore, these diplomatic actions might violate EU law. However, such a violation would exist,

The ECJ dismissed Hungary's action.³⁴ Addressing the issue of whether Slovakia had violated Article 21(1) of the Treaty on the Functioning of the European Union³⁵ (TFEU) and Directive 2004/38, the court began by recognizing that Article 21 TFEU conferred upon each European citizen the right of free movement.³⁶ At the same time, "EU law must be interpreted in the light of the relevant rules of international law, since international law is part of the EU legal order and is binding on [those] institutions."³⁷ Thus, the court reasoned, the relevant inquiry was whether President Sólyom's status as the Hungarian head of state "constitute[d] a limitation, on the basis of international law," on his free movement rights.³⁸

The court concluded that his status did limit those rights. Looking to customary international law, the ECJ found that heads of state enjoy "a particular status in international relations"³⁹ that imposes a duty on the host state to guarantee their protection.⁴⁰ This duty was enough to "distinguish[]" heads of state from other citizens⁴¹ such that the person's presence should be regulated by the "law governing diplomatic relations."⁴² Thus, President Sólyom's free movement protections were limited, and the Slovak Republic was not obligated to admit him into its territory.⁴³

The ECJ's decision in *Hungary* espoused the view that international law concepts can control the outcome even when core EU constitu-

he argued, only if there were a state of "persistent paralysis" between the two states, *id.* ¶ 59, which on his view was simply not present between Hungary and the Slovak Republic, *id.* ¶ 60.

³⁴ *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465, ¶ 72.

³⁵ Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47.

³⁶ See *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465, ¶ 43.

³⁷ *Id.* ¶ 44 (citing Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council*, 2008 E.C.R. I-6351, ¶ 291, at I-6492; Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, 1998 E.C.R. I-3655, ¶¶ 45-46, at I-3704).

³⁸ *Id.* ¶ 45.

³⁹ *Id.* ¶ 46. The court referenced the New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167. *Id.* ¶ 47.

⁴⁰ *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465, ¶ 48.

⁴¹ *Id.* ¶ 50.

⁴² *Id.* ¶ 49.

⁴³ *Id.* ¶ 52. The ECJ rejected three additional arguments raised by Hungary. First, it held that the Slovak Republic had not invoked Directive 2004/38's public security exception in violation of the abuse-of-rights doctrine. *Id.* ¶¶ 56-57. Second, because the ECJ's jurisdiction did not extend to "future possible infringements" of EU law, the court refused to rule on whether future actions taken by the Slovak Republic to prevent the Hungarian President from entering the country would violate EU law. *Id.* ¶¶ 68-69. Finally, the ECJ declined to lay out rules governing the derogation of Article 21 TFEU and Directive 2004/38 by international law principles, as that issue was outside the scope of the present case. See *id.* ¶¶ 70-71.

tional principles, such as the right of free movement, are at stake.⁴⁴ In so doing, the ECJ may have defined some of the limits of the dualist principle articulated in *Kadi*, according to which EU and international law are separate and distinct, and perhaps even presaged a shift toward a more monist view, whereby the two are intertwined. While the scope of *Hungary* is unclear and the case may prove to be a context-specific exception to the ECJ's otherwise dualist approach, it might instead suggest a broader role for international law within the EU than had previously been thought.

The role that international law plays within the EU framework has been sharply debated.⁴⁵ On one hand, the ECJ has held that the EU is bound to "respect international law in the exercise of its powers,"⁴⁶ and there is doctrine suggesting that some rules of international law are "binding on the EU institutions and form part of the EU legal order."⁴⁷ This view, by which international law is directly incorporated into EU law, is called monism.⁴⁸ According to the dualist view, on the other hand, EU and international law are distinct and the latter cannot be directly incorporated into the former without legislative assent.⁴⁹ In the foundational *Van Gend en Loos*⁵⁰ case, the ECJ noted that the EU is a "new legal order,"⁵¹ an observation that, commentators have argued, implies the dualist view that EU laws have supremacy over international legal obligations.⁵²

In the 2008 *Kadi* case, the court staked out a dualist claim. The decision involved a challenge to a European regulation that implemented a U.N. Security Council resolution placing restrictions on indi-

⁴⁴ European constitutional principles are normative values that "limit the actions of the Member States and the Union." Armin von Bogdandy, *Founding Principles*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 11, 23 (Armin von Bogdandy & Jürgen Bast eds., 2d rev. ed. 2010). Free movement of persons is a fundamental freedom protected as a constitutional principle. See Thorsten Kingreen, *Fundamental Freedoms*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW*, *supra*, at 515, 520 n.34.

⁴⁵ See Robert Uerpmann-Witzack, *The Constitutional Role of International Law*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW*, *supra* note 44, at 131, 137 ("[T]he status of international law within the [EU] is anything but clear.")

⁴⁶ Case C-286/90, *Anklagemyndigheden v. Poulsen*, 1992 E.C.R. I-6048, ¶ 9, at I-6052.

⁴⁷ *CRAIG & DE BÚRCA*, *supra* note 12, at 341.

⁴⁸ See, e.g., Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 *COLUM. L. REV.* 628, 636 (2007).

⁴⁹ See Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 *HARV. INT'L L.J.* 1, 2 n.4 (2010).

⁵⁰ Case 26/62, *N.V. Algemene Transport — en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

⁵¹ *Id.* at 12.

⁵² See Christina Eckes, *Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?*, 18 *EUR. L.J.* 230, 232 (2012) ("[T]he Court of Justice's choice to protect supremacy from obligations originating outside the EU ('external dimension of supremacy') is a necessary consequence of the Union's complex constitutional set-up.")

viduals suspected of having terrorist ties.⁵³ The ECJ held that international agreements do not have primacy over EU law and “cannot have the effect of prejudicing the constitutional principles” of the EU.⁵⁴ Advocate General Maduro espoused this idea in his opinion, setting out a vision of an EU autonomous from and superior to international law: “The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.”⁵⁵ Within this framework, international law obligations are “decoupl[ed]” from and subordinated to EU law.⁵⁶

Hungary’s approach, however, was much more monist. The ECJ held that because “international law . . . is binding on the [EU] institutions,”⁵⁷ and because international law allows a state to ban a foreign head of state, EU law did not provide a remedy. Here, the ECJ treated international law principles as directly applicable to the EU itself, even though additional EU principles — such as the right of free movement⁵⁸ — were implicated. Far from being subordinated, international law obligations automatically superseded such EU principles.

Taken on its face, the *Hungary* decision may represent a sharp break from *Kadi*. While *Kadi* recognized a limited role for international law in ECJ jurisprudence,⁵⁹ Professor Gráinne de Búrca notes that the “bottom line” of the case was that international law “exist[s] on a separate plane and cannot call into question or affect the nature, meaning, or primacy of fundamental principles of [EU] law.”⁶⁰ Free

⁵³ See Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council*, 2008 E.C.R. I-6351, ¶¶ 13–45, at I-6417–27.

⁵⁴ *Id.* ¶ 285, at I-6491; see also de Búrca, *supra* note 49, at 23 (“The ECJ’s reasoning was robustly dualist, emphasizing repeatedly the separateness and autonomy of the EC from other legal systems and from the international legal order more generally, and the priority to be given to the EC’s own fundamental rules. A related and significant feature was the lack of direct engagement by the court with the nature and significance of the international rules at issue in the case, or with other relevant sources of international law.”).

⁵⁵ *Kadi*, 2008 E.C.R. I-6351, ¶ 24, at I-6372 (Opinion of Advocate General Maduro).

⁵⁶ Nikolaos Lavranos, *International Decision, Commission v. Austria; Commission v. Sweden*, 103 AM. J. INT’L L. 716, 720 (2009).

⁵⁷ *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465, ¶ 44.

⁵⁸ See CRAIG & DE BÚRCA, *supra* note 12, at 741 (discussing importance of the right of free movement).

⁵⁹ See *Kadi*, 2008 E.C.R. I-6351, ¶ 291, at I-6492 (noting that actions taken pursuant to the EU’s powers must be interpreted and their scope circumscribed “in the light of the relevant rules of international law”).

⁶⁰ De Búrca, *supra* note 49, at 24; see also Lavranos, *supra* note 56, at 720. Others have taken a more cautious approach, reading the decision as one that shows “some skepticism towards international law,” Takis Tridimas & Jose A. Gutierrez-Fons, *EU Law, International Law, and Economic Sanctions Against Terrorism: The Judiciary in Distress?*, 32 FORDHAM INT’L L.J. 660, 661 (2009), but that does not necessarily create a strict separation, see *id.*

movement of peoples is one of the “four freedoms” of the EU,⁶¹ and the ECJ’s determination that international law automatically trumped such a freedom — without an intervening action by an EU lawmaking institution⁶² — seems inconsistent with a strong dualist view of *Kadi*.

Hungary may thus reflect a limitation on dualism in EU law, and while the court did not precisely define that limitation, it can be understood in several ways. First, in *Kadi*, core *individual* rights alone were at stake, including basic due process rights such as the right to be heard in a judicial forum.⁶³ In *Hungary*, by contrast, President Sólyom’s *diplomatic* status limited his personal rights.⁶⁴ Under such a reading, fundamental principles of the EU — in this case President Sólyom’s right of free movement — would not be at stake, and it would be more appropriate for international law to govern. Second, *Hungary* directly implicated *intermember* relations, marking one of only a few times that the ECJ has issued a final judgment in a case where one member state initiated an action directly against another.⁶⁵ In the past, member states and the ECJ have preferred to resolve such disputes via political mechanisms,⁶⁶ and the *Hungary* court likely was concerned about deeply involving itself in mediating essentially diplomatic conflicts. Finally, the specific legal principle at stake in *Hungary* — head of state protection — has long been recognized as “fundamental . . . and the most important of all diplomatic privileges and immunities.”⁶⁷ The ECJ may have been reluctant to hold that EU law trumped such a foundational idea in international law; such hesitancy would likely extend to other fundamental norms such as those against genocide or torture,⁶⁸ but might not extend to legal concepts with a weaker historical grounding.

However, *Hungary* may be read not only as establishing a limitation on dualism but also as presaging a longer-term shift toward mon-

⁶¹ Andrea M. Corcoran & Terry L. Hart, *The Regulation of Cross-Border Financial Services in the EU Internal Market*, 8 COLUM. J. EUR. L. 221, 225 (2002) (noting that the four fundamental freedoms underlying economic integration include free movement in people, goods, services, and capital).

⁶² See *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465, ¶ 51.

⁶³ *Kadi*, 2008 E.C.R. I-6351, ¶¶ 333–353, at I-6501–06.

⁶⁴ *Hungary*, 2012 ECJ EUR-Lex LEXIS 2465, ¶ 45.

⁶⁵ See Press Release, Court of Justice of the Eur. Union, *supra* note 10, n.2.

⁶⁶ See CRAIG & DE BÚRCA, *supra* note 12, at 433; see also ROBERT SCHÜTZ, EUROPEAN CONSTITUTIONAL LAW 284 n.135 (2012) (“Member States very rarely bring actions against another Member State . . .”).

⁶⁷ FRANCISZEK PRZETACZNIK, PROTECTION OF OFFICIALS OF FOREIGN STATES ACCORDING TO INTERNATIONAL LAW 11 (1983); see also 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 251 (Ronald F. Roxburgh ed., 3d ed. 1920) (“[A] head of state . . . is . . . neither under the jurisdiction of a court of justice nor under any kind of disciplinary control . . .”).

⁶⁸ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 840 (1997) (giving examples of jus cogens, or peremptory norms, which are considered fundamental).

ism. If so, this change would alter the prevailing conception of the authors of EU law. Under a dualist system, decisions about which legal norms control are made by the “democratic process itself.”⁶⁹ To that end, EU incorporation decisions are made by the joint actions of the European Commission, the Council of Europe, and the European Parliament.⁷⁰ But in a monist system, directly applicable international law principles are set either by international agreement or by customary law, which is derived from “a general and consistent practice of states followed by them from a sense of legal obligation.”⁷¹ A monist system would thus shift power away from EU legislative institutions. And because customary law is shaped by the norms of the international community as a whole, direct incorporation under a monist framework would allow a broader set of decisionmakers to craft EU norms.⁷²

The normative implications of such a monist shift are unclear. On one hand, the EU has been criticized for having a “democratic deficit,” in that law is crafted by technocratic policymakers within the EU who are not accountable to the European populace.⁷³ Increasing the power of democratically elected institutions has been proposed as a cure,⁷⁴ and a monist approach — which commonly depends on unaccountable judicial officials to interpret and apply customary international law — is inconsistent with such a goal.⁷⁵ On the other hand, national policymakers have often been reluctant to implement certain legal provisions, such as those embodied in human rights treaties, and scholars have suggested that a monist approach may make it easier to translate these provisions into national frameworks.⁷⁶ In essence, by enhancing the impact of international law on the EU, the *Hungary* court may

⁶⁹ Gráinne de Búrca & Oliver Gerstenberg, *The Denationalization of Constitutional Law*, 47 HARV. INT'L L.J. 243, 245 (2006).

⁷⁰ See TFEU, *supra* note 12, art. 294, at 173–75; see also CRAIG & DE BÚRCA, *supra* note 12, at 126–28.

⁷¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987). International agreements are generally made by states and are interpreted using normal tools of statutory construction. See *id.* §§ 311, 325. Customary international law, however, is determined by looking to state custom and practice. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900).

⁷² Cf. Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784, 1798 (2011) (discussing complications of determining the scope of customary international law).

⁷³ See Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 633 (1999).

⁷⁴ See David Schleicher, *What if Europe Held an Election and No One Cared?*, 52 HARV. INT'L L.J. 109, 112 (2011). But see Bart M.J. Szweczyk, *European Citizenship and National Democracy: Contemporary Sources of Legitimacy of the European Union*, 17 COLUM. J. EUR. L. 151, 177 (2011).

⁷⁵ See de Búrca & Gerstenberg, *supra* note 69, at 245; see also Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1976 (2004) (“[C]ontemporary international law is deeply antidemocratic.”).

⁷⁶ See Waters, *supra* note 48, at 650–51.

have increased the capacity of actors *outside the EU* to shape the EU. This may create an EU more reflective of global norms, but perhaps less able to adapt to European priorities.

A second implication concerns the scope of international law within member states themselves. Over its history, the ECJ has developed and applied the concepts of direct effect and supremacy: EU law grants individuals rights that are enforceable by the ECJ, and those rights trump national law.⁷⁷ This legal framework allows Brussels-based law to govern conduct within member states directly.⁷⁸

However, because EU law is directly applicable to member states — and because under a monist view, international law would be directly incorporated into EU law — a “double monist” doctrine may allow international law to be directly applicable against member states. For states, like the Netherlands and France, that already take a monistic approach to international law,⁷⁹ such a change would have little effect. But for those, like the United Kingdom, with a dualist outlook,⁸⁰ such a doctrinal development could be dramatic. Such states could be bound by international provisions that they had not affirmatively accepted through either their national legislatures or their political representatives in the EU. But because of the principle of supremacy, they cannot opt out of such obligations via national legislation.⁸¹

It remains unclear whether courts will fully embrace *Hungary's* monist approach. But by stepping back from *Kadi's* broad dualist language, the court made clear that there remains a core role for international law in the jurisprudence of the European Union.

⁷⁷ See Carl Baudenbacher, *The Implementation of Decisions of the ECJ and of the EFTA Court in Member States' Domestic Legal Orders*, 40 TEX. INT'L L.J. 383, 384–85 (2005) (reviewing principles of direct effect and supremacy); see also Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629, ¶ 17, at 643 (“[EU laws] not only . . . render automatically inapplicable any conflicting provision of current national law but — in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States — also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.”).

⁷⁸ Note that such a framework is generally monist between the EU and the member states. See Jay J. Aragonés, Comment, *Regina v. Secretary of State for Transport Ex Parte Factortame Ltd.: The Limits of Parliamentary Sovereignty and the Rule of Community Law*, 14 FORDHAM INT'L L.J. 778, 779 (1990–1991).

⁷⁹ See Waters, *supra* note 48, at 641 n.43.

⁸⁰ See Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 205; Roger O'Keefe, *The Doctrine of Incorporation Revisited*, 79 BRIT. Y.B. INT'L L. 7, 7–8 (2008); James E. Pfander, *Government Accountability in Europe: A Comparative Assessment*, 35 GEO. WASH. INT'L L. REV. 611, 612 (2003).

⁸¹ For instance, in English law, customary international law can be overruled by statute. Ginsburg et al., *supra* note 80, at 206. Because of the EU's supremacy framework, however, England probably cannot be exempted from a norm of international law adopted by the EU.