NOTES

CONSTITUTIONAL COURTS AND INTERNATIONAL LAW: REVISITING THE TRANSATLANTIC DIVIDE

Conventionally, scholars and pundits have depicted a deep transatlantic divide in domestic legal systems' receptivity to international law. On one shore lie the European states and European Union, associated with an attitude of respect for, and fidelity to, international law and institutions. Commentators have widely portrayed Europe as amenable to incorporating international norms and tribunal decisions into its legal systems.[1] On the opposite shore lies the United States, projecting an attitude of "exceptionalism, unilateralism, and general distrust of international law and institutions."[2] Commentators have roundly described the United States as rejecting external mechanisms of accountability and as adopting an "unapologetically pick-and-choose approach to international law."[3]

Two recent constitutional court decisions have called into question the traditional depiction of Europe as far more international law–friendly than the United States. First, in *Kadi v. Council*,[4] the European Court of Justice (ECJ) held that EU regulations that implement UN Security Council resolutions are void if incompatible with fundamental principles of the European constitutional order.[5] Second, in *Judgment 238/2014*,[6] the Constitutional Court of Italy (CCI) held that the rule of international customary law on jurisdictional immunities of states, to the extent that it is incompatible with the Italian Constitution, is inapplicable in Italian courts.[7]

---

[1] *See* Gráinne de Búrca, *The European Court of Justice and the International Legal Order After* Kadi, 51 HARV. INT'L L.J. 1, 47 (2010) ("[T]he general perception of the EU as an organization that maintains a distinctive fidelity to international law has been bolstered by academic and popular commentary.").

[2] *Id.* at 45. *See generally, e.g.*, Harold Hongju Koh, Foreword, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov./Dec. 2000, at 9.

[3] Gráinne de Búrca, *International Law Before the Courts: The EU and the US Compared*, 55 VA. J. INT'L L. 685, 686 (2015).

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

[5] *See id.* ¶¶ 326, 372. Although the European Union is not a state, scholars treat its legal system as a standalone order distinct from the international realm. *See, e.g.*, Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT'L J. CONST. L. 397, 399 (2008).

[6] Corte Cost., 22 ottobre 2014, Foro it. 2015, I, 1152 (It.), *translated in Judgment No. 238 — Year 2014*, CORTE COSTITUZIONALE, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf [http://perma.cc/8T86-34XX] [hereinafter *Judgment 238/2014*].

[7] *See Judgment 238/2014*, *supra* note 6, Conclusions in Point of Law, ¶ 3.5.

These two unequivocal refusals to give domestic effect to international obligations elicited impassioned reactions from international law scholars.[8] A wide swath of commentators discredited the approaches of both courts, condemning their alleged "dualist" treatment of the international and domestic legal systems as fundamentally separate orders.[9] For some, the decisions debunked the myth of a transatlantic divide, revealing that Europe and the United States harbor similar (if not identical) stances vis-à-vis international law. In the wake of *Kadi*, Professors Jack Goldsmith and Eric Posner asserted that "Europe's commitment to international law is largely rhetorical,"[10] concluding that the ECJ is just as guarded and reticent as the United States to admit international obligations into its legal system.[11] Then, in reaction to *Judgment 238/2014*, Professor Eugene Kontorovich argued in a blog post entitled *Italy Adopts [U.S.] Supreme Court's View of ICJ Authority* that the CCI's upfront dismissal of international custom marked the end of America's judicial exceptionalism toward the International Court of Justice (ICJ).[12]

Referring primarily to commentary surrounding *Kadi* and *Judgment 238/2014*, this Note argues that the scholarship to date has failed to provide a nuanced assessment of the European approach to controlling the domestic effects of international law. Rejecting commentators' indeterminate references to traditional paradigms of "monism" and "dualism," the Note distinguishes two variables for characterizing how national courts treat international obligations: (1) the procedural mechanism by which international law becomes domestically enforceable; and (2) the substantive hierarchy established within a domestic legal order between the constitution and international law. It first draws attention to the fact that Europe and the United States still maintain contrasting procedures for incorporating international norms. It then shows that although *Kadi* and *Judgment 238/2014* signal that *at a general level* Europe shares the United States' understanding of constitutional supremacy over international law, a significant divide remains: whereas U.S. jurisprudence makes no distinction between dif-

---

[8] *See infra* section II.C, pp. 1373–75.

[9] *See infra* section II.C, pp. 1373–75.

[10] Jack Goldsmith & Eric Posner, Opinion, *Does Europe Believe in International Law?*, WALL ST. J. (Nov. 25, 2008, 12:01 AM), http://www.wsj.com/articles/SB122757164701554711.

[11] *See id.* ("Europeans hold their values and interests dear, just as Americans do, and will not subordinate them to the requirements of international law. When a conflict arises, international law must yield.").

[12] Eugene Kontorovich, *Italy Adopts Supreme Court's View of ICJ Authority*, WASH. POST: VOLOKH CONSPIRACY (Oct. 28, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/28/italy-adopts-supreme-courts-view-of-icj-authority [https://perma.cc/VG7C-L32G] ("Whatever one can say about *Medellin* now, it will be hard to call it American exceptionalism. . . . Europe is beginning to listen to America.").

ferent constitutional provisions vis-à-vis international law, the CCI and ECJ have designated fundamental rights as "extraordinary" constitutional principles that — unlike "normal" constitutional provisions — necessarily supersede incompatible international norms.

From a methodological standpoint, one may question how two cases could suffice to proffer conclusions regarding a general "European" approach to the relationship between international and domestic law. While such a critique is warranted, *Kadi* and *Judgment 238/2014* are neither insignificant nor anomalous decisions. First, courts are rarely called upon to adjudicate conflicts between international norms and constitutional principles. Many emerging issues are resolved politically or involve interpretation of a treaty or custom rather than a clash with domestic law; even when a conflict arises, it may not implicate constitutional principles. Second, commentators have recognized *Kadi* and *Judgment 238/2014* as landmark decisions. *Kadi* is now treated as a high-profile pronouncement of the ECJ's vision of the relationship between the European and international legal orders.[13] While *Judgment 238/2014* is only a year old, scholars have already trumpeted its significance.[14] Third, as discussed below, the approach exhibited by the ECJ and CCI in these decisions is similar to that of other courts in Europe — most notably Germany. In response to the ECJ's development of the doctrine of supremacy of EU law over Member States' laws, the German Constitutional Court set substantive limits on its incorporation of EU law that mirror the protective strategy presently adopted by the ECJ and CCI.[15] Overall, even though *Kadi* and *Judgment 238/2014* may not support sweeping generalizations, they at least demonstrate that prominent European courts have adopted a shared and distinctive perspective on international law.

---

[13] *See* de Búrca, *supra* note 1, at 1 (deeming *Kadi* "arguably [the ECJ's] most important judgment to date on the subject of the relationship between the European Community . . . and the international legal order"); Joseph H.H. Weiler, *Editorial*, 19 EUR. J. INT'L L. 895, 895 (2008) ("[T]he ECJ's decision in *Kadi* is destined to become a landmark in the annals of international law."); *see also, e.g.*, JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS 916–26 (3d ed. 2010) (treating *Kadi* as an emblematic case for assessing how the ECJ addresses challenges to Security Council decisions).

[14] *See, e.g.*, Maurizio Arcari, Introduction, *Colliding Legal Systems or Balancing of Values? International Customary Law on State Immunity vs Fundamental Constitutional Principles in the Italian Constitutional Court Decision No 238/2014*, 2 QUESTIONS INT'L L. 1, 1 (2014), http://www.qil-qdi.org/wp-content/uploads/2014/12/01_Constitutional-Court-238-2014_INTRO.pdf [http://perma.cc/LV4M-XNY4] ("[D]ecision no 238 . . . presents . . . all the features to become one of the leading cases of international[] as well as constitutional law."); Elisabetta Lamarque, *Some WH Questions About the Italian Constitutional Court's Judgment on the Rights of the Victims of the Nazi Crimes*, 6 ITALIAN J. PUB. L. 197, 199 (2014), http://www.ijpl.eu/assets/files/pdf/2014_volume_2/3.%20Lamarque.pdf [http://perma.cc/RE7T-DZAS] ("[*Judgment 238/2014*] is set to become the most famous [CCI] judgment outside of Italy, at least in recent years.").

[15] *See infra* section III.B, pp. 1378–81.

This Note proceeds in four parts. Part I summarizes how scholars have conventionally contrasted American and European approaches to the domestic treatment of international law. It then describes the traditional framework used for conceptualizing the relationship between domestic and international law. Part II reviews the ECJ's *Kadi* decision as well as the CCI's *Judgment 238/2014*, and surveys scholarly reactions thereto. Part III shows that the European approach to constitutional supremacy over international law differs substantially from its transatlantic counterpart. The CCI and ECJ are treating fundamental rights as special overriding principles that necessarily supersede international law in cases of conflict. Part IV concludes by briefly discussing the implications of European courts' distinction between fundamental and nonfundamental constitutional principles for purposes of deciding whether to apply or reject international law.

I. THE CONVENTIONAL PICTURE: A TRANSATLANTIC DIVIDE

A. Portrayals of European and American Stances Vis-à-Vis International Law

International law scholars and pundits have traditionally depicted a sharp difference between Europe and the United States, as well as between their respective highest courts, in terms of their attitude toward international law.[16] Conventional accounts characterize the United States as a "powerful, self-interested[,] and often unilateral[] actor in international affairs."[17] According to this view, the United States is "generally resistant" to the idea that it should be subject to international law norms, and even when it joins multilateral agreements, it typically refrains from granting domestic legal effect to their terms.[18] It tends to reject international mechanisms of accountability and has in this way adopted an "unapologetically pick-and-choose" posture toward international law.[19] As Professor Gráinne de Búrca notes, an "extensive literature (both positive and critical)" points to U.S. "unilateralism and exceptionalism in relation to international law," and many U.S. scholars remain "skeptical of the legitimacy of international law."[20]

Contributing to this picture, scholars highlight the U.S. Supreme Court's ambivalence regarding domestic internalization of international law. Such ambivalence was emblematized by the Court's decision

---

[16] *See* de Búrca, *supra* note 3, at 686–88, 697, 699–700 (summarizing conventional depictions).
[17] *Id.* at 686.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 700; *see also id.* nn.46–47 (collecting such literature).

in *Medellín v. Texas*,[21] which refused to give effect to the right to consular notification in Article 36 of the Vienna Convention on Consular Relations for a Mexican national who was arrested and faced a possible death sentence.[22] Although the ICJ had ruled that U.S. courts should reconsider Medellín's conviction and sentence following the violation of his consular notification rights, the Supreme Court decided that domestic courts were not obligated to comply because ICJ judgments are not self-executing.[23] While in one sense *Medellín* merely reaffirmed the distinction between self-executing and non-self-executing treaties set forth in *Foster v. Neilson*,[24] it also stood for the specific proposition that ICJ orders do not directly bind domestic courts. The decision, deemed to "reflect[] a judicial determination to prevent various international law measures . . . from becoming part of domestic law without unambiguous Congressional action,"[25] was roundly criticized, especially abroad.[26] Overall, the predominant perception has been that the Supreme Court "remain[s] resistant to law which emanates from outside the American democratic process, or which lacks a clear domestic imprimatur as applicable US law."[27]

By contrast, European polities tend to be portrayed as promoters of multilateralism who support the international rule of law and respect the mandate of international institutions.[28] The EU in particular is often viewed as "one of the lead actors in sponsoring, signing, ratifying, and promoting adoption of international agreements."[29] Furthermore, the conventional view has been that the ECJ, in keeping with the EU's overarching foreign policy, readily supports the EU's commitment to faithfully adhere to its obligations under international law.[30]

B. The Traditional Comparative Framework: Monism and Dualism

Traditionally, scholars have conceptualized nations' relationships between domestic and international legal systems through the dichot-

---

[21] 552 U.S. 491 (2008).

[22] *Id.* at 498–99.

[23] *See id.* at 522–23. In other words, the ICJ judgment merely imposed an obligation on the United States at the international level under Article 94 of the Charter of the United Nations to comply, but did not automatically become binding law within the U.S. legal system.

[24] 27 U.S. (2 Pet.) 253 (1829).

[25] de Búrca, *supra* note 3, at 714.

[26] *See* Kontorovich, *supra* note 12 ("It is hard to overstate the ridicule these decisions attracted from wide swaths [of] the academy, international lawyers, and so forth. The Supreme Court was portrayed as a parochial international scofflaw. The decisions were said to be ugly examples of American exceptionalism that would alienate America from the 'world.'").

[27] de Búrca, *supra* note 3, at 700.

[28] *See id.* at 687.

[29] *Id.*

[30] *Id.* at 697.

omous theories of *monism* and *dualism*.[31] The dualist position conceives of international and domestic law as belonging to fundamentally separate legal orders.[32] International and domestic law operate on different levels because they govern different actors: relations among states versus relations between a state and its citizens and among citizens.[33] Domestic judicial organs should apply rules of international law only once they have been "incorporated" into domestic law, typically via enactment of an implementing statute.[34] The state determines whether, when, and how to incorporate international norms.[35] International law is not subject to solely constitutional constraints: a legislature may also impose statutory limitations by repealing or superseding international obligations.[36]

In contrast, the monist position conceives of domestic and international law as forming part of a single universal legal order.[37] International law is "automatically part of a state's domestic legal system[,] and is . . . as much domestic law as is contract or tax law."[38] Domestic actors must apply international agreements or customs without the state having taken any implementing action.[39] Finally, international law trumps incompatible national law even when the conflict implicates constitutional limitations.[40]

In practice, states do not fall neatly within either of these paradigms.[41] Multiple issues arise with respect to treatment of international law: whether it should have direct effect; whether it should prevail over domestic law in cases of conflict; and whether treaties should be handled differently from custom. In this context, states treat international norms in a variety of ways: "[t]here is no necessary relationship between the treatment of customary international law and treaty law, nor any general convergence among states in terms of the manner in which they treat international obligations."[42] As a result, scholars

---

[31] *See, e.g.*, LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW 653 (5th ed. 2009); DUNOFF ET AL., *supra* note 13, at 243–44; MALCOM N. SHAW, INTERNATIONAL LAW 93–95 (7th ed. 2014).

[32] *E.g.*, SHAW, *supra* note 31, at 93.

[33] DUNOFF ET AL., *supra* note 13, at 244.

[34] DAMROSCH ET AL., *supra* note 31, at 653.

[35] DUNOFF ET AL., *supra* note 13, at 244.

[36] DAMROSCH ET AL., *supra* note 31, at 653.

[37] *E.g.*, DUNOFF ET AL., *supra* note 13, at 243.

[38] *Id.*

[39] *Id.* at 243–44.

[40] DAMROSCH ET AL., *supra* note 31, at 653.

[41] *See* Niels Petersen, *The Reception of International Law by Constitutional Courts Through the Prism of Legitimacy* 1–2 (Max Planck Inst. for Research on Collective Goods, Preprint No. 2009/39, 2011), http://www.coll.mpg.de/pdf_dat/2009_39online.pdf [http://perma.cc/B29V-NXGM].

[42] Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Institutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 207.

have conceded that pure forms of monism or dualism are not actually encountered in practice.[43] Instead, some cautiously describe states as "fall[ing] along a *continuum* between pure monism and total dualism."[44] But even then, comparisons between different legal systems demonstrate the futility of trying to situate states on a spectrum connecting monist and dualist poles.[45] Thus, many scholars now dismiss the traditional paradigms as wholly inadequate for describing how courts treat international law within their respective domestic spheres.[46]

Nevertheless, commentators continue to invoke the monist–dualist dichotomy when characterizing national courts' stances vis-à-vis international law.[47] Entrenched in the international legal vernacular, the terms "monist" and "dualist" still help experts and pundits alike convey "a more open or more hesitant political disposition toward international law."[48] As one scholar puts it:

> [D]ualistic and monistic approaches have . . . moved beyond the mere question of how international law is introduced into internal law. The issue is now colored by a [host] of questions of the relation between the legal orders, where "isolationistic" and "egocentric" approaches will be termed dualist and "integrative" or "community" approaches will be labeled as monist. This may be the case . . . generally with regard to the degree of closeness or distance of the municipal system to the international one. Any tendency of separation will be branded as a hallmark of dualism, any sign towards cooperation or merger will be hailed as a progress of monism. Or the reverse: dualism hailed and monism discredited.[49]

Use of such vague, impressionistic terminology threatens to obscure important nuances in how national legal systems treat international law and, by the same token, to overstate similarities and differences between legal systems. This oversimplification has plagued recent

---

[43] *See, e.g.*, DUNOFF ET AL., *supra* note 13, at 244.

[44] *Id.* (emphasis added).

[45] For example, State A subordinates domestic law to international law but requires formal incorporation before international law can apply domestically. State B subordinates international law to domestic law but grants international law domestic effect absent any act of incorporation. It would be futile to argue about whether State A or State B has the more monist or dualist legal system.

[46] *See, e.g.*, Koen Lenaerts, *The* Kadi *Saga and the Rule of Law Within the EU*, 67 SMU L. REV. 707, 707 (2014); Petersen, *supra* note 41, at 27–28; von Bogdandy, *supra* note 5, at 400 ("Monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law. . . . [T]hey are intellectual zombies of another time and should be laid to rest, or 'deconstructed.'").

[47] *See* von Bogdandy, *supra* note 5, at 399.

[48] *Id.* at 400.

[49] Robert Kolb, *The Relationship Between the International and the Municipal Legal Order: Reflections on the Decision No 238/2014 of the Italian Constitutional Court*, 2 QUESTIONS INT'L L. 5, 9 (2014), http://www.qil-qdi.org/wp-content/uploads/2014/12/02_Constitutional-Court-238-2014_KOLB.pdf [http://perma.cc/K6TK-LVM9].

commentary regarding European constitutional courts' stances with respect to international law.

II. TRANSATLANTIC CONVERGENCE AFTER *KADI* AND *JUDGMENT 238/2014*?

Two decisions, by the ECJ and CCI respectively, call into question the conventional depiction of a deep-seated transatlantic divide between European and American stances with regard to international law. This section provides background on the cases and summaries of key points in the opinions, followed by a brief report of scholars' reactions.

A. Kadi

Starting in 1999, the U.N. Security Council adopted a series of resolutions requiring Member States to freeze the funds and other financial resources of persons and entities associated with Osama bin Laden, the al Qaeda network, and the Taliban.[50] In 2001, a U.N. Sanctions Committee added Yasin Kadi and the Barakaat International Foundation to the list of persons and entities subject to the asset-freeze measures.[51] In 2002, the EU Council adopted Regulation 881/2002 to implement these restrictive measures in the territory of the European Community.[52] Mr. Kadi and the Foundation brought separate actions seeking annulment of the regulation, arguing that it breached their fundamental rights under EU law to a fair hearing, use of property, and effective judicial review.[53]

The Court of First Instance of the European Communities (CFI) dismissed both actions.[54] The CFI found that it lacked jurisdiction to review the lawfulness of the EU regulation.[55] Since the regulation's purpose was to implement Security Council resolutions, judicial review of its lawfulness would entail indirect review of the resolutions' lawfulness.[56] Such review would be incompatible with the commitments of Member States under the U.N. Charter.[57] The CFI concluded that it had "no authority to call in question, even indirectly, [the resolutions'] lawfulness in the light of Community law."[58] Nonetheless, the CFI found that it was empowered to check whether the resolutions re-

---

[50] *See* Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 E.C.R. I-6351, ¶¶ 13–21.
[51] *Id.* ¶ 31.
[52] *See id.* ¶¶ 36–40.
[53] *Id.* ¶¶ 49–50.
[54] Case T-315/01, Kadi v. Council, 2005 E.C.R. II-3659, ¶ 292; Case T-306/01, Yusuf v. Council, 2005 E.C.R. II-3544, ¶ 347.
[55] *See Kadi*, 2005 E.C.R. II-3659, ¶ 221; *Yusuf*, 2005 E.C.R. II-3544, ¶ 272.
[56] *See Kadi*, 2005 E.C.R. II-3659, ¶¶ 213–216; *Yusuf*, 2005 E.C.R. II-3544, ¶¶ 264–267.
[57] *See Kadi*, 2005 E.C.R. II-3659, ¶¶ 220–225; *Yusuf*, 2005 E.C.R. II-3544, ¶¶ 271–276.
[58] *Kadi*, 2005 E.C.R. II-3659, ¶ 225; *Yusuf*, 2005 E.C.R. II-3544, ¶ 276.

spected *jus cogens*.[59] After determining that they did not violate peremptory norms,[60] the CFI dismissed the actions.[61]

On appeal, the ECJ rejected the CFI's finding that EU regulations implementing Security Council resolutions are immune from judicial review.[62] While acknowledging that as a general matter the EU must respect international law,[63] the ECJ asserted that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty."[64] The Treaty establishing the European Economic Community (EC Treaty), signed in Rome in 1957 and repeatedly amended, establishes EU institutions and lays out their core responsibilities and procedures.[65] According to the ECJ, any international obligation that breaches the EC Treaty's foundational principles cannot form part of the EU legal order.[66] After recognizing that "fundamental rights form an integral part of the general principles of law whose observance the Court ensures," the ECJ went on to conclude that respect for such rights is one of the Treaty's "constitutional" principles.[67] The ECJ clarified that it did not possess jurisdiction to review the lawfulness of the Security Council resolutions, whether for compatibility with EU law or with *jus cogens*.[68] However, it opined that review of the lawfulness of an EC regulation intended to give effect to an international agreement would not entail review of the agreement as such.[69] As a result, the ECJ could review the EC regulation without thereby calling into question the primacy of Security Council resolutions under international law.[70]

The ECJ proceeded to assess whether Regulation 881/2002 breached the plaintiffs' fundamental rights. First, it found that the plaintiffs' rights to be heard and to secure judicial review of their rights were "patently not respected."[71] Second, it found that the regu-

---

[59] *Kadi*, 2005 E.C.R. II-3659, ¶ 226; *Yusuf*, 2005 E.C.R. II-3544, ¶ 277. As the CFI emphasized, *jus cogens* norms are "understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible." *Kadi*, 2005 E.C.R. II-3659, ¶ 226; *Yusuf*, 2005 E.C.R. II-3544, ¶ 277.

[60] *See Kadi*, 2005 E.C.R. II-3659, ¶¶ 227–291; *Yusuf*, 2005 E.C.R. II-3544, ¶¶ 277–346.

[61] *Kadi*, 2005 E.C.R. II-3659, ¶ 292; *Yusuf*, 2005 E.C.R. II-3544, ¶ 347.

[62] Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 E.C.R. I-6351, ¶¶ 280, 330.

[63] *Id.* ¶ 291.

[64] *Id.* ¶ 285.

[65] *See* Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47.

[66] *Kadi*, 2008 E.C.R. I-6351, ¶ 285.

[67] *Id.* ¶ 283; *see id.* ¶ 285.

[68] *Id.* ¶ 287.

[69] *Id.* ¶ 286.

[70] *Id.* ¶ 288.

[71] *Id.* ¶ 334; *see id.* ¶¶ 348–352.

lation unjustifiably restricted Kadi's right to property.[72] Having found violations of several of the plaintiffs' fundamental rights, the ECJ reversed the CFI's judgment and annulled Regulation 881/2002.[73]

B. Judgment 238/2014

In 2004, the Italian Supreme Court ruled in *Ferrini v. Repubblica Federale di Germania*[74] that the customary rule of state immunity from foreign jurisdiction did not prevent Italian courts from hearing tort claims brought by Italian citizens against Germany for war crimes and crimes against humanity.[75] Faced with a wave of lawsuits brought in *Ferrini*'s aftermath, Germany filed suit against Italy in the ICJ.[76] In 2012, the ICJ held in *Jurisdictional Immunities of the State*[77] that state immunity from foreign civil jurisdiction for sovereign acts is still generally recognized as international custom.[78] It specifically found that such immunity exists regardless of the gravity of the state's wrongful act — *even if* the act breaches *jus cogens*.[79] Concluding that Italian courts disregarded the customary rule when they exercised jurisdiction over Germany, the ICJ ordered Italy to ensure that its courts discontinue pending proceedings and remedy the breach caused by concluded cases.[80]

To comply with the ICJ's pronouncement, the Italian Parliament passed Law No. 5 of 2013.[81] Meanwhile, however, an Italian lower court — the Tribunal of Florence — had accepted jurisdiction over several new claims against Germany.[82] In 2014, the Tribunal referred its case to the CCI, questioning the compatibility with the Italian Constitution of: (1) the custom of state immunity, as construed by the ICJ; (2) the Italian statute ratifying the U.N. Charter, which required Italy

---

[72] *Id.* ¶ 370.

[73] *See id.* ¶ 372.

[74] Cass., sez. un., 11 marzo 2004, n. 5044, Foro It. 2007, I, 936 (It.).

[75] *Id.* ¶¶ 10–12. Luigi Ferrini sought compensation for international law crimes, including deportation and forced labor in concentration camps, committed by Nazi forces in Italy during World War II. *Id.* ¶ 1.

[76] *Germany Files Suit Against Italy in UN World Court on War Reparations Claims*, UNITED NATIONS (Dec. 24, 2008), http://www.un.org/apps/news/story.asp?NewsID=29414 [http://perma.cc/6NZS-NYYM].

[77] (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. Rep. 99 (Feb. 3).

[78] *See id.* ¶¶ 56–57.

[79] The ICJ reasoned that the custom of state immunity amounted to a procedural rule preventing the exercise of jurisdiction, and hence did not conflict with substantive prohibitions on *jus cogens* violations. *See id.* ¶¶ 80–97.

[80] *See id.* ¶¶ 134–138.

[81] Legge 14 gennaio 2013, n. 5, G.U. Jan. 29, 2013, n. 24 (It.). Law No. 5 of 2013 required Italian judges to decline jurisdiction in pending proceedings and allowed the override of final judgments when necessary to comply with the ICJ's order. *Id.*

[82] *See Judgment 238/2014*, *supra* note 6, Conclusions in Point of Fact, ¶ 1.

to comply with ICJ judgments; and (3) Law No. 5 of 2013, which specifically implemented *Jurisdictional Immunities*.[83]

In *Judgment 238/2014*, the CCI struck down as unconstitutional the provisions of Italian law that compelled its courts to comply with the ICJ's order in *Jurisdictional Immunities*.[84] From the outset, the CCI emphasized that it did not (and could not) question the ICJ's interpretation of customary international law on state immunity from foreign suits.[85] Instead, it set out to examine whether the customary rule, as incorporated into the Italian legal order via its constitution (Article 10), was compatible with two constitutional principles: the protection of inviolable human rights (Article 2) and access to the judicial system to vindicate those rights (Article 24).[86]

The CCI found that although the constitution itself provides for the automatic incorporation of customary international law into the Italian legal order, fundamental constitutional principles limit the introduction of such international norms.[87] A custom that breaches such principles cannot enter the Italian legal system.[88] With respect to the issue at hand, the CCI concluded that the custom of state immunity as construed by the ICJ jeopardized Articles 2 and 24 of the constitution.[89] The CCI acknowledged that fundamental rights *may* be curtailed in some circumstances, but only to protect sovereign functions of the foreign state — in other words, the exercise of governmental powers.[90] Yet acts of deportation, forced labor, and crimes against humanity fall outside the lawful exercise of governmental powers.[91] The CCI reasoned that the sacrifice of "supreme" principles of the constitution — denial of judicial protection of victims' fundamental rights — is disproportionate if it serves to avoid interference with foreign state conduct that consists of war crimes and breaches of inviolable human rights.[92] It

---

[83] *See id.*

[84] *See id.*, Conclusions in Point of Law, ¶¶ 3.5, 4.1, 5.1.

[85] *See id.* ¶ 3.1. The CCI emphasized that "at the international law level, the interpretation by the ICJ of the customary law of immunity . . . does not allow further examination by national governments and/or judicial authorities." *Id.*

[86] *See id.* Article 2 provides in part: "The Republic recognises and guarantees the inviolable rights of the person." Art. 2 COSTITUZIONE [COST.] (It.), *translated in* SENATO DELLA REPUBBLICA, CONSTITUTION OF THE ITALIAN REPUBLIC [hereinafter ITALIAN CONSTITUTION], http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [http://perma.cc/T6AN-LWNJ]. Article 24 provides in part: "Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings." *Id.* art. 24.

[87] *See Judgment 238/2014*, *supra* note 6, Conclusions in Point of Law, ¶ 3.2.

[88] *See id.* ¶ 3.4.

[89] *See id.* ¶ 3.5.

[90] *See id.* ¶ 3.4.

[91] *See id.*

[92] *See id.*

concluded that since the custom of state immunity was incompatible with fundamental principles of the constitution, it was never incorporated into the Italian legal order.[93]

The CCI's subsequent findings regarding the constitutionality of both the statute ratifying the UN Charter and Law No. 5 of 2013 followed directly from the above conclusion. The CCI declared the statute ratifying the UN Charter unconstitutional to the extent that it required Italian courts to comply with the ICJ's order and thereby deny their jurisdiction over Germany.[94] The CCI then declared article 3 of Law No. 5 of 2013 unconstitutional on the same basis.[95]

C. Reactions to Kadi *and* Judgment 238/2014

1. Kadi. — *Kadi* elicited mixed reactions from the international community. On the one hand, human rights advocates hailed the judgment for its strong defense of fundamental rights.[96] On the other hand, a number of scholars stressed the "dualist" character of the ECJ's reasoning[97] and expressed concern about the decision's impact on the EU's relationship with international law.[98] For some, the ECJ's approach was similar to the U.S. Supreme Court's tack in *Medellín*.[99] Professor Joseph Weiler provided the most emphatic analogy:

> [T]he process adopted by the ECJ is remarkably *Medellin*-type — a bold and unsophisticated assertion that once within its jurisdictional review, in effect the measures would be 'Europeanized' and in reality not treated any differently had they been autonomous measures adopted by the Council of Ministers . . . . This cannot be the correct way in which supreme ju-

---

[93] *See id.* ¶ 3.5.

[94] *See id.* ¶¶ 4–4.1.

[95] *See id.* ¶¶ 5–5.1.

[96] *See, e.g.*, Katja S. Ziegler, Recent Development, *Strengthening the Rule of Law, but Fragmenting International Law: The* Kadi *Decision of the ECJ from the Perspective of Human Rights*, 9 HUM. RTS. L. REV. 288 (2009).

[97] *See, e.g.*, Juliane Kokott & Christoph Sobotta, Review, *The* Kadi *Case — Constitutional Core Values and International Law — Finding the Balance?*, 23 EUR. J. INT'L L. 1015, 1015–17 (2012) ("The Court's dualist approach was described as unfaithful to its traditional fidelity to public international law . . . ." *Id.* at 1015.); Riccardo Pavoni, *Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ* Kadi *Judgment: A Misplaced Argument Hindering the Enforcement of International Law in the EC*, 28 Y.B. EUR. L. 626, 630 (2009) (deeming "[t]he Court's radically dualistic approach . . . the result of a precise and deliberate methodological choice on the part of the Court" — a choice that was "both unfortunate and unjustifiable").

[98] *See, e.g.*, de Búrca, *supra* note 1, at 2 ("[T]he judgment represents a significant departure from the conventional presentation and widespread understanding of the EU as an actor maintaining a distinctive commitment to international law and institutions."); Ramses A. Wessel, *The* Kadi *Case: Towards a More Substantive Hierarchy in International Law?*, 5 INT'L ORGANIZATIONS L. REV. 323, 323 (2008) ("This judgment may have an impact on the traditional monist approach of the European Community towards international law and hence on the way we look at hierarchy in the international legal order.").

[99] *See, e.g.*, de Búrca, *supra* note 1, at 2–4.

> risdictions should interact with norms originating from the highest organs of the International Legal Order — withdrawing into one's own constitutional cocoon, isolating the international context and deciding the case exclusively by reference to internal constitutional precepts — a pristine page out of the US Supreme Court approach in *Medellin*.[100]

2. Judgment 238/2014. — Like *Kadi*, *Judgment 238/2014* spawned extensive commentary from international scholars.[101] Lending support to the view that the case "reignited the evergreen debate between the supporters/detractors of monism [and] dualism," many observers equated the CCI's approach to the question of the relationship between international and domestic legal orders with that of the U.S. Supreme Court in *Medellín* or the ECJ in *Kadi*.[102] Commentators roundly decried what they perceived as old-fashioned dualism on the part of the CCI.[103] In the words of one scholar, the decision "resonates the good old 19th century dualism as formulated by Heinrich Triepel, according to which international law and domestic law are 'two circles which at best touch each other but which never intersect.'"[104] Although exceptionally vehement, another scholar's account gives a flavor of the widespread perception that the CCI's opinion exhibited deplorable parochialism:

> [D]ecision no. 238/2014 . . . is a high peak of a new form of robust dualism. Dualism is here not limited to explain the penetration of international legal norms into the national legal order. It ventures further, extending to a denial of any constructive 'dialogue' with international law and the judgment of the ICJ. . . . [T]his decision will give rise to a shattering schism between internal and international law . . . .[105]

---

[100] Weiler, *supra* note 13, at 896.

[101] *See* Lamarque, *supra* note 14, at 198–99 ("This [CCI] judgment has already broken all records thanks to the extraordinary amount of initial comments, not to mention the forthcoming spate of more in-depth critiques . . . ." (footnote omitted)).

[102] Arcari, *supra* note 14, at 3; *see also* Massimo Lando, *Intimations of Unconstitutionality: The Supremacy of International Law and* Judgment 238/2014 *of the Italian Constitutional Court*, 78 MOD. L. REV. 1028, 1034 (2015) ("The approach to the relationship between national and international law in [*Judgment 238/2014*] apparently adheres to the position endorsed in . . . [*Kadi*] and [*Medellín*].").

[103] *See, e.g.*, Kolb, *supra* note 49, at 11; Filippo Fontanelli, *The Italian Constitutional Court's Challenge to the Implementation of the ICJ's* Germany v. Italy *Judgment*, ILAWYER (Oct. 30, 2014), http://ilawyerblog.com/italian-constitutional-courts-challenge-implementation-icjs-germany-v-italy-judgment [http://perma.cc/8LBN-W6RZ] (deeming the decision "the most spectacular display of dualism this side of *Medellin*," one that "epitomises the pitfalls of dualism").

[104] Anne Peters, *Let Not Triepel Triumph — How to Make the Best out of* Sentenza No. 238 *of the Italian Constitutional Court for a Global Legal Order*, EJIL: TALK! (Dec. 22, 2014), http://www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i [http://perma.cc/8KEJ-LPLH] (translating HEINRICH TRIEPEL, VÖLKERRECHT UND LANDESRECHT 111 (C.L. Hirschfeld ed., 1899)).

[105] Kolb, *supra* note 49, at 6.

Even scholars who agreed normatively with rejecting state immunity in cases of crimes against humanity criticized the CCI's dualist method of reasoning.[106] Several scholars contextualized the CCI's decision by describing it as the latest episode in a trend by which European courts have returned to "dualistically colored practices in the relationship between the legal orders."[107] *Judgment 238/2014* was thus "a follower of the ECJ *Kadi* decision," and just "as unpersuasive."[108]

Finally, some commentators focused on the CCI's refusal to implement an ICJ order, analogizing to the U.S. Supreme Court's approach in *Medellín*.[109] Professor Eugene Kontorovich concluded that "[w]hatever one can say about *Medellin* now, it will be hard to call it American exceptionalism. . . . Europe is beginning to listen to America."[110] Although a few scholars distinguished *Judgment 238/2014* from *Medellín*, they did so not because they viewed the CCI's reasoning as any less "dualist" than that of the U.S. Supreme Court, but rather on the narrower grounds that *Medellín* focused on the question of treaty self-execution and was therefore not concerned with the issue of respect for fundamental rights.[111]

III. A DIFFERENT TRANSATLANTIC DIVIDE

Kadi and *Judgment 238/2014* undeniably call into question conventional portrayals of Europe as more receptive to international law than the United States. However, the scholarship to date has painted a caricatured and unduly parochial picture of the European courts' approaches to the relationship between international and domestic legal orders. This section provides a more nuanced analysis of the cases and what they signify for the conventional "transatlantic divide" narrative. Assessing the divide on both procedural and substantive grounds, it emphasizes as a preliminary matter that European systems largely lack the procedural mechanism present in the United States for controlling domestic incorporation of international law. It then argues that *Kadi* and *Judgment 238/2014* nonetheless illustrate a different (and in some

---

106 *See, e.g.*, Cesare Pinelli, *Decision No. 238/2014 of the Constitutional Court: Between Undue Fiction and Respect for Constitutional Principles*, 2 QUESTIONS INT'L L. 33, 41 (2014), http://www.qil-qdi.org/wp-content/uploads/2015/01/04_Constitutional-Court-238-2014_PINELLI_FIN.pdf [http://perma.cc/U45U-GKGS].

107 Kolb, *supra* note 49, at 6; *see also* Arcari, *supra* note 14, at 3; Nico Krisch, *The Backlash Against International Courts*, VERFASSUNGSBLOG (Dec. 16, 2014), http://www.verfassungsblog.de/en/backlash-international-courts [http://perma.cc/Q5JG-XBKD]; Peters, *supra* note 104 (viewing *Judgment 238/2014* as "just one more building block in the wall of 'protection' built up by domestic courts against 'intrusion' of international law").

108 Peters, *supra* note 104.

109 *See, e.g.*, Kontorovich, *supra* note 12.

110 *Id.*

111 *See, e.g.*, Peters, *supra* note 104.

ways more potent) tool for resisting incorporation: substantive limits on international law rooted in constitutional protections for fundamental rights.

A. European Automatic Incorporation, American Procedural Hurdles

Commentators who sweepingly equate *Kadi* and *Judgment 238/2014* with *Medellín* overlook the reality that *Medellín* focused on the procedural mechanism for incorporating an ICJ judgment, whereas *Kadi* and *Judgment 238/2014* exclusively address the substantive hierarchy between domestic and international law. Standing for constitutional primacy over contrary international obligations, *Kadi* and *Judgment 238/2014* in no way call into question Europe's distinctively liberal stance regarding the procedure for incorporating international law, that is, making it almost automatically an integral part of domestic legal systems.

Judgment 238/2014 has given scholars the impression that the CCI adopted a dualist stance as to the *procedure for incorporating* international law.[112] On the one hand, Article 10 of the Italian Constitution provides for direct incorporation of customary international law into the Italian legal order.[113] As the CCI has consistently reaffirmed, this provision operates as a "permanent and automatic implementation mechanism"[114] for international custom.[115] However, distinguishing an "external" international norm from its effects within the Italian legal order, the CCI wrote that "[t]he impediment to the *incorporation* of the conventional norm . . . to our legal order . . . has no effects on the lawfulness of the external norm itself."[116] The CCI found that "the *incorporation*, and thus the application, of the international norm . . . [is] precluded, insofar as it conflicts with inviolable principles and rights."[117] These explicit references to incorporation in the CCI's reasoning led one commentator to conclude that *Judgment 238/2014* "is not about supremacy but about incorporation."[118]

Such a view conflates the substantive issue of hierarchy between a domestic constitution and international law with the procedural issue of how a domestic order incorporates international law. Technically speaking, the CCI undeniably rejected "incorporation" of international

---

112 *See, e.g.*, *id.*

113 "The Italian legal system conforms to the generally recognised principles of international law." ITALIAN CONSTITUTION, *supra* note 86, art. 10.

114 Serena Forlati, *International Judgments and the Italian Legal Order: Some Comments on the Italian Constitutional Court's Ruling on the Issue of the* Jurisdictional Immunities of the State, 5 ROMANIAN J. COMP. L. 248, 252 (2014).

115 *Id.* at 251–52, 252 n.15.

116 *Judgment 238/2014*, *supra* note 6, Conclusions in Point of Law, ¶ 4.1 (emphasis added).

117 *Id.* ¶ 3.4 (emphasis added).

118 Peters, *supra* note 104.

custom. However, until the CCI issued *Judgment 238/2014*, that custom was incorporated into the Italian order via Article 10 of the constitution and was binding upon Italian lower courts. In the Italian system, international custom is incorporated *unless and until* the CCI subsequently declares otherwise. Absent ex post review for constitutionality, international custom is part of Italian law.[119] The CCI's conclusion that on a procedural level the custom of state immunity never "entered" the Italian order is misleading, if not inaccurate: the Italian system treats such custom as internal law unless and until the CCI receives an opportunity to review the custom for compatibility with guarantees of fundamental rights — as it did in *Judgment 238/2014*.

The European Union harbors a similarly hands-off stance regarding the procedure for incorporation of international law. As one scholar commented, *Kadi* "should not be seen as an attempt to preserve the autonomy of the European decision-making *process* and keep outside interferences at bay. . . . Indeed, . . . the European legal order has . . . not subjected the introduction of treaty law and customary international law to any formal act of incorporation."[120] The ECJ has significantly eased the formalities of incorporation of international conventions and likewise adopted a liberal position toward customary international law, making such law "almost automatically an integral part of European law."[121] This procedural openness with regard to incorporation is characteristic of other European states, most notably Germany. Germany's Federal Constitutional Court (FCC) acknowledged in 2006 that an ICJ judgment had direct effect and must guide German courts' interpretations of the Vienna Convention on Consular Affairs, albeit subject to the substantive limitations of German constitutional principles.[122] The control exercised by the FCC over the ICJ was "substantive, not . . . procedural."[123]

---

[119] One might reply that *if* the Italian lower courts were to immediately refer all concerns and doubts as to the constitutionality of norms of customary international law to the CCI, the CCI would in effect act as a combined procedural and substantive hurdle to incorporation.

[120] Jean d'Aspremont & Frédéric Dopagne, Kadi*: The ECJ's Reminder of the Elementary Divide Between Legal Orders*, 5 INT'L ORGANIZATIONS L. REV. 371, 376–77 (2008) (emphasis added) (footnotes omitted).

[121] *Id.* at 374 (citing Case C-162/96, A. Racke GmbH v. Hauptzollamt Mainz, 1998 E.C.R. I-3655; Case T-115/94, Opel Austria GmbH v. Council, 1997 E.C.R. II-39); *see also* Jan Wouters et al., *Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law*, *in* THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW 249, 255, 264 (Marise Cremona & Anne Thies eds., 2014).

[122] *See* Petersen, *supra* note 41, at 26–27; *see also* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2115/01, Sept. 19, 2006 (Ger.), http://www.bverfg.de/e/rk20060919_2bvr211501.html [http://perma.cc/HC37-DAL3].

[123] Petersen, *supra* note 41, at 27 ("The German Court thus wants to remain . . . in full *substantive* control of the implementation of international decisions into the domestic legal order." (emphasis added)).

In contrast to the European approach stands the U.S. Supreme Court's holding in *Medellín* that ICJ judgments have no direct effect in domestic courts.[124] As noted earlier, the *Medellín* Court concluded that although ICJ orders generate an obligation for the United States to comply via Article 94 of the Charter of the United Nations, they are not binding on U.S. courts unless and until Congress decides to implement them through domestic legislation.[125] In conclusion, scholars' blanket analogies between *Kadi*, *Judgment 238/2014*, and *Medellín* becloud the reality that Europe retains a distinctively hands-off approach to the procedure for incorporation of international law.

B. European Fundamental Rights Exceptionalism

At first glance, *Kadi* and *Judgment 238/2014* stand for the proposition that Europe generally shares the United States's understanding of constitutional supremacy over contrary international norms. However, a closer reading of the decisions suggests that European courts have espoused a distinct understanding of such constitutional supremacy. Whereas U.S. jurisprudence gives all constitutional provisions equal weight, the CCI and ECJ have recognized fundamental rights as "foundational" principles that — unlike normal constitutional provisions — supersede international law in situations of conflict.

Addressing the question of how a court should resolve a conflict between international and domestic law, the CCI established constitutional primacy. In finding that Articles 2 and 24 of the constitution limit the receptiveness of the Italian legal order to customary international law, the CCI asserted authority to reject domestic application of international norms. However, it did not sweepingly declare that the constitution *in its entirety* trumps inconsistent custom. The constitution itself, at Article 10, proclaims: "The Italian legal system conforms to the generally recognised principles of international law."[126] A priori, then, international custom would lie "on par" with other provisions of the constitution.[127] The CCI confirmed as much when it stated that the norm of customary international law in question "is hierarchically equivalent to the Constitution through the referral of Article 10, para. 1 of the Constitution."[128] Nevertheless, the CCI went on to posit a hierarchy internal to the constitution itself, in which certain values constitute "supreme principles" that control interpretation of the rest of

---

124 *See* Medellín v. Texas, 552 U.S. 491, 498–99 (2008).

125 *See id.* at 522–23.

126 ITALIAN CONSTITUTION, *supra* note 86, art. 10.

127 *See* Lamarque, *supra* note 14, at 204 ("For many years, in fact, consolidated constitutional jurisprudence has claimed that through the 'open door' of art. 10 . . . customary international law becomes part of Italian law on the same level as constitutional norms . . . .").

128 *Judgment 238/2014*, *supra* note 6, Conclusions in Point of Law, ¶ 3.1.

the constitution, including Article 10.[129] The CCI declared that guarantees of the inviolability of human rights (Article 2) and of access to judicial redress to protect such rights (Article 24) — "qualifying fundamental elements of the constitutional order" — act as material limits to the application of international norms incorporated via the constitution itself.[130] As a result, the CCI's construal of the constitution cabins the scope of its own authority to disregard international law: it can refuse to admit into the Italian legal order a norm that jeopardizes "supreme" principles of the constitution, but presumably cannot refuse a norm that solely conflicts with "ordinary" constitutional principles.

The CCI's stance as to the circumstances under which it may disregard international law as domestically inapplicable is similar to that of the ECJ in *Kadi*.[131] The ECJ in *Kadi* first clarified that neither EU Member States nor EU institutions may avoid review for compliance with the EC Treaty, portrayed as the "basic constitutional charter" of the European Union.[132] As the ECJ stated unambiguously: "[T]he obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty."[133] The EC Treaty trumps secondary EU law (legislation by Member States or EU institutions), even when such law implements international legal obligations. Thus, international law cannot shield domestic European legislation that would otherwise violate "constitutional principles" of the European Union.[134]

Although *Kadi* is slightly less explicit in this respect than *Judgment 238/2014*, it appears that the ECJ has also established an internal hierarchy of norms within its constitutional order. The ECJ explicitly contemplated that limited circumstances may allow for some derogations from EU primary law (that is, sections of the EC treaty itself), for example from Article 113 of the EC Treaty on the common commercial policy.[135] Similarly, the ECJ noted that Article 297 of the EC Treaty "permits obstacles to the operation of the common market" when necessary for a Member State "to carry out international obligations . . . for the purpose of maintaining international peace and secu-

---

[129] *Id.* ¶ 3.4 (quoting Corte Cost., 22 gennaio 1982, n.18, Racc. uff. corte cost. 1982, 165 (It.)).

[130] *Id.* ¶ 3.2.

[131] In fact, the CCI avowedly drew inspiration from the ECJ's *Kadi* decision in this regard. *See id.* ¶ 3.4.

[132] Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 E.C.R. I-6351, ¶ 281.

[133] *Id.* ¶ 285.

[134] *See* Lenaerts, *supra* note 46, at 707–08 ("[I]n order for an international agreement (or a principle of customary international law) to form part of EU law, it must not call into question the constitutional structure and values on which the EU is founded. . . . [I]ncorporation of international law into EU law must ensure compliance with fundamental rights as recognized in the . . . EU Charter of Fundamental Rights.").

[135] *See Kadi*, 2008 E.C.R. I-6351, ¶ 301.

rity."[136] However, the ECJ went on to clarify that "[t]hose provisions cannot . . . authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) [of the EC Treaty] *as a foundation of the Union*."[137] It emphasized that the EC Treaty may "in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including . . . [review] of the lawfulness of Community measures as regards their consistency with those fundamental rights."[138] By distinguishing sections of the EC Treaty that may yield to international obligations from nonderogable "fundamental principles" lying at the "foundation" of the European legal order, the ECJ appeared to erect the same type of substantive constitutional hierarchy that the CCI posited in *Judgment 238/2014*. In both cases, fundamental human rights figure at the apex of the domestic legal order, and, by virtue of their paramount position therein, they exceptionally limit the domestic applicability of international law.

The understanding shared by the CCI and ECJ regarding the hierarchy of their respective domestic legal orders vis-à-vis international law closely parallels that adopted in Germany by the FCC in response to the ECJ's assertion in *Costa v. ENEL*[139] of the primacy of EU law over Member States' domestic law.[140] In *Solange I*,[141] the FCC ruled that in the hypothetical case of a conflict between a European Community norm and the guarantee of fundamental rights provided by German Basic Law, the latter would prevail.[142] The FCC explained: "The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the . . . Basic Law . . . and one which forms *part of the constitutional structure* of the Basic Law."[143] Just like the CCI in *Judgment 238/2014* and the ECJ in *Kadi*, the FCC viewed the guarantee of fundamental rights as an extraordinary section of the German Basic Law, so intrinsic to the constitutional order as a whole that supranational law could never supersede it.[144]

---

136 *See id.* ¶ 302.

137 *Id.* ¶ 303 (emphasis added).

138 *Id.* ¶ 304.

139 Case 6/64, Costa v. ENEL, 1964 E.C.R. 585.

140 *See id.* at 594.

141 BVerfG, 2 BvR 52/71, May 29, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271, 1974 (Ger.), *translated in Solange I — Beschluß*, TEX. L., http://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588 (last updated Dec. 1, 2005) [http://perma.cc/V6CB-2F7C].

142 *See id.* ¶ B.I.4.4. On the facts of the case, the FCC held that the rules of Community law at issue did not violate fundamental rights guaranteed under German Basic Law. *See id.* ¶ B.III.

143 *Id.* ¶ B.I.4.4, *translated in* TEX. L., *supra* note 141 (emphasis added).

144 Subsequently, the FCC ruled that as long as the Community generally ensured an effective protection of fundamental rights substantially similar to that required by the German Basic Law,

In more recent years, the FCC has confirmed that German Basic Law may supersede international law. In 2004, the FCC wrote that while Germany is committed to respecting international law, its Basic Law does not submit to "non-German acts of sovereignty that [are] removed from every constitutional limit and control. . . . The law of international agreements applies on the domestic level only when . . . in conformity with substantive constitutional law."[145] Subsequently, in 2006, the FCC clarified the domestic status of an ICJ judgment interpreting international custom.[146] In so doing, the FCC found that German courts' obligation to follow the ICJ's interpretation of the Vienna Convention was limited by a violation of Basic Rights.[147] The FCC recognized an obligation to conform to decisions of the ICJ *unless* "superior law, like the German [Basic Law], is violated by the implementation of [the ICJ's] decision."[148]

The U.S. constitutional system shares the general understanding expressed by the Italian, EU, and German constitutional courts that constitutional principles trump incompatible rules of international law. In this sense, one cannot speak of a transatlantic divide: both sides espouse a vision of the primacy of their respective constitutional orders over the international order. However, the U.S. Supreme Court has not drawn any distinctions between constitutional provisions: fundamental human rights do not hold the foundational, extraordinary constitutional status they hold in the eyes of the European constitutional courts for purposes of considering whether to apply international law domestically. The European approach differs markedly in that the courts have constructed internal hierarchies within their constitutional orders vis-à-vis international norms. The CCI in *Judgment 238/2014* and the ECJ in *Kadi* squarely situated fundamental human rights at the very core of their legal orders, granting the provisions enshrining such rights a superior status to that of other constitutional principles in relation to international norms.

---

it would no longer exercise jurisdiction to decide on the constitutionality of Community legislation. BVerfG, 2 BvR 197/83, Oct. 22, 1986, 73 BVERFGE 339, 1986, ¶ 132 (Ger.). Importantly, however, the FCC neither said that it no longer had such jurisdiction nor ruled out the possibility of resuming its exercise of jurisdiction should material conditions change. Thus, the German government's power to transfer sovereign rights to the European order extends no further than is compatible with the protection of fundamental rights guaranteed by the German Basic Law.

145 BVerfG, 2 BvR 1481/04, Oct. 14, 2004, ¶ 36 (Ger.), http://www.bverfg.de/e/rs20041014_2bvr148104en.html [http://perma.cc/EH5W-LQBS].

146 BVerfG, 2 BvR 2115/01, Sept. 19, 2006 (Ger.), http://www.bverfg.de/e/rk20060919_2bvr211501.html [http://perma.cc/HC37-DAL3].

147 *See* Jana Gogolin, Development, Avena *and* Sanchez-Llamas *Come to Germany — The German Constitutional Court Upholds Rights Under the Vienna Convention on Consular Relations*, 8 GERMAN L.J. 261, 263 (2007).

148 *Id.* at 270.

IV. IMPLICATIONS OF THE TRANSATLANTIC DIVIDE

European supremacy of fundamental provisions of constitutional law over international law and American procedural hurdles to the incorporation of international law represent distinct mechanisms for exercising control over the effect of international law on a domestic legal order. Both sides of the Atlantic have retained safeguards to prevent international law from trumping domestic law on a universal or wholesale basis. While also relying on constitutional supremacy, the United States has focused on procedural protection via its non-self-execution doctrine.[149] Europe, despite having largely forfeited procedural protection, has retained the "emergency brake"[150] of constitutional supremacy. Unlike the American approach, the European approach exemplified by *Kadi* and *Judgment 238/2014* is content sensitive: international law is refused domestic effect only when it proves incompatible with fundamental human rights — not all constitutional provisions. What are the implications of Europe's preference for (1) relying exclusively on constitutional supremacy rather than procedural safeguards, while (2) limiting such protection to instances of incompatibility of international law with fundamental rights?

The European approach threatens to generate more entrenched conflicts between domestic and international law. Although the U.S. incorporation hurdle provides opportunities for legislatures to flatly disregard international law, it remains relatively easy for the United States to change course. To the extent that incorporation is subject to popular approval, a new legislative consensus could overcome a prior refusal to implement an international obligation. By contrast, a European constitutional court's finding of incompatibility of an international obligation with its constitution endures irrespective of changing political sensibilities. Absent a reversal in the court's jurisprudence, a formal constitutional amendment would be necessary to overcome the conflict with the international obligation. Even then, however, the understanding that fundamental rights are *essential* principles of the Italian, German, and EU constitutional orders seems to entail that even if there were sufficient political will to amend the constitutions in order to comply with international law, such action would be precluded. The CCI, for example, suggested in *Judgment 238/2014* that Articles 2 and 24 of the Italian Constitution are unamendable: "[T]hey stand for the qualifying fundamental elements of the constitutional order[, and

---

149 The fact that no international obligation may take effect in U.S. courts before the legislative branches have incorporated the obligation entails that in practice the United States's procedural safeguard performs more protective work than constitutional supremacy.

150 Peters, *supra* note 104.

as] such, *they fall outside the scope of constitutional review*."[151] Overall, as a comparative matter the relationship between domestic and international law created by the European courts is more rigid than that established by the U.S. system.

The special status European jurisprudence has conferred to fundamental rights also has the effect of circumscribing constitutional courts' authority to disregard international norms. Europe's permissive approach to incorporation of international law generates added oversight responsibility for its constitutional courts: in the absence of procedural safeguards, the courts are the sole gatekeepers for their domestic legal systems vis-à-vis international norms. By contrast, American procedural hurdles entail that the legislative branch holds primary gatekeeping responsibility. And yet, the U.S. Supreme Court has more tools at its disposal to reject international law than its European counterparts. Indeed, were a constitutional issue raised regarding legislation implementing an international obligation, the Supreme Court could strike down such legislation as long as it conflicted with any constitutional provision. In Europe, *Kadi* and *Judgment 238/2014* imply that constitutional norms other than those guaranteeing fundamental rights would not suffice to exclude contrary international law. Whereas the American judiciary can review implementing legislation for conformity with the entire Constitution, European courts can rely only on a subset of constitutional principles. Europe may have given its judiciaries center stage in controlling the domestic application of international law, but its own courts' jurisprudence has narrowly construed the grounds for exercising such control.

---

[151] *Judgment 238/2014*, *supra* note 6, Conclusions in Point of Law, ¶ 3.2 (emphasis added). As Professor Robert Kolb notes: "The Italian constituent power would have to change the constitution itself . . . . [But t]he Constitutional Court seems to have ruled out that possibility by declaring that the fundamental principles of Article 2 and 24 of the Constitution are also material limits to the revision of the Constitution." Kolb, *supra* note 49, at 12.