session, Geneva, 7–25 July 2008. Available from: http://goo.gl/XUGoC (accessed 19 February 2012).

United Nations (2008b) *Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir Addendum Mission to the United Kingdom of Great Britain and Northern Ireland* [online]. Human Rights Council Seventh session, Agenda item 3. Available from: http://goo.gl/jYtW8 (accessed 19 February 2012).

United Nations (2012a) *Ratifications and Reservations* [online]. Office of the High Commissioner of Human Rights. Available from: http://goo.gl/uY37P (accessed 19 February 2012).

United Nations (2012b) *What Are Human Rights?* [online]. Office of the High Commissioner of Human Rights. Available from: http://goo.gl/s2z85 (accessed 19 February 2012).

Waas, L.V. (2008) *Nationality Matters: Statelessness under International Law*, Antwerp: Intersentia.

Williams, R. (2010) *The Divided World: Human Rights and Its Violence*, Minneapolis: University of Minnesota Press.

Wintour, P. and Travis, A. (2011) *Move for British Bill of Rights Faces Deadlock* [online]. *The Guardian*. Available from: http://goo.gl/nXrvY (accessed 19 February 2012).

Žižek, S. (2005) 'Against Human Rights', *New Left Review*, 34: 115–31.

5

TOWARDS GLOBAL CITIZENSHIP PRACTICE?[1]

Antje Wiener

Modern citizenship suffers from what might be termed an inside/outside dilemma. This is because the protection of citizens inside communities entails a conceptual requirement for 'others', or 'outsiders', who present a potential threat. The very constitution of a community of citizens creates a:

> civil state as regards our fellow citizens, but a state of nature as regards the rest of the world; we have taken all kinds of precautions against private wars only to kindle national wars a thousand times more horrible [. . .] *in joining a particular group of men [sic], we have really declared ourselves the enemy of the human race.*
>
> *(Rousseau, cited in Linklater 2007: 17, emphasis added)*

Citizenship is thus bound up with an ethical dilemma, in that the act of creating a safe community of citizens also constitutes an outside – a state of nature – in which individual safety is compromised (Linklater 1998). While the bestowal of equal sovereign rights on all member states of the United Nations (UN) meant protection against security threats, the stability of the UN system relies on the concept of modern statehood. Accordingly, the political interest in maintaining the UN system implies an acceptance of the ethical citizenship dilemma.

> [T]hroughout the international system, as long as territorially bounded states are recognized as the sole legitimate units of negotiation and representation, a tension, and at times even a fatal contradiction, is palpable: the modern state system is caught between *sovereignty* and *hospitality*, between the prerogative to choose to be a party to cosmopolitan norms and human rights treaties, and the obligation to extend recognition of these human rights to all.
>
> *(Benhabib 2006: 31)*

There are two ways of addressing the dilemma: either crack it, a way forward which assumes the dilemma is fabricated and therefore not a classical unsolvable problem, or, scrutinize the underlying assumptions on which it rests. This chapter takes the latter approach, asking three questions: First, is the normative assumption about territorially bounded states as sole negotiators still valid today? Second, how stable are political communities or polities in the twenty-first century, given that borders are crossed in the process of citizens' *going and staying away*', rather than '*coming and going*' and coming back (Torpey 1998)? Third, is the stability of the sovereignty-based international society of states challenged by non-state actors?

A change in the sovereign status of modern states and their territorial boundaries indicates a need to reassess the above-noted dilemma. Liberal institutional theories in International Relations (IR) and Political Theory offer little hope as their Janus-faced states perpetuate the ethical dilemma. They operate according to universal assumptions about the citizenry, not humanity. Their unit of analysis remains the state or the 'people' (Rawls 2002), leaving to one side international encounters among non-state actors. In contrast, this chapter notes a number of changes in the global realm which provide good reasons for a reassessment of the ethical dilemma. They include, *first*, the changing sovereign status of European Union (EU) member states in the process of pooling sovereignty; this change has occurred gradually and is based on a series of legal and constitutional changes (Craig and De Búrca 1998). The *second* change is the growing negotiating and legislative powers of international organizations such as the UN Security Council (SC), the World Trade Organization (WTO), the EU and others (Dunoff and Trachtman 2009). The new political weight of international organizations as non-state actors in the global realm has caused others to contest their policies and claims. These encounters constitute new 'sites of contestation' (Benhabib 2007) where struggles over fundamental rights, principles and norms take place. They are the places where global citizenship practice is most likely to emerge.

To scrutinize the underlying assumptions of the ethical dilemma we first need to identify deviations from the balance among sovereign states. To that end the chapter focuses on the citizen–state relationship, which was constitutive for modern state-building and is defined as 'citizenship practice' (Wiener 1998; Hanagan and Tilly 1999). The concept of citizenship practice draws on Charles Tilly's observation that the routinized relationship between the population and the emerging political authority of the state played a central role in the process of modern state-building (Tilly 1975). Citizenship practice is defined as the process of policy making and political participation which shapes the institutional terms of citizenship (Wiener 1998). It entails necessary *constitutive elements* – the individual and the state – and specific *historical elements* – rights, access and belonging. The following proceeds in four sections. The first section develops the argument; the second section introduces the concept of global citizenship practice; the third section focuses on the dual security problematique; and the fourth section turns to an empirical study of those moments when fundamental rights are contested in encounters between citizenship and security practices. The chapter concludes with some comments on the outlook for further large-scale research on global citizenship practice.

Border crossing – coming and going and staying away

The history of the passport describes the emergence of modern citizenship as a process of 'coming and going' to and from a citizen's community (Torpey 1998). In contrast, late modern citizenship practice increasingly entails *going and staying away* from one's community of origin – for a variety of reasons. This shift means that citizenship practice extends beyond the modern nation-state borders recognized by the UN's Charter regime. If the citizen–state relation is an indicator of the political authority of states, the activity of border crossing undermines this erstwhile stable modern relationship. In addition, as the EU's citizenship practice has demonstrated, border crossing creates 'foreigners' who lack fundamental rights of access to participation in their new communities of belonging. As a result, the constitutional quality of modern citizenship is changing; the 'thick' bundle of citizenship rights which was established at the height of the modern welfare state regime in the 1970s, and which encompassed the protection of rights, access to vote, and belonging to a nation-state, has gradually become 'thinned out'. Contributing to this process were everyday practices such as migrant workers crossing borders, leisure activities, and educational exchange programmes. This *vacuum* of thin citizenship stands to be refilled by new rights, constituted through citizenship practice elsewhere. If the EU's experience is taken as a frame of reference 'for citizenship practice in a non-state' (Wiener 1998), moments in which the historical elements of citizenship were contested indicate the changing constitutional quality of citizenship. For example, access to fundamental rights such as judicial review, voting rights, and security – understood as both protection through, and from, security practices – reveals the possibility of new constitutional layers of citizenship in addition to, and/or in tension with, the constitutional settings of modern nation-states.

With regard to border crossing on a global scale, this experience raises a question about the potential for qualitative change of the citizen–state relation through global citizenship practice. Whether, and how, this occurs and which institutions matter is elaborated in the following sections. For now, it is important to note that borders defining the 'safe' place of citizenship rights, and their protection, have been perforated. Citizenship practice has diffused (spread in diverse ways) into the global realm which lacks institutions responsible for, and capable of, safeguarding the constitutional rights of citizens. If this were the case, we would have reached the end of the story, and the ethical dilemma would endure. A practice-based approach to citizenship suggests a different outcome, however. It allows for various scenarios which are distinguished according to two questions. First, whether the global diffusion of citizenship activities – triggered by citizens who are *going and staying* in new contexts which do not allow them to benefit from constitutionalized regional organizations, such as the EU – indicates a fragmentation and thinning out

of constitutional quality. And second, whether there are indicators of places in the global normative order where constitutional quality can be restored.

The rationale behind this query draws on the familiar trajectory of citizenship practice and polity formation which spans from the Greek city-state in the classics, via the modern nation-state in Europe and elsewhere, to the EU's non-state polity in the late twentieth century. If citizenship practice has had a constitutive impact on the constitutional quality of political authority in these contexts, then an inquiry into the way *global citizenship practice* is likely to constitute a constitutional layer in a fourth – global – realm seems sensible. If citizenship practice follows from diffused citizen activity such as border crossing (coming and going), and settlement outside one's community, then a constitutionalizing input in a global polity would be expected. The outcome would have to be either an alternative to, or a revision of, the UN system of modern sovereign states. According to the literature, possible options include a plurality of constitutional communities (Walker 2011; Tully 2008a, 2008b) or the formation of a global polity (Fassbender 2009; Cohen 2010).

For an activity to be considered as citizenship practice a specific reference to the historical elements of rights access, or belonging, needs to be present. In the absence of this, citizens' activities of coming and going, or going and staying away, are not considered as indicators of citizenship practice that is constitutive of polity formation. Empirical research therefore needs to focus on moments when the safety of citizens is contested. These moments are characterized by a *double security problematique* which arises when security policy threatens the safety of citizens. Such situations occur when citizenship practice challenges security practice; take, for example, new security measures such as the 'black-listing' of individuals, which the UNSC is authorized to activate to protect the majority against those who are suspected of collaboration with terrorists.[2] This policy, however, potentially undermines the fundamental right to judicial review and fair process, and therefore entails a threat to the security of blacklisted individuals in cases where the suspicion of terrorist collaboration fails to be proved. The third section will detail this problematique with reference to recent court cases where general principles of citizenship were contested and renegotiated.

Extending citizenship rights in cycles of fragmentation and bundling

Rights and identity are the two central pillars of modern citizenship theory (Brubaker 1992; Soysal 1994; Barber 1988). The relationship between them has been forged through reference to a specific community in which those who enjoy membership rights develop a special identity over time (Marshall 1950). The necessary reference to individual rights and membership in a politically defined community has reflected the inside/outside logic of sovereignty (Walker 1993). Accordingly, the concept of citizenship defines the limits and possibilities of membership in a community. In turn, socio-historical approaches have conceptualized citizenship as

a living concept. A practice-based approach allows for the study of 'struggles' on the ground as well as 'contestation' in theory (Tully 2008a). This perspective overlaps with that of more radical cosmopolitans who focus on 'sites of contestation', defined as the 'constitutionally structured reaggregation of the markers of sovereignty, in a set of interlocking institutions each responsible and accountable to the other' (Benhabib 2007: 31). This 'conjunction brings into being a complex new *field*' which allows for the contextualization of modern citizenship based on the 'language of diverse citizenship' and makes possible an analysis of '*modern citizenship as one out of many possible options* of citizenship' (Tully 2008a: 485, 493, emphasis added; Goetze 2009). The following details the practice approach.

Citizenship practice

Citizenship theory has always grappled with the parallel requirements of normative, and hence universal, expectations on the one hand, and contingent, and hence particular, realizations on the other. With a view to conducting empirical research, it has been suggested that using the concept of 'citizenship practice' will enable both dimensions to be acknowledged (Jenson and Phillips 1996; Wiener 1997, 1998; Shaw 1997; Kostakopolou 2001; Lister 2003; Pfister 2005). I define citizenship as an *organizing principle* that frames citizenship practice in constitutional terms (Figure 5.1).

The innovative conceptual move towards citizenship practice allows for an analytical distinction between the universal and the particular aspects of citizenship, without losing the constructive tension between them. Accordingly, research on citizenship practice distinguishes between a *first dimension* of constitutive elements and the *second dimension* of historical elements. The former encompasses the individual (as the potential citizen), the political organization (as the potential polity) and the relation between both (as the potential citizenship practice). Notably, it is the practice that ultimately establishes who enjoys which rights, on what cultural grounds, and through which political, economic and social means (Marshall 1950). The latter comprises rights, access and belonging (Figure 5.2). Their quality depends on citizenship practice. As Marshall noted, 'citizenship is a developing concept', its 'ideal' is contingent (Marshall 1950). The balance between the three constitutive elements of citizenship may shift accordingly. If such a shift is dramatic
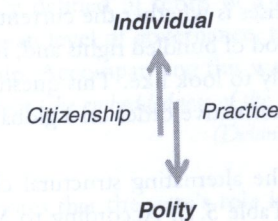
Individual

Citizenship *Practice*

Polity

FIGURE 5.1 The constitutive elements of citizenship (Wiener 1998: 22)

FIGURE 5.2 The historical elements of citizenship practice (Wiener 1998: 26)

and enduring, a critical juncture in the historical configuration of citizenship might be observed.

In sum, citizenship practice makes both the citizen and the polity possible. Its progress over time, yet in specific places, continually constitutes and reconstitutes both the citizen and the polity. As a generic concept, citizenship is not limited to a *universal principle* defining the rights and duties of individuals within a political community. As a practice it is also an *organizing principle* of constitutional communities. It is therefore the key empirical indicator to assess change in the normative global order.

Critical junctures

As Tilly demonstrated in his seminal work on state-building and citizenship, it is precisely the changing and growing relation between the state and the population which forms the basis of citizenship. According to this historical approach to state-building such junctures of citizenship formation occur in the aftermath of long periods of structural change (Tilly 1975; Hanagan and Tilly 1999). This approach was substantiated by Marshall's social studies of citizenship in Britain. Thus, the studies identified a change from a situation of fragmented civil, political and social rights over two centuries, to the bundling of citizenship rights in the twentieth century (Marshall 1950). It was brought about by a double process of fusion and separation which established the institutions of citizenship within a specific context; in this case, the British polity. Prior to this, the most distinctive juncture occurred when citizenship rights were 'crystallized' in Western welfare states in the 1970s (Soysal 1994). It was followed by a new period of fragmentation when citizenship rights were established 'above' the nation-state, in Europe. Its first constitutional manifestation was the stipulation of Union citizenship with Article 8a–e of the Maastricht Treaty of European Union in 1993. In light of these major structural changes, the question that arises is whether the current process of fragmentation is likely to lead to another period of bundled rights and, if so, what the constitutional terms of this process are likely to look like. This question matters crucially for the debate about the emerging normative order on a global scale (Barnett and Sikkink 2008; Deitelhoff *et al.* 2010).

Consider, for example, the alternating structural change from fragmented to bundled citizenship rights (Table 5.1). According to Marshall the erstwhile fragmented triad of civil, political and social rights that had been constituted through citizenship practice in the eighteenth, nineteenth and twentieth centuries,

TABLE 5.1 Cycles of extending rights

Structural pattern of change: substance, institutions and levels	
Rights/time	*Institutions/level*
'Blended' citizenship Rights and 'amalgamated institutions' in sixteenth and seventeenth centuries	**Local:** Equal citizenship rights and duties
Fragmented citizenship rights in the eighteenth and nineteenth centuries	**Sub-national:** Civil (courts of justice), political (parliament, councils of local government), social rights (educational system and social services)
Bundled rights in the twentieth century	**National**: citizenship rights and nationality
Fragmented citizenship in the twenty-first century	**Supra-, sub- and national:** Multi-*level* and multi-*space* citizenship (EU)

respectively, became bundled in the late twentieth century. This was followed by a gradual fragmentation of the bundle when changes were introduced, such as the right to vote and stand in local elections for all EU citizens, the right to free movement, and the right to vote and stand for election in European Parliament elections (Shaw 2009). As is well documented by the six decades of 'European' citizenship practice, the EU's non-state polity has been able to constitutionalize some of these fragmented rights and bestow them with a new constitutional quality.

As citizenship practice unfolds in different sites of contestation, it qualifies the historical elements of citizenship. Accordingly the 'new geography of citizenship [was] thus defined by borders and the right to move across them, by belonging to a multiplicity of places, and by the terms of participation, access and control within a polity without political centre' (Wiener 1998: 301). As citizenship practice evolves in the regional context of the EU, member states are held responsible for granting supranationally derived rights and implementing the associated policies.

As citizenship practice transgresses community boundaries, and the social construction of non-state institutions proceeds, a remarkable change has taken place. While previously the state was considered as the political organization with the authority to grant and protect citizenship, it has now become embedded in citizenship. As Delanty notes,

> [N]o longer exclusively defined in terms of a relation of the state to the transnational or European level of governance, the EU became increasingly implicated in citizenship. Accompanying this was a shift from 'government' to 'governance' to reflect '*the embeddedness of the state in citizenship*'.
>
> (Delanty 2007: 66, emphasis added)

Seyla Benhabib further notes that the state's role in IR has changed in a dual way. '[V]is-à-vis peoples' cross-border movements, the state remains sovereign, albeit in a much reduced fashion.' However, '*vis-à-vis* the movement of capital

and commodities, information and technology across borders, the *state today is more hostage than sovereign*' (Benhabib 2007: 25, emphasis added). Now, novel acts of 'civil disobedience' (Isiksel 2010) and the actions of non-state actors such as the European Court of Justice (ECJ), lead to the implementation of citizenship rights inside a nationally constituted polity.

The reversal of the citizenship–state relation suggests a change of perspective. It implies crossing the boundaries between inside and outside the civilized territory of citizenship, thus opening up a new perspective on the erstwhile inside/outside dilemma of citizenship. The theoretical move towards practice-oriented citizenship studies underlines the need to conceptually account for the diversified actorship of citizenship practice. As non-state actors' citizenship practice is added to the range of individual citizenship practice in the struggle over rights, access and belonging to a polity, the polity itself becomes contested. Moving away from familiar concepts of modern citizenship, where states provided the key indicator of an emerging political community, we can identify new types of communities (Table 5.1). In the process 'communities of practice', which derive the extension and purpose of communities from social interaction (Adler and Pouliot 2011; Wiener and Vetterlein 2012), have become more powerful than modern concepts of citizenship that require a given community.

The dual security problematique

In IR the untamed Hobbesian outside matters more than the civilized inside of states. The latter has remained the terrain of citizenship since the classics (Kratochwil 1994) and, with a few notable exceptions, has been studied mainly by political theorists.[3] Both the outside and inside are parts of a narrative about the normative global order of the international society of states. While the Peace of Westphalia in 1648 established the ground rules for centuries of interstate relations, it also marked the bounded territory of political struggle over authority, justice, and democracy for citizens. This inside versus outside perspective coined the definition of IR as inter*state* or inter*governmental* relations, conducted by diplomats or government representatives. Accordingly, citizenship and citizens' interactions, and their constitutive impact on the global normative order, were left largely to one side (Morgenthau 1948; Waltz 1979; Walker 1993).

It follows that the act of creating citizens as political beings was intended to protect vulnerable individuals from security threats through affiliation with a group. It established the status of citizenship qua membership in a bounded political community. At the time, 'individuals left the state of nature by granting each other determinate rights and duties, the rights and duties of citizens. *Between their respective political associations, however, the state of nature continued to exist*' (Linklater 2007: 18, emphasis added). Thus, while perceived as the core element in the process of creating a civilized sphere for citizens, the act was also constitutive of a *dilemma* in global politics (Benhabib 2006). Although political communities were identified as territories of citizenship where nature had been tamed, they were,

nevertheless, still situated within an untamed global context. Even though the Hobbesian 'state of nature' was now further removed from the individual who, qua citizenship, enjoyed protection within her political community, it nevertheless remained a security threat, albeit an indirect one. The state of nature was now predominantly played out through emerging interstate relations.

Internal civilization that is exclusively possible within the safe haven of such a polity comes at the cost of growing external security threats. These threats are on the increase as a consequence of processes of globalization (Albert 2007), processes which are all-pervasive yet remain unmatched by the rather elusive and scattered instances of constitutionalization. According to the modern inside/outside logic of citizenship and sovereignty (Tilly 1975; Walker 1993), Linklater's ethical dilemma, introduced above, can only be overcome once globalization is matched by constitutionalization (Peters 2009). Constitutionalization is here defined as a process by which institutional arrangements in the non-constitutional global realm take on, or are redesigned with reference to, a specific constitutional quality. How this quality evolves precisely, and on which – normative, functional or pluralist – grounds it is required, remains subject to debate and further systematic research (Wiener *et al*. 2012). Alternatively, a practice approach to citizenship, which focuses on constitutional quality from a bottom-up perspective, enables thinking along the lines of the 'universalism of the particular' (Walker 2011). There is, therefore, a call for much more detailed and large-scale research on the potential shift from globalized to constitutionalized IR.

This chapter uses a distinction between safety and security to express the implied dual security *problematique*. It distinguishes between a 'thick' concept of security, defined as the safety of citizens based on citizenship inside political communities, and a 'thin' concept of security, defined as the policy measures of global security governance. Accordingly it is possible to understand the distinct impact of citizenship practice on cities, nation-states or non-state polities. It is argued that, as citizenship practice reaches beyond these types of polity, the 'safety' of citizens has become threatened. Two types of practice demonstrate this shift. On the one hand, the *globalized citizenship practice* of going and staying away means that citizens leave the safety of constitutional communities; on the other hand *newly empowered international organizations*, such as the UNSC, conduct security practices in the name of civil protection or the 'war on terror'. These new security practices, which are implemented in a top-down fashion, are likely to interfere with fundamental personal rights; take, for example, the 'black-listing' of individuals suspected of cooperation with terrorist groups, or detention without arrest warrants in cases where terrorist activity is suspected. Such practices therefore call for scrutiny regarding the protection of the fundamental rights of individuals. At the same time, a bottom-up process of citizenship practice has involved border crossing as part of a process which has led to the stipulation of new supranational citizenship rights and principles via new regionally based constitutional organs such as those of the EU.

Therefore, global citizenship practice entails two aspects of globalization. On the one hand it addresses the diffusion of citizenship practice into the global realm (where the safety of citizens can no longer be guaranteed as long as the international

society of states operates according to modern expectations). On the other hand, citizens who do not engage in global activities are affected by the movement of others in the process of coming and going and staying away. Regarding the inside/outside dilemma, the key question is whether the extension of citizenship practice into the international realm is powerful enough to constitute the institutional terms of citizenship required to counter the effect of security practices. To address this question we need to turn to key constitutional principles and the ways in which they are upheld or contested in both processes. Who is responsible for the protection of fundamental rights when the obligation of states to protect their citizens is no longer in place? As the following examples suggest, the options for replacing this state obligation with new institutions depend on the degree to which regional, or indeed global, international organizations are constitutionalized.

Moments of contestation – a new critical juncture in the trajectory of citizenship practice?

As the more technical, institutional, interstate security arrangements are no longer sufficient to establish citizens' safety, the spotlight is increasingly on the well-being of the individual citizen. Citizens' well-being can be threatened by new security practices which challenge their safety and thus undermine citizenship (Edwards and Meyer 2008). To examine this chapter's main argument, this section focuses on moments of contestation as a way of exploring the ethical dilemma which follows on from the assumption of territorially organized sovereign states. To that end it works with the citizenship practice approach, operationalizing it in the following way. First, citizenship practice is defined as the policy and politics which are constitutive of the institutionalization of citizenship in a polity. In turn, security practices are the policies and politics carried out in order to protect citizens from terrorism and other security threats. Studying moments of global citizenship practice – where the dual security problematique brings conflictive encounters between both types to the fore – is expected to reveal the nexus of the security-safety aspect of the ethical dilemma. In addition, these moments of contestation are expected to offer insights into potential new layers of constitutional quality, given that citizenship practice is defined as the process of policy making and politics that establish the institutional terms of citizenship.

The likelihood for the two sets of practices to conflict, and hence to provide a space for the negotiation of new institutions, follows from the unintended safety threat which is often inherent in those global governance measures that operate according to the rationale of efficiency rather than justice or democracy, and which therefore lack the normative roots of constitutional principles. Thus, while security practices are intended to protect the safety of citizens, it nevertheless could be that they are in breach of the fundamental rights of individuals. That is, they ultimately threaten citizens' safety. The scenario is better understood once we recall that, in the global realm, international organizations operate as new types of actors who intervene in citizenship practices.

Global citizenship practice, therefore, needs to take multiple actorship into account. Thus non-state actors are likely to be as influential as individual citizens in constituting the institutional terms of citizenship. By performing security practices, on the one hand, and by taming security practices by supporting the fundamental rights and hence the safety of individuals, on the other, these actors intervene in the process of constituting and reconstituting polities. Their contribution to global citizenship practice needs to be understood as a distinctive input to the constitutional layer of the emerging global polity. While more specific research is required, to cover a wider range of empirical case studies, the following discussion refers to two examples where citizenship practice extends beyond the boundaries of both the nation-state polity, and the European non-state polity, in order to challenge security policy with reference to fundamental norms.

In one case, the contested security policy is challenged with reference to the prohibition of torture and the breach of that norm by US government representatives and civil servants outside US territory. In the second case, the contested security policy was to be implemented in the EU's non-state polity and was challenged with reference to the breach of the fundamental rights of individuals by the UNSC. Both cases demonstrate how the double security problematique triggers citizenship practice, and how the relationship between individual actors and the polity is re/constituted in the process. Both are legal cases which have generated quite some debate, mainly among legal scholars and lawyers, but increasingly among social scientists as well. One is the *Kadi case*; the other is the *Rumsfeld case*. Both shed light on the conflictive encounter between security practices and citizenship practices in a global context, and how this encounter forges a new constitutional layer of global citizenship.

The Kadi case

The *Kadi and Al Barakaat*[4] *case* (hereafter, the *Kadi case*) involves the UNSC, the ECJ and a number of EU member states, apart from the litigants. It demonstrates the way new policy instruments work to implement new security practices, based on policies introduced in the aftermath of the Taliban and Al-Qaeda terrorist actions, respectively, and initiated by the UN's Sanctions Committee. One such example focuses on the decisions, made by the UNSC in the name of security, that have had serious repercussions for personal liberties (De Búrca 2010; Isiksel 2010). Among these security practices was the UNSC's decision to use smart sanctions. These security practices in the global realm were originally generated with the establishment of the UNSC Sanctions Committee in 1998, in response to Taliban activities. The practices were challenged with reference to constitutional rights when a black-listed individual – a Saudi national with a business in Sweden – contested the EU Council regulation endorsing the freezing of his assets and his right to free movement in the EU. In its judgment the ECJ held that these security practices were in breach of the EU's normative order and, especially, the respect of fundamental rights (De Búrca 2009; Kumm 2009). The ECJ overruled the judgments of the

Court of First Instance (CFI) in its 2008 judgment. It annulled Council Regulation 881/20024 which had imposed restrictive measures against persons and entities associated with Osama bin Laden, the Al-Qaeda network, and the Taliban, noting the EU's breach of fundamental rights. It is important to note that the ECJ stressed that it had no authority to call into question the lawfulness of UNSC resolutions. However, it also stressed that as long as the UNSC did not provide sufficient protection for the fundamental rights of individuals, the EU's own normative order had to provide that protection instead.

This case is of particular interest because of the involvement of non-state actors as opposed to states. While international organizations are typically based on state membership and therefore not held responsible for organizing accountability themselves, the *Kadi case* suggests a change. Now,

> the UN Security Council has begun to exercise *legislative-type powers* under Chapter VII of the Charter, as in its adoption of resolutions requiring states to freeze the assets of individuals suspected of supporting terrorism, and its establishment of the Counter-Terrorism Committee and the Sanctions Committee.
>
> (De Búrca 2008: 8, emphasis added; see also Fremuth and Griebel 2007: Hinojosa 2008)

In other words, the role of IOs includes agenda-setting, territory controlling, sanction-setting and so forth. Notably, the actions taken by international organizations in the name of security offer an empirical access point to discuss the normative issue of enduring shortcomings of international law when it comes to the protection of individual rights. Notably, with this judgment the EJC has begun to bring the EU's own legal order to bear both with regard to fundamental rights protection by other international organizations and with regard to European citizens. By bringing the EU's own normative order to bear during various steps of the judicial decision process, the ECJ stressed the importance of fundamental individual rights protection in contexts beyond the modern state. The EU's non-state polity is thus presenting itself as a relatively stable polity with an autonomous normative order that is increasingly consolidated through citizenship practice.

It has been argued that this interaction between the ECJ and the UNSC has mainly had the effect of sustaining the EU's normative order with a thick constitutional layer. For example, Isiksel argues that the ECJ's involvement in the *Kadi case* is best considered as an act of 'civil disobedience' which signals 'a prioritisation of the status of fundamental rights norms within the supranational constitutional architectonic' (2010: 552, 553) that strengthened the EU's constitutional quality. I suggest that the ECJ's decision on Kadi represents a critical juncture in international relations, insofar as it demonstrates the growing influence of non-state actors in global power relations. By contesting the UNSC's security practices and condemning them as undermining the fundamental rights of individuals, the ECJ interfered in the terrain of international law. While this act has been beneficial for EU citizens,
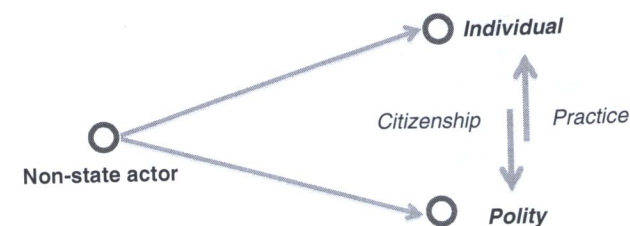
FIGURE 5.3 Global citizenship practice

it is likely to set new standards for handling the fundamental rights of individuals on a global scale. Since the ECJ addressed another global actor, the UNSC, in its judgment, and made explicit reference to the fundamental rights of individuals, its intervention can be considered as a non-state actor's engagement in citizenship practice. This changes the original constellation of the constitutive elements of citizenship practice towards the inclusion of non-state actors (Figure 5.3). Other non-state actors that matter for constituting the constitutional layer of an emerging world polity are UN institutions, especially the UNSC and the UN Convention of the Law of the Sea, as well as other regional institutions such as the European Court of Human Rights (ECtHR).

The Rumsfeld case

This case involves a human rights lawyer, Wolfgang Kaleck, from Germany, a non-governmental civil rights organization, the Center for Constitutional Rights in New York, Donald Rumsfeld, a former Secretary of State of the USA, as well as a number of other high ranking US government and military officials, and the public as presented by the media. In contrast to the *Kadi case*, the *Rumsfeld case* was not tried in court. It was brought before the German Constitutional Court (BVG) with reference to the German Criminal Code of Crimes Against International Law (CCAIL).[5] This code establishes the possibility of universal prosecution of crimes against humanity, and stipulates with §1 CCAIL that cases of international criminal law can be filed in Germany under its universal jurisdiction statute, which allows Germany to prosecute serious international crimes regardless of where they occurred or the nationality of the perpetrators or victims (compare Kaleck and Wiener 2007). The charges against Rumsfeld and nine further plaintiffs filed by a human rights lawyer on behalf of 13 Iraqi victims included 'War crimes against people', German Criminal Code of Crimes Against International Law (CCAIL) §8, §4, §13 and §14; 'Grievous bodily harm,' German Penal Code (StGB) §223, §224; §6 No. 9, German CCAIL §1, and the *UN Convention on Torture*.

Overall, Rumsfeld has been charged five times with direct involvement in torture as a result of his role in the Bush administration's programme of torture post-9/11. Two previous criminal complaints were filed in Germany under the same universal jurisdiction statute. One case was filed in 2004 by CCR, the International

Federation for Human Rights (FIDH), and Berlin attorney Kaleck. That case was dismissed in February 2005 in response to official pressure from the US, in particular from the Pentagon. The second case was filed in 2006 by the same groups, as well as dozens of national and international human rights groups, Nobel Peace Prize winners and the UN's former Special Rapporteur on Torture. The 2006 complaint was presented on behalf of 12 Iraqi citizens who had been held and abused in Abu Ghraib prison in Iraq, and one Saudi citizen still held at Guantánamo. This case was dismissed in April 2007, as was an appeal against this decision in the same year. Two other cases were filed against Rumsfeld, in Argentina in 2005, and in Sweden in 2007. While the German Federal Prosecutor decided against proceeding with the case on 10 February 2005, with regard to global citizenship practice and the double security problematique this case nonetheless opens a new perspective on interventions in global citizenship practice by NGOs.[6] The 13 Iraqi victims sought support from abroad given that the institutions of the Iraq polity were unable to protect their fundamental rights.

The imbalance of fundamental rights protection which has been triggered by the encounter between security and citizenship practice raises the following questions for research on global citizenship practice. First, are the constitutionally granted fundamental rights of citizens – required to establish the safety of citizens and lost by the diffusion of citizens into the global realm – likely to be countered by acts of global citizenship practice establishing institutional terms of global citizenship? Second, how does the definition of citizenship change, and what is the role of non-state actors in this process? Which are the communities that matter for the protection of individual safety, and where do they emerge? Which practices carry constitutional quality and which are merely an expression of globalized policy making?

While the UN's organizational format still reflects the Westphalian pattern of sovereign states 300 years on, nevertheless, since its founding in 1948, international actor constellations and political input have been changing. With the Universal Declaration of Human Rights the fundamental rights of individuals were given a prominent place in the normative world order;[7] thus, the declaration 'concerns matters *between the state and its own population (vertical* approach) rather than inter-state relations' (Rosas 1995: 62, emphasis added). The two most far-reaching proposals, which seek to establish a more rigorous constitutional quality in the international society of states, consist, first, of a global constitution establishing a global polity based on the UN Charter (Fassbender 2009), and second, in the suggestion to scrutinize global democracy based on a global community of states where all members enjoy equal sovereign rights (Cohen 2004, 2008). While both turn towards constitutional theory in an effort to enhance conditions of democracy and justice in the global realm, they do not refrain from relying on the uncontested status of *sovereign states as the constituent units* of the normative global order. With regard to this chapter's main argument, then, this would suggest that the ethical dilemma is here to stay.

However, if we take observations from legal scholars into account, then it is notable that the sovereign status of states has been under duress for quite some time.

This is well documented by the gradual process of moving aspects of sovereignty from EU member states to the EU polity with the 1967 ECJ judgment *Van Gend en Loos*, and a number of judgments since. Among distinctive landmark cases were the rulings in *Van Gend and Loos*,[8] *Costa* vs. *ENEL*,[9] the *Solange* and the *Martinez Sala* rulings, as they contributed to a change in the formal interpretation of the fundamental norms of sovereignty, fundamental rights and citizenship.[10] Thus, the ECJ's ruling in *Van Gend and Loos* established the principle of direct effect; this confers rights on individuals which they can invoke before the national and Community courts. The principle promotes Community law becoming part of national law and strengthens its efficacy. In addition, it safeguards the rights of individuals in that they can invoke a Community provision, irrespective of whether a national text exists or not. The ECJ's ruling in *Costa* vs. *ENEL* established the principle of supremacy of European law over national law in relation to matters covered by the treaties.

Both rulings have established a change in the quality of member state sovereignty since the 1960s. Apart from ECJ rulings, the impact of the changed status of sovereign states has been brought to the fore by incidents in which the traditional role of sovereign states vis-à-vis their citizens has been addressed. One of the traditional roles of states is precisely the issue of protecting citizens' safety in line with constitutional principles, fundamental rights and norms (for example, the *Kadi case*). Once these are in place, and duly protected globally, we can begin to speak of an emerging global polity. Turning to specific legal cases allows us to address the key, underlying, question of this chapter, namely, whether a thinning out of citizenship in the nation-state polity necessarily results in a loss of constitutional quality, or whether constitutional quality might be 'added' elsewhere. The latter outcome is based on the assumption that constitutional quality, once established, does not vanish but may resurge in another place.

Conclusion: a new critical juncture?

This chapter has focused on the ethical – inside/outside – dilemma of citizenship, and the tension between citizens' safety and security measures, and has explored the potential for dialogue between citizenship and security studies. Working with a practice approach to citizenship, the chapter set out to scrutinize the assumption of the stable sovereignty of states, arguing that this assumption lies at the root of an ethical dilemma. The chapter has argued that once citizenship practice is defined as the relationship between an individual and the polity – with this relationship being constitutive of a specific type of polity – and once intervening actors such as international organizations are brought into the analysis, the sovereignty assumption of states needs to be revised, and new layers of constitutional quality identified in the global environment. The development of Union citizenship in the EU, the case of international citizenship practice in relation to the *Kadi case*, as well as the multiple actor involvement in the *Rumsfeld case*, suggest a further change in the cyclic development of bundled and fragmented citizenship. On the one hand, the EU's polity tends towards bundling rights in its strengthened normative order; on

the other hand, it is possible to detect the emergence of a renewed fragmentation of citizenship rights based on global citizenship practice.

While it is too early to make claims about a global polity, this chapter's findings have established the grounds for further exploring how these different perspectives on citizenship might play out in the future. As an organizing principle able to counter the safety challenge of a range of technical security practices, citizenship is likely to acquire a more prominent role in IR theory. Especially with a view to establishing access to constitutional rights, such as judicial review in international relations, students of international relations require a better understanding of how the tension between the constitutive and historical elements of citizenship plays out within the global realm. Global citizenship practice – understood as the process by which the institutional terms of citizenship are established to constitute the triad of rights, access and belonging – matters for the constitution of a global polity in two ways. First, European citizens and/or residents have been put into the privileged position of enjoying access to additional judicial protection when national jurisdiction fails (as with the *Kadi* case). In regions that lack similar regional judicative organizations, citizens will not enjoy the same access rights. In addition to world-wide inequality based on economic factors, unequal access to constitutional rights presents a further imbalance. As this article suggests, the mere protection of the culture of equal sovereignty based on the UN Charter does not suffice to address equality on a global scale. Second, it is held that if citizenship practice is a constitutive element for the constitution of communities, then research on changing citizenship practice will provide cues for community formation within the global realm, and – potentially – outside the modern setting.

Further research on global citizenship practice will benefit from addressing three interrelated sets of questions: *First (empirically)*, whether the kind of institutions that were constituted through citizenship practice at the regional level are powerful enough to protect individual rights beyond the boundaries of nation-states. And, related to this, given that earlier citizenship practice was constitutive for the city-state, the nation-state and the regional non-state, whether citizenship practice leads to the constitution of the global polity as a fourth type of polity. *Second (normatively)*, which organizing principles or institutional changes are required for democratic standards such as fundamental individual rights, democracy, the rule of law and citizenship to be respected in response to, and despite, new security measures? Are the two prevailing types of polities which have been constituted through citizenship practice – that is, the nation-state and the regional non-state – both still adequate forms of political organization in the twenty-first century? *Third*, and most *generally*, what kind of constitutional measures are in place to protect individual rights as citizenship practice diffuses to the global realm?

Notes

1 This paper was first presented at the *ECPR* Workshop in Lisbon and then at the workshop "Changing subjects: rights, remedies and responsibilities of individuals under global legal pluralism" at the *European University Institute*, Florence, 7 May 2011. I would like to thank all participants for their helpful comments. Special thanks go to

the ECPR workshop coordinators Jef Huysmans and Xavier Guillaume, and the EUI workshop coordinators Turkuler Isiksel and Anne Thies. I would also like to thank Jane Jenson whose exceptional scholarship inspired my long-term interest in citizenship beyond modern state boundaries, especially during the Canadian years. Very helpful research assistance at the University of Hamburg was provided by Daniel O. Schlechter. Responsibility for this version of the paper is my own.

2 UNSC Resolution 1267 (1999) established a 'Sanctions Committee' responsible for designating the funds or other financial resources which all member states must freeze to ensure that they are not made available to, or for the benefit of, the Taliban, or any undertaking owned or controlled by the Taliban.

3 The term 'civilization' is defined with reference to the act of constituting citizenship to protect individuals, as members of a political community, from the outside world. It is thus distinguished from recent work in IR that studies civilization as a sociocultural process in the Eliasian sense.

4 European Court of Justice (2008) 'Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Cases C-402/05P and C-415/05P, 3 September 2008', EUR-Lex, The Publications Office of the European Union <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML> (accessed 17 June 2012).

5 This law has been in force since 30 June 2002.

6 Including the International Federation for Human Rights (FIDH), the European Center for Constitutional and Human Rights (ECCHR), Berlin <http://ecchr.eu/organisation_en.html> and the French League for Human Rights <http://www.ldh-france.org>.

7 For the Universal Declaration of Human Rights, see the UN Website <http://www.un.org/en/documents/udhr/index.shtml> (accessed 19 January 2011).

8 European Court of Justice (1963) 'Van Gend and Loos v Netherlands Inland Revenue Administration, Case 26–62, 5 February 1963', EUR-Lex, The Publications Office of the European Union <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962CJ0026:EN:HTML> (accessed 17 June 2012).

9 European Court of Justice (1964) 'Flaminio Costa v E.N.E.L., Case 6–64, 15 July 1964', EUR-Lex, The Publications Office of the European Union <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964CJ0006:EN:HTML> (accessed 17 June 2012).

10 For details see also Kumm 2011; for the German Constitutional Court's *Solange* ruling see Dunoff and Trachtman 2009.

References

Adler, E. and Pouliot, V. (2011) 'International practices', *International Theory*, 3(1): 1–36.

Albert, M. (2007) 'Globalization theory: yesterday's fad or more lively than ever?', *International Political Sociology*, 2(1): 165–82.

Barber, B.J. (1988) *The Conquest of Politics: Liberal Philosophy in Democratic Times*, Princeton, NJ: Princeton University Press.

Barnett, M. and Sikkink, K. (2008) 'From international relations to global society', in C. Reus-Smit and D. Snidal (eds) *The Oxford Handbook of International Relations*, Oxford: Oxford University Press.

Benhabib, S. (2006) *Another Cosmopolitanism*, Oxford: Oxford University Press.

—— (2007) 'Twilight of sovereignty or the emergence of cosmopolitan norms? Rethinking citizenship in volatile times', *Citizenship Studies*, 11(1): 19–36.

Brubaker, W.R. (1992) *Citizenship and Nationhood in France and Germany*, Cambridge, MA: Harvard University Press.

Cohen, A. (2010) 'Legal professionals or political entrepreneurs? Constitution making as a process of social construction and political mobilization', *International Political Sociology*, 4(2): 107–23.

Cohen, J.L. (2004) 'Whose sovereignty? Empire versus international law', *Ethics & International Affairs*, 18(1): 1–24.

—— (2008) 'A gobal state of emergency or the further constitutionalization of international law: a pluralist approach', *Constellations*, 15: 456–84.

Craig, P.P. and De Búrca, G. (1998 [1st ed. 1995]) *EU Law: Text, Cases and Materials*, Oxford: Oxford University Press.

De Búrca, G. (2008) 'Europe's judicial resolution and the UN Security Council', *The Kadi Case: Implications for Domestic, European and International Constitutionalism*, Workshop, Amsterdam.

—— (2009) 'The European courts and the Security Council: between dédoublement fonctionnel and balancing of values: three replies to Pasquale De Sena and Maria Chiara Vitucci', *European Journal of International Law*, 20(3): 853–87.

—— (2010) 'The EU, the European Court of Justice and the international legal order after Kadi', *Harvard International Law Journal*, 51(1): 1–50.

Deitelhoff, N., Gosepath, S., Niesen, P. and Herborth, B. (2010) *Call for Papers for Tagung Internationale Politische Theorie*, 10–12 June 2010, Frankfurt. Online. Available at: <https://www.dvpw.de/fileadmin/user_upload/sek_vp/2010_Call_IPT.pdf> (accessed 5 November 2010).

Delanty, G. (2007) 'European citizenship: a critical assessment', *Citizenship Studies*, 11: 63–72.

Dunoff, J.L. and Trachtman, J.P. (2009) *Ruling the World: Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press.

Edwards, G. and Meyer, C.O. (2008) 'Introduction: charting a contested transformation', *Journal of Common Market Studies*, 46(1): 1–25.

Fassbender, B. (2009) 'Rediscovering a forgotten constitution: notes on the place of the UN Charter in the international legal order', in J.L. Dunoff and J.P. Trachtman (eds) *Ruling the World?*, Cambridge: Cambridge University Press.

Fremuth, M.L. and Griebel, J. (2007) 'On the Security Council as a legislator: a blessing or a curse for the international community?', *Nordic Journal of International Law*, 76(4): 339–61.

Goetze, C. (2009) 'Global governance und die asymmetrische verwirklichung von global citizenship. Die humanitarisierung des flüchtlingsregiems', in G.F. Schuppert and M. Zürn (eds) *Governance in einer sich Wandelnden Welt*, PVS-Sonderheft 41/2008, Wiesbaden: VS.

Hanagan, M. and Tilly, C. (eds) (1999) *Extending Citizenship, Reconfiguring States*, Lanham, MD: Rowman & Littlefield.

Hinojosa, M. and Miguel, L. (2008) 'The legislative role of the Security Council in its fight against terrorism: legal, political and practical limits', *International and Comparative Law Quarterly*, 57(2): 333–59.

Isiksel, T. (2010) 'Fundamental rights in the EU after Kadi and Al Barakaat', *European Law Journal*, 15(5): 551–77.

Jenson, J. and Philips, S.D. (1996) 'Staatsbürgerschaftsregime im Wandel – oder: die Gleichberechtigung wird zu Markte getragen. Das Beispiel Kanada', *Prokla. Zeitschrift für kritische Sozialwissenschaft*, 26(4): 515–42.

Kaleck, W. and Wiener, A. (2007) 'Umstrittene Fundamentalnormen in der Staatengesellschaft. Das deutsche Völkerstrafrecht und die Völkerrechtsdebatte', in W. Klaus-Dieter (ed.) *Staat und Gesellschaft: Fähig zur Reform?* Baden-Baden: Nomos.

Kostakopolou, T. (2001) *Citizenship, Identity and Immigration in the European Union: Between Past and Future*, Manchester: Manchester University Press.

Kratochwil, F. (1994) 'Citizenship: the border of order', *Alternatives*, 19(4): 485–506.

Kumm, M. (2009) 'The cosmopolitan turn in constitutionalism: on the relationship between constitutionalism in and beyond the state', in J.L. Dunoff and J.P. Trachtman (eds) *Ruling the World?*, Cambridge: Cambridge University Press.

—— (2011) 'How does European Union law fit into the world of public law? Costa, Kadi and three conceptions of public law', in J. Neyer and A. Wiener (eds) *Political Theory of the European Union*, Oxford: Oxford University Press.

Linklater, A. (1998) *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era*, Cambridge: Polity Press.

—— (2007) *Critical Theory and World Politics: Citizenship, Sovereignty and Humanity*, London: Routledge.

Lister, R. (2003) *Citizenship: Feminist Perspectives*, New York: New York University Press.

Marshall, T.H. (1950) *Citizenship and Social Class*, Cambridge: Cambridge University Press.

Morgenthau, H. (1948) *Politics among Nations: The Struggle for Power and Peace*, New York: Alfred A. Knopf.

Peters, A. (2009) 'The merits of global constitutionalism', *Indiana Journal of Global Legal Studies*, 16(2): 397–411.

Pfister, T. (2005) 'Citizenship and globalization', *Ethnopolitics*, 4(1): 105–13.

Rawls, J. (2002 [1st ed. 1999]) *The Law of Peoples*, Cambridge, MA: Harvard University Press.

Rosas, A. (1995) 'State sovereignty and human rights: towards a global constitutional project', in D. Beetham (ed.) *Politics and Human Rights*, Oxford: Blackwell.

Shaw, R. (2009) 'Politics and the internet: the New Zealand research', *Political Science*, 61(2): 5–19.

Shaw, J. (1997) 'European Union citizenship: the IGC and beyond', *European Public Law*, 3(3): 413–39.

Soysal, Y.N. (1994) *The Limits of Citizenship: Migrants and Postnational Membership in France*, Chicago, IL: University of Chicago Press.

Tilly, C. (1975) *The Formation of National States in Western Europe*, Princeton, NJ: University Press.

Torpey, J. (1998) 'Coming and going: on the state monopolization of the legitimate "means of movement"', *Sociological Theory*, 16(3): 239–59.

Tully, J. (2008a) *Public Philosophy in a New Key, Vols. 1–2*, Cambridge: Cambridge University Press.

—— (2008b) 'Two meanings of global citizenship: modern and diverse', in M.A. Peters, A. Britton and H. Blee (eds) *Global Citizenship Education: Philosophy, Theory and Pedagogy*, Rotterdam: Sense Publishers.

Walker, N. (2011) 'Reconciling MacCormick: constitutional pluralism and the unity of practical reason', *Ratio Juris*, 24(4): 369–85.

Walker, R.B.J. (1993) *Inside/Outside International Relations*, Cambridge: Cambridge University Press.

Waltz, K. (1979) *Theory of International Politics*, Reading, MA: Addison-Wesley.

Wiener, A. (1997) 'Making sense of the new geography of citizenship: fragmented citizenship in the European Union', *Theory & Society*, 26(4): 529–60.

—— (1998) *'European' Citizenship Practice: Building Institutions of a Non-State*, Boulder, CO: Westview Press.

Wiener, A. and Vetterlein, A. (2012) *Communities of Practice and Practices of Community: What is Possible?* Paper presented at the Millennium Conference: London School of Economics and Political Science.

Wiener, A., Lang, A.F., Maduro, M.P. and Kumm, M. (2012) 'Editorial: why a new journal on global constitutionalism?', *Global Constitutionalism*, 1(1): 1–17.

PART II

Insecure state–citizen relations