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Myth or Necessity?

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Abstract

Constitutionalism beyond the state is a deeply contested project. The emergence of global governance and global laws that directly affect individuals and regulate the conduct of states toward their own citizens raise questions about the basic hierarchy of authority among states, regional bodies and global institutions. States no longer have a monopoly of the production of international or global law. Thus questions about the legitimacy of global law and governance arise particularly, but not only, when they have constitutionalism- and democracy eviscerating effects. The discourse of global constitutionalism as a possible characterization of or response to the expanded juridification and exercise of coercive public power on the supra state level follows from these developments. But what kind of constitutionalism is appropriate beyond the state and what should be the relation among distinct and at times competing legal orders? This article addresses these questions focusing on the global political system and using the lens of the recent ECJ decision in the Kadi case to formulate the appropriate conceptual issues. I argue for a constitutional pluralist approach but I also argue that this requires reform of the global political system. I claim that a human rights-oriented constitutionalism is compatible with state sovereignty, appropriately understood. We should drop unhelpful dichotomous frameworks such as cosmopolitanism versus sovereignty, monism versus dualism and think creatively with respect to changing sovereignty regimes, federal unions of states that are not themselves states but which are constitutional and potentially constitutionalist legal orders. In this way we can try to preserve the best of what the older sovereignty regime of international law had to offer – constitutionalism, democracy, self determination of states, sovereign equality – while conceptualizing and (re-)designing the new, especially in light of international human rights concerns, in ways compatible with these and other, individual-oriented normative principles.

Keywords

Constitutional Change – Democracy – Governance – Human Rights – Law – Legitimacy – Pluralism

Introduction

It is an understatement to say that the contemporary international society of states is deeply divided. Despite the happy consciousness of those who proclaimed the end of history and the worldwide triumph of the liberal democracy in the early 90s, the legitimating principles for domestic polities around the globe remain diverse. Yes, the sovereign state form has been globalized in the aftermath of decolonization and the collapse of the Soviet empire. To use David Armitage's apt phrase, the 'contagion of state sovereignty' and the proliferation of declarations of independence and constitution-making in the various transitions toward political autonomy is impressive.[1] Yet we still inhabit a global pluri-verse of 193 sovereign states whose political cultures, organizational principles, conceptions of justice and legitimacy, are diverse and at times in conflict with one another.[2]

Superimposed on this segmentally differentiated, pluralistic international society of sovereign states, are the legal and political regimes of the functionally differentiated global subsystems of world society, whose institutional structures, decision making-bodies and binding rules have acquired an impressive autonomy vis-à-vis their member states and one another.[3] These 'regimes' or 'subsystems', of which the global political system is one, engage in new forms of global governance and law-making, that reaches beyond and penetrates within states.[4] Individuals are increasingly ascribed rights and responsibilities under globalizing international law. This expanding individuation of international law seems to mark an important difference with the Pre-WWII international legal system and with stereotypes of 'Westphalian' sovereignty. Although states still are the main subjects that make international law, they no longer have the monopoly of the

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[1] On the universalization of sovereignty see D. Armitage, 'The Contagion of Sovereignty: Declarations of Independence since 1776', *South African Historical Journal*, 52/1, 2005, pp. 1-18. See also D. Armitage, *Declarations of Independence: A Global History,* (Cambridge: Harvard University Press, 2007) (decolonization of course was neither a human rights movement nor a movement of democratization).

[2] The UN still does not have a litmus test of regime type for membership. Every independent and 'peace-loving' state is entitled to membership in the UN if it accepts the obligations of the Charter and is deemed willing and able to carry them out. Admission is effected by a decision of the General Assembly upon recommendation of the Security Council. See Chapter II, Article 4, Sections 1 and 2.

[3] On the distinction between segmental and functional differentiation see N. Luhmann, *The Differentiation of Society* (New York: Columbia University Press, 1984). For the systems-theoretical concept of 'world society' see N. Luhmann, 'The World Society as a Social System', *International Jounal of General Systems*, 8/3, 1982, pp. 131-8; G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory', in C. Joerges, I. J. Sand, and G. Teubner (eds) *Transnational Governance and Constitutionalism* (Oxford: Hart Publishers, 2004), pp. 3-28; G. Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in G. Teubner (ed.) *Global Law Without a State* (Brookfield, VT: Dartmouth Publishing Group, 1997) pp. 3-15. On the concept of international society see H. Bull, *The Anarchical Society*, third edition (New York: Columbia University Press, 2002). For a critique see E. Keene, *Beyond the Anarchical Society: Grotius, Colonialism and World Order in International Politics* (Cambridge: Cambridge University Press, 2002); A. Hurrell, *On Global Order: Power, Values and the Constitution of International Society* (Oxford: Oxford University Press, 2007). For the concept of a dualist world order see J. L. Cohen, 'Whose Sovereignty? Empire Versus International Law', *Ethics and International Affairs*, 18/3, 2004, pp. 1-24.

[4] Even if states enforce international or global law it is the latter that is being enforced. I will focus on global political subsystem and its key organization, the UN. See A. Fischer-Lescano, *Globalverfassung. Die Geltungbegrundung der Menschenrechte* (Weilerswist: Velbruck Wissenschaft, 2005) for an analysis of the global political system from a systems-theoretical point of view.

production of that law. Indeed the international organizations they have spawned seem to be morphing into 'global governance institutions' (GGIs) which, like the sorcerer's apprentice, tend to invert the principle/agent relationship extant at the time of their creation.[5] The latter now regulate states and individuals, including the conduct of states toward their own citizens, in the name of the 'international community', importantly redefining (some would say abolishing) the sovereignty of states. The latter are bound by rules and regulations often the product of majority decisions that make the old image of international society, segmental differentiation and the consent based, horizontal production of international law appear anachronistic.[6]

Yet there does not seem to be any overarching meta-rule for regulating interactions or conflicts among or within these globalizing legal and political orders.[7] Moreover, there is an increasing awareness that the very global governance institutions that provide a framework for collective goal attainment and peaceful conflict resolution among sovereign states can themselves be rights violating. Instead of fostering a global rule of law, they are in certain key domains having constitutionalism- and democracy-eviscerating effects while also undermining social solidarity.[8] Organs of international organizations now engage in new and unanticipated forms of legislative, quasi-judicial and administrative 'governance' that directly (and sometimes adversely) affect

[5] 'Global Governance Institution' (GGI) is a vague but useful term to indicate a new form of global regulation and rule-making that raises distinctive legitimacy problems. See A. Buchanan and R. Keohane, 'The Legitimacy of Global Governance Institutions' *Ethics and International Affairs,* 20/4, 2006, pp. 405-37. For a critique of the concept of governance see C. Offe, 'Governance: An Empty Signifier?' in *Constellations*, 16/4, 2009, pp. 550-62.

[6] On the concept of international community see B. Simma, 'From Bilateralism to Community Interest in International Law', Recueil des cours, 250/6, 1994, pp. 217-384. For an historical overview, see B. Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law*, 36, 1998, pp. 531-7; B. Fassbender, 'We the Peoples of the United Nations: Constituent Power and Constitutional Form in International Law' in M. Loughlin and N. Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford: Oxford University Press, 2008, at p. 272. See also E. Kwaka, 'The International Community, International Law, and the United States: Three in One, Two against One, or One and the Same?', A. Paulus, 'The Influence of the United States on the Concept of the "International Community"' and the reply by M. Koskenniemi, S. Ratner, and V. Rittberger, 'Comments on Chapters 1 and 2', all in M. Byers and G. Nolte (eds) *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003).

[7] The basic hierarchy of authority between (globalizing) international and domestic law remains ultimately unresolved. Moreover, the international law commission's report on fragmentation acknowledges that the lexical priority of ius cogens, the Vienna Convention on the Law of Treaties (VLCT), Article 103 of the UN Charter does not resolve the issue of conflicting norms and regimes at the level of global governance. See 'International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', U. N. Doc. A/CN/4/L.682, 13 April 2006; M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', *The Modern Law Review*, 70/1, 2007, pp. 1-30.

[8] For an optimistic view see R. O. Keohane, S. Macedo and A. Moravcsik, 'Democracy-Reinforcing Multilateralism', *International Organization*, 63, Winter 2009, pp. 1-31. But see K. L. Scheppele, 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency' in S. Choudhry, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press 2008); K. L. Scheppele, 'The International State of Emergency: Challenges to Constitutionalism after September 11', paper prepared for Yale Legal Theory Workshop, 21 September 2006; J. L. Cohen, 'Global State of Emergency or the Further Constitutionalization of International Law?', *Constellations*, 15/4, 2008, pp. 456-84.

individuals and their rights. Yet there is a dearth of legal and political accountability mechanisms to regulate the new forms of global law making and governance that are proliferating. As others have pointed out, the new 'governance' functions do not come with oversight mechanisms, avenues of redress for those directly impacted or new rules (higher laws) that regulate the self regulation, expanded autonomy and powers of trans-infra- and/or supra-national bodies or globalizing international organizations.[9]
No wonder that the question of how to conceptualize what is and what should be the relationship among these entities is contested. The conceptual divide is between those who mobilize the discourse of constitutionalism to characterize the increased juridification and regulatory reach of the globalizing and individualizing regimes of international law and governance vs. those who view the multiplicity of sites of rule and law-making through the lens of legal pluralism, and reject the language of constitutionalism.

What are the stakes of this dispute? The former see the constitutionalization of public international law as the way to tame the bellicose power politics and imperialist tendencies of nation-state sovereignty by constraining actors to solve their disputes through law and negotiation while protecting the human rights.[10] The latter insist that the heterogeneity of international society and the pluralism – even fragmentation – of the international political system along with the proliferation of international legal regimes within it (human rights, human security, humanitarian law, international criminal law etc.) is a desirable antidote to hegemonic imposition that too often occurs in the name of 'universalist' global law.[11] This empirical and normative assessment, expresses sensitivity to the asymmetry among global powers and to the emergence of new types of hegemony or imperial formations, not to mention the diversity of a still deeply divided international society.[12] From this perspective, global constitutionalist discourse appears naive and/or

[9] See G. de Burca, 'The EU, The European Court of Justice and the International Legal Order after Kadi', *Harvard International Law Journal*, 1/51, 2009, pp. 1-8.

[10] The literature on global constitutionalism is vast. See E. de Wet, 'The International Constitutional Order', *International Comparative Law Quarterly,* 55, 2006, pp. 51-76; A. Verdross, *Die Verfassung der Volkerrechtsgemeinschaft* (1926); C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', Hague Academy of International Law, General Course on Public International Law, Recueil des Cours 281, 1999, pp. 9-438; see B. Simma, 'From Bilateralism to Community Interest in International Law, Hague Academy of International Law, Recueil des cours 250, 1994, pp. 217-384 for a sampling of those who argue for an international community based in shared, now constitutionalized values. Fischer-Lescano, *supra,* note 4, and Fassbender, *supra,* note 6, represent the decentered and centered versions respectively. For collections of essays on global constitutionalism see R. Macdonald and D. M. Johnston (eds) *Towards World Constitutionalism* (Leiden: Brill, 2005); C. Joerges and E.-U. Petersman (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart, 2006); J. Dunoff and J. Trachtman (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge: Cambridge University Press, 2009). See also the introduction in Fassbender, *supra,* note 6.

[11] The earlier literature on legal pluralism was more anthropological and sociological than jurisprudential and much of it challenged the state's claim of legal sovereignty as the monopoly of law making capacity within imperial contexts and/or with respect to pre-modern societies. For an overview see B. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' *Sydney Law Review*, 29, 2007, pp. 375-411; B. de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths, 2002); N. Krisch, 'The Case for Pluralism in Postnational Law', LSE Legal Studies Working Paper, 12/09.

[12] See A. Stoler, 'On Degrees of Imperial Sovereignty', *Public Culture,* 18/1, 2006; J. Tully, *Public Philosophy in a New Key, Volume II: Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008), M. Hardt

apologetic. The discourse and project of constitutionalism vis–à-vis the emergent global political system, is rejected out of hostility to the leveling (gleichschaltung) of the autonomy of the multiple legal and political orders that would apparently have to go with it.[13] The plurality of legal/political orders allegedly increases the avenues of contestation, protects domestic autonomy, local democracy and diversity, and makes the legitimacy of global law a question rather than a given.[14]

Given the above description of multiplicity within and among globalizing legal and political orders it does seem counter-intuitive to buy into the discourse of constitutionalism beyond the state. Nevertheless, I will adopt that discourses. But I regard the idea of the constitutionalization of the global political system is a *verite a faire*, not a *fait accompli*. I see global constitutionalism, as normative and political project necessary in light of the expanding scope, activism and discretion of the key global governance institutions in the UN Charter System, particularly the Security Council (SC). It is also indispensible to the legitimacy of the coercive public power exercised by the latter increasingly over individuals and not only over states parties.

However, in embracing this project, I will also challenge the terms of the debate. Both approaches – those defending and those contesting the discourse of constitutionalism beyond the state – buy into the Kelsenian thesis that a mature autonomous legal system of constitutional quality must entail a clear hierarchy of norms *and* be monist in character. Accordingly, we seem to be faced with the following choice: Either we embrace the further integration and constitutionalization of the global political system involving the step to a monist global legal order based on cosmopolitan principles (especially human rights), deemed primary and hierarchically superior to (only relatively or contingently autonomous) domestic legal orders. Or we accept a disorderly (indeed, order-less) global legal pluralism that acknowledges the multiplicity of autonomous political and legal orders but renounces any attempt to construct an order of orders, or a principled mode of interaction among the sites of law-making leaving this up to contestation or, alternatively to the power of the powers that be.

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and A. Negri, *Empire* (Cambridge: Harvard University Press, 2000). See also the special section 'The Revival of Empire,' in *Ethics & International Affairs,* 17.2, 2003, pp. 34–98.

[13] M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', *Modern Law Review*, 70/1, 2007, at p. 23. As he points out, one can level a similar charge against the legal pluralists: by accepting the multiplicity of orders simply because they are there, by renouncing the constitutionalist project, and by attaching the label 'law' indiscriminately to any form of coordinated rule-making, legal pluralists tend to collapse the distinction between law and regulation, dissolve the legal code into one among many normative-regulatory regimes, reduce legal decisions to policy choices and thereby lose sight of the critical point of the exercise. Koskenniemi refers to the work of Gunther Teubner as pluralist but the Teubner school (Teubner, Fischer-Lescano) tends to equate juridification within each globalizing subsystem (regime) with constitutionalization while embracing a radical pluralist position regarding the interrelation among the various regimes of each global subsystem. See G. Teubner and A. Fischer-Lescano, 'Regime Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law', *Michigan Journal of International Law*, 25/4, 2004, pp. 999-1046.

[14] This is the claim of radical legal pluralists like N. Krisch, 'The Pluralism of Global Administrative Law', *European Journal of International Law*, 17/1, 2006, pp. 247-8. See also P. S. Bermann, 'Global Legal Pluralism', *Southern California Reivew*, 80, 2007. David Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream', *NYU Review of Law and Social Change,* 31, 2007.

My thesis is that the dichotomy between constitutionalism and pluralism (mistakenly mapped onto the monism/dualism distinction) is misleading because it screens out the most interesting alternative – constitutional pluralism – as if it were an oxymoron. It prevents us from perceiving the possibility of a politics and constitutionalist project that would point to a way of relating the proliferating orders within (and perhaps beyond) the global political system that could vindicate much of what is valued by both sides. The conceptual dispute turns, in part, on the image one has of the direction (empirical and normative) in which globalization is pushing our polities, our international institutions and the appropriate response. The intuition behind this article is that we should avoid simplistic dichotomous and naive evolutionary thinking when we reflect on what is new and try to refine our analytic tools, among them ideal types, with which to broach our contemporary constellation. New forms of global interrelations stand on what has been created before one can establish another relation to the international society of sovereign states, but transnational, infra-national, supranational global institutions still lean on, supplement and reorient instead of completely substituting for the international relations they enter into and international law they produce through traditional means. We should not be too quick to abandon our concepts (sovereignty, sovereign equality, inter-national law, etc). In this regard, Joseph Weiler's geological metaphor is very wise, for we have to avoid both infeasible utopias and unrealistic unimaginative realism.[15]

As I have argued elsewhere, despite the expanding regulatory role of global governance institutions, increased integration of the international community (and of regional communities) does not amount to the end of sovereign territorial states.[16] Nor, however has the universalization of the international society of states or global functional differentiation and the emergence of 'world society' and 'international community' left sovereignty, or international law unchanged. I thus do not buy into the false choices posed by cosmopolitans and statists (another unhelpful dichotomy).[17] Segmental pluralism still exists although it is overlaid by global functional differentiation, as already indicated. The global political system is composed of sovereign states, large and small, federal and unitary, the international society to which they all belong and the international law they make, alongside new legal subjects and actors – regional organizations/quasi-federations (like the EU) which are not states but distinctive forms of bounded territorial constitutional polities acting within the international system,

[15] J. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 64, pp. 547-62, 2004. Weiler's image of a layered conception of international law is useful insofar as it accounts for new legal forms without assuming the older forms disappear or are simply replaced. The referent of 'constitutional' legislative global or transnational law is accordingly the common assets and goals of the international community which are in the interest of but distinct from the particular goals and other interests of member states in GGI's like the UN or the WTO. Indeed the democratic deficits he refers to that are produced by the new forms of global law making and regulation cannot be rectified without input by the democratic sovereign state. See conclusion to this article.

[16] See Cohen, *supra,* note 3. See also Weiler, *supra,* note 15, pp. 556-58.

[17] See J. L. Cohen, 'Sovereign Equality vs Imperial Right', *Constellations,* 13/4, 2006, pp. 485-505; R. Forst, 'Towards a Critical Theory of Transnational Justice' in T. Pogge, (ed.) *Global Justice* (Oxford: Blackwell Publishing, 2003).

alongside international organizations morphing into global governance institutions with new functions and significant cosmopolitan legal elements.[18]
Certain competences once associated with the sovereign state have been delegated to regional supra-national or global actors and in this sense one can speak of divided or pooled 'sovereignty'. But insofar as it entails the autonomy and supremacy of a legal order and the self-determination of a polity, sovereignty in the ultimate constitutional/constitutive sense cannot be divided or shared: it is irreducible to a bundle of competences.[19] As such, it is best to view the shifting prerogatives of sovereign states, through the concept of changing sovereignty regimes, rather than through a *monistic* conception of cosmopolitan constitutionalism or through anachronistic sovereigntist assumptions.[20] Once we dispense with the dichotomies, the issue of the constitutionalization of global functional regimes (and of regional non-state polities) can be broached in a nuanced manner, and the utility of the concept of constitutional

[18] There are debates over the precise (and shifting) nature of the EU. For the federal vision see M. Forsythe, *Union of States* (New York: Holmes and Meier Publishing, 1981); K. Nicolaidis and R. House (eds) *The Federal Vision* (Oxford: Oxford University Press, 2001) and O. Beaud, *Theorie de la Federation* (Paris: Presses Universitaires de France, 2007). For an opposite view, see B. de Witte, 'The European Union as an International Legal Experiment' (2008).

[19] From the international or global perspective, states are sovereign insofar as they are acknowledged to be such by the international legal and political system. But recognition, although increasingly centered in the UN, is still a prerogative of autonomous sovereign states as 'members' of international society, to accord to other claimants. I analyze the complexities of sovereignty as ascribed by the international legal order and as a political phenomenon elsewhere. See Cohen, *supra*, note 16; J. L. Cohen, 'Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective', in S. Besson and J. Tasioulis (eds) *The Philosophy of Public International Law* (Oxford: Oxford University Press, 2010). On the distinction between competences of sovereignty and the autonomy and supremacy of a legal order and political community see: G. Jellinek, *Allgemeine Staattslehre* (Hermann Gentner Verlag: Bad Homburg, 1960), pp. 435-504; and H. Kelsen, *General Theory of Law and the State* (Cambridge: Harvard University Press, 1945), pp. 328-90. See also H. Kelsen, *Das Problem der Souveranitat und die Theorie des Volkerrechts: Beitrag zu einer reinen Rechstslehre* (Tubingen: Mohr, 1928).

[20] Monistic cosmopolitans like T. Pogge and B. Fassbender assume we are in or en route to a multilayered cosmopolitan constitutional global order oriented to the common good, shared values and human rights entails the dispersal of sovereignty into vertically nested regimes subordinated to an overarching and supreme legal framework informed by cosmopolitan principles. See T. Pogge, 'Cosmopolitanism and Sovereignty' in T. Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002), pp. 168-96; B. Fassbender, 'Sovereignty and Constitutionalism', in N. Walker (ed.) *Sovereignty in Transition* (Oregon: Hart Publishing, 2003), pp. 115-45. From this perspective of the international community of individuals and its global law, states are no more than the instruments whose inherent function is to serve the interests of their citizens as legally expressed in human rights. Sovereignty is nothing more than the sum of competences and rights distributed by the global legal (constitutional) order to states. On the other side there has been a revival of classical sovereigntist discourse among primarily American thinkers including J. Rabkin, *Why Sovereignty Matters* (the American Enterprise Institute Press, 1998); J. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (University of Chicago Press, 2005); E. Posner and J. Goldsmith, *The Limits of International Law* (Oxford University Press, 2005. See also P. J. Spiro, 'The New Sovereigntists: American Exceptionalism and its False Prophets', *Foreign Affairs,* 79/9, 2000. These sovereignty theorists trot out the old 'realist' canard that questions whether international law is really law, i.e. whether it has any normative pull, beyond what domestic legal norms or policy considerations require. The strong sovereigntist approach construes international law and global governance neither as a check on state action nor as autonomous of state interest and consent. For them there is thus no novel legitimacy problematic raised by new forms of global governance and global law. The question of hierarchy and supremacy is solved – it rests with the sovereign state.

pluralism for ordering the relations among the relevant legal and political entities can come into view.[21]

I am aware of the debates over the viability of extending the concepts of constitution/constitutionalism beyond the state. I thus begin with an analytic of these concepts. I then address the ways in which the discourse of constitutionalism has been applied, in-appropriately in my view, to the UN Charter system. I will argue that partly due to its assumption of novel global governance functions in the war on terror, the latter, is beset with legitimacy problems generated by a set of innovative resolutions associated with global security law that directly sanction individuals and involve legislative initiatives of a new type. I shall then turn to an analysis of the high profile Kadi case, the most important challenge to anti-constitutionalist effects of global security law and the new Council activism. My thesis is that the best way to grasp the meaning and potential of the constitutionalist reactions this case is triggering, is not through the old monist/dualist frame or through the constitutionalist/legal pluralist dichotomy but through the lens of constitutional pluralism. I conclude by indicating why constitutionalization of the global political system as a normative and political project is on the agenda today, and why it should be understood in the framework I propose. In short, the reform of global governance institutions in a constitutionalist direction is crucial for their future legitimacy. Unlike most legal theorists who approach the issue, unsurprisingly from a legalistic perspective (constitutionalization as involving norms identified through inference as higher law, constitutionalization as a subject-less process of legal self- reflection, constitutionalization as a matter of legal reason, not political will and as the work of adjudicating bodies oriented to the protection of 'fundamental' rights, constitutionalization as teleology and as facilitating administrative problem-solving) I will understand constitutionalism and constitutionalization in legal *and* political-theoretical terms: as involving the regulation of power by law but also a process of political self-determination.[22] The issue of constitutional reform accordingly pertains not only to legal issues (constitutions as higher law, constitutionalization as limitation) but also to issues of political form.

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[21] The concept of constitutional pluralism emerged in reference to the EU context. See N. Walker, 'The Idea of Constitutional Pluralism', *Modern Law Review*, 65/3, 2002, pp. 317-59; M. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N. Walker (ed.) *Sovereignty in Transition* (Oxford: Hart Publishing, 2003); N. Walker, 'Late Sovereignty in the European Union', in ibid.; J. Weiler, 'On the Power of the Word; Europe's Constitutional Iconography', *International Journal of Constitutional Law*, 3/2-3, 2005, pp. 173-90. For an overview and critique of the constitutional pluralist approach see J. B. Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement', EUI Working Papers Robert Schuman Centre for Advanced Studies (RSCAS), 13/07, pp. 18-26.

[22] For critiques of this legalistic approach to constitutionalization as fostering administrative rationality see M. Koskenniemi, 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law'. A. Somek, 'Constitutionalization and the Common Good' *International Journal of Constitutional Law*, forthcoming. See also R. Hawse and K. Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?', *Governance: An Internal Journal of Policy, Administration and Institutions*, 16/1, 2003, pp. 73-94, for a critique of the premature and ideological uses of the discourse of constitutionalism in the area of trade law. See Cohen, *supra,* note 3, for a similar critique of 'symbolic constitutionalism' regarding the global political system.

Constitution/constitutionalism

Transformations in the international system, especially the increase in juridification, the expansion of human rights law and discourses, and the emergence of global governance have triggered the revival of the discourse of constitutionalism and debates about its relevance to non state orders.

The concepts of constitution and constitutionalism are of course various and contested. Both have, since the modern period, been associated with the state but there is no reason to automatically restrict either concept to that framework.[23] Nor is it all that difficult to put some order into the multiplicity of meanings. It is important to keep the analytical question of what a constitution is or does distinct from what it should do or what is a good constitution from a normative point of view, although there is inevitable slippage because the concept of constitutional*ism* invariably evokes normative associations. I start with the Kelsenian distinction between the material and formal meanings of the concept, initially developed, to be sure, with reference to the domestic legal order of states.

A constitution in the material sense consists of those rules, procedural or substantive, which regulate the creation of general legal norms, establish organs and delimit their powers.[24] A constitution in the formal sense is a solemn document – a written text that can be changed only through special procedures typically whose purpose is to render the change of these norms more difficult. The formal constitution serves to safeguard the norms determining the organs and procedure of legislation (the core features of the material constitution). Accordingly the enactment, amendment, annulment of constitutional laws is made more difficult than that of ordinary laws.[25] Typically this entails a supermajority – and a procedural mechanism that renders the formal constitution more or less rigid, and accords its rules superior rank (higher law) to the rules made by the organs established or regulated by the constitution. This creates a dualist structure that requires some body or mechanisms able to police the boundaries between the formal and the material constitution, between the modes of change specific to each.

However, as Kelsen points out, a formal constitution is not an essential element of every constitutional order. But normative hierarchy is a core feature of a legal system and in Kelsen's view that hierarchy culminates in the (supremacy) of the constitutional norms

[23] There is already a burgeoning literature on this issue. For an argument against the concept of supra- or transnational constitutionalism based the claim that insofar as constitutionalism and constitution making involves a process of self determination of a people and reference back to a demos or constituent power constitution in whose name it is made and derives legitimacy, see D. Grimm 'Integration by Constitutions', *International Journal of Constitutional Law,* 3/2-3, 2005, pp. 193-208; D. Grimm, ' Does Europe Need a Constitution?', *European Law Journal*, 1995, pp. 282-302; D. Grimm, 'The Constitution in the Process of Denationalization' *Constellations*, 12/4, 2005, pp. 447-63. For a discussion of the complexities of the issue see N. Walker, 'Taking Constitutionalism Beyond the State' *Political Studies*, 56, 2008, pp. 519-43. For the rudiments of another view based on a non-statist conception of federation see C. Schmitt, *Constitutional Theory of the Federation in Constitutional Theory* (Durham: Duke University Press, 2008), pp. 379-409; Forsythe, *supra*, note 18; Beaud, *supra*, note 18.

[24] H. Kelsen, *General Theory of Law and The State* (Harvard University Press: Cambridge, 1945), pp.124-5.

[25] Kelsen, *supra,* note 24.

themselves. The chain of justification of validity and authority lead back to the constitution of the state, the ultimate positive legal 'source' for validity of lower norms in the norm hierarchy.[26]

Thus far we are speaking of the concept of constitution as a blueprint for government. From this perspective, a constitution can be seen as a device for improving governmental effectiveness, an instrument of governance that involves enabling constraints meant to serve as a medium of regulation, facilitate resolution of collective action problems, foster cooperation in matters of common interest and enable rulers to pursue policy ends and/or common purposes. As an instrument of governance, a constitution is to provide security, regularity and reliability, through establishing a unified hierarchical legal system that is calculable and effective. However the concepts, constitution and certainly constitutionalism are also associated today with normative significations. The most minimal normative meaning of 'constitutionalism' denotes the commitment on the part of a political community to be governed by constitutional rules and principles.[27] A step up the ladder of normative meaning is the idea that a constitutional legal order is autonomous, and, to borrow a phrase from the Luhmanians, 'structurally coupled' to the political system so that the exercise of authoritative political power proceeds through the legally determined procedures that secure the autonomy of each domain.[28] As such constitutions delimit and inter-relate the legal and political systems of a polity.

Constitutionalism however is also associated with meanings that enable one to asses the quality of a constitutional order from a normative point of view. The two ideal-typical perspectives in the relevant literature are the 'liberal' and 'democratic/republican' conceptions or what is called somewhat misleadingly: power limiting vs. the power establishing (foundational) constitutionalism. Liberal constitutionalism is accordingly associated with the idea of power limitation through mechanisms such the articulation and protection of fundamental rights among the purposes of the constituted order, and so on. Liberal constitutionalism also involves the more general principle that government is limited and regulated by law (and the idea of the rule of law) and that the exercise of public power under law is for public purposes and the wellbeing of the individuals comprising the community.[29] A shared premise of liberal and democratic constitutionalism is that the addressees of authoritative (state) policy and rules are free

[26] Kelsen assumes that a legal system must be characterized by strict unity and hierarchy in the structure of validity claims—all norms whose validity may be traced back to one and the same basic norm form a legal system. The question why the fundamental constitutional norms are valid leads to the concept of an ultimate norm, whose validity the jurist does not question but must presuppose. This is the famous concept of the 'grundnorm', understood as a transcendental postulate, not a substantive legal principle. It is not necessary to go into this here. For critiques see H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1988), pp. 309-42; J. Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), pp. 122-45.

[27] A. S. Sweet, 'Constitutionalism Legal Pluralism and International Relations', *Indiana Journal of Global Legal Studies*, 16/2, 2009, pp. 626-7.

[28] N. Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), pp. 381-422; G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory', in C. Joerges, I. J. Sand, and G. Teubner (eds) *Transnational Governance and Constitutionalism* (Oxford: Hart Publishers, 2004), pp. 3-28; Teubner, *supra,* note 4, pp. 3-15.

[29] C. Mollers, 'The Politics of Law and the Law of Politics', in E. O. Eriksen, J. E. Fossum and A. J. Menéndez (eds) *Developing a Constitution for Europe* (London: Routledge, 2004), pp. 129-39.

and equal. That is why subjecting public power to the discipline of legal norms – to the form of law which allegedly secures generality and impartiality – is deemed essential to the justification of power among those who conceive of one another as free and equal consociates under law.

Liberal constitutionalism also establishes some of the powers it separates, procedurally regulates, and limits by basic rights and, insofar as it requires a strong state to back it up, it is enabling of effective government. Nevertheless, democratic/republican constitutionalism is seen as comprehensively foundational in a distinctive sense: it involves a project to construct and ground an entirely new system of government, not only to shape or contractually limit a pre-existing one. It crucially does not acknowledge any residues of public power that are not subject to constitutional law or remain outside it. On this model, all governmental powers derive their authority from the constitution which is supreme, and their legitimacy from the constitutive activity of the demos—the 'constituent power' to whom it is imputed.[30] Thus democratic constitutionalism is not a contract between a ruler and the ruled rather it: '[…]defines a horizontal association of citizens by laying down the fundamental rights that free and equal founders mutually grant each other.'[31] On the democratic model, the adoption of a constitution involves action or a series of acts ascribable to those free and equal persons/citizens (or their representatives) who will be regulated by the constitution.[32] This is the democratic idea of the self-determination by a political community of its political, legal and constitutional forms. Constitutionalism is seen as facilitating the exercise of collective self-legislation insofar as it provides the procedures needed to indentify the popular sovereign (the demos as electorate), for selecting its representatives, and for determining its will on a coherent basis. Constitutionalism accordingly involves not only legal reflexivity (the law of lawmaking) but also democratic political reflexivity: the political process/procedures of constitution-making also involve the political process/procedures through which the demos can alter even the highest laws (through conventions or amendment rules) and has the final say, i.e. is seen as the ultimate source and locus of that law.

Taken together liberal democratic constitutionalism as a normative construct entails the ideal of limited collective self-government under law: constitutionalism is central to the legitimate exercise of public power and constitutionalized public power, if it is to be democratic, must in some sense be ascribable to a demos or demoi (in the case of a federation) whose welfare, interests, opinions and will it enables (through the institutionalization of political rights, civil and decisional and public spheres), somehow registers, is responsible and accountable to.

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[30] See Mollers, *supra,* note 29. Modern republican and democratic constitutionalism invoke popular sovereignty and impute the constitution to the people or demos construed as the source of the higher law qualities and of constitutional dualism.

[31] J. Habermas, 'Kant's Idea of Perpetual Peace', in C. Cronin and P. De Grieff (eds) *The Inclusion of the Other* (Cambridge: MIT Press, 1998), at p. 131.

[32] This need not entail a Schmittian conception of constituent power or a dramatic image of a 'big bang' revolutionary founding. For a nuanced analysis of democratic constitution making that avoids the mythologizing of a constituent power construed as a macro subject, see A. Arato, 'Post Sovereign Constitution Making and its Pathology in Iraq', *New York Law School Law Review*, 51/535, 2006-07, pp. 535-55.

The constitutional quality of the UN charter system: global constitutional moments?

Since the end of the cold war, constitutional discourse regarding public international law and the UN Charter system has proliferated. Influential analysts have interpreted key changes in the international system since 1945 as 'constitutional moments'.[33] Accordingly, the erection and subsequent development of the UN Charter system amounts to the construction of an autonomous, supreme, increasingly integrated global legal order of constitutional quality that has profoundly modified state sovereignty.[34] The changes in the positive rules of international law this entailed are well known: the most important being the principle of collective security eliminating the *jus belli* except for self-defense – an unprecedented attempt to regulate the use of force through law. The legal principles of sovereign equality, territorial integrity, and self-determination and international human rights were enunciated, codified and universalized.[35] Since the dismantling of colonialism, wars of annexation became illegal, political autonomy and territorial integrity of borders was ascribed to all states. The purposes articulated in the Charter also include protecting fundamental human rights.

The concern for human rights enunciated in the Charter and in the Universal Declaration was codified in important subsequent international Covenants.[36] Genocide, ethnic cleansing and enslavement are not considered to be within the domestic jurisdiction of any state and no treaty will be deemed valid that involves an agreement to engage or tolerate such action. These norms now have what is called *jus cogens* status.[37] Since 1989, it is deemed the responsibility of the sovereign state to protect its civilian population against grave rights violations and in case of default, this responsibility (R2P) devolves on the international community.[38] Some have referred to this expectation as a second

[33] A.-M. Slaughter and W. Burke-White, 'An International Constitutional Moment', *Harvard International Law Journal,* 43/1, 2002. For a critique see A. Fischer-Lescano, 'Redefining Sovereignty via International Constitutional Moments?', in M. E. O'Connell, M. Bothe and N. Ronzitti (eds) *Redefining Sovereignty: The Use of Force after the End of the old War. New Options, Lawful and Legitimate?* (Ardsley: Transnational Publishers, 2005).

[34] B. Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law,* 36/579, 1998; B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (Boston: Martinus Nijhoff Publishers, 2009).

[35] UN Charter Article 2(1) on Human Rights. See the Preamble and Article 1(2).

[36] These include, among others, UDHR (The Universal Declaration of Human Rights), adopted 1948; ICCPR (International Covenant on Civil and Political Rights) entered into force 1976; ICESCR (International Covenant on Economic, Social and Cultural Rights), entered into force 1976; CERD (Convention on the Elimination of All Forms of Racial Discrimination), entered into force 1969; CEDAW (Convention on the Elimination fo all Forms of Discrimination against Women), entered into force 1981; CAT (Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment), entered into force 1987. For an interesting analysis see C. R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009).

[37] VCLT (Vienna Convention on the Law of Treaties), done at Vienna 23 March 1969, entered into force 17 January 1980 (United Nations Treaty Series vol. 1155, p. 331); D. Shelton, 'Normative Hierarchy in International Law', *The American Journal of International Law*, 100/2, 2006, pp. 291-323.

[38] See 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (Ottawa: International Development Research Centre, 2001). Available at: <http://www.iciss.ca/pdf/Commission-Report.pdf> . See also the report of the Secretary General's High

'constitutional moment' involving the emergence of a new basic norm in the international system, described as a principle of civilian inviolability.[39] Finally the elevation of 'human' as distinct from state security to a central concern of the international community newly expressed by the Security Council via its practices of humanitarian intervention and transformative 'humanitarian occupation' in the name of human rights, and its recent assumption of the power to sanction individuals and to legislate for the rest of the United Nations membership with respect to transnational terrorism indicates to some that a third international constitutional moment has occurred.[40]

These developments gave the idea of the progressive individualization and constitutionalization of international law a foothold in theoretical discussions.

The global constitutionalists share three key assumptions, the differences among (UN-) centered and decentered versions notwithstanding. The first is that the autonomy and constitutional quality of the global legal system spells the end of sovereignty. On one prominent interpretation the principle of sovereign equality enunciated in the Charter is that it is not a principle of sovereignty at all.[41] The grammatical shift from noun to adjective in the term that appears in the Charter, 'sovereign equality' expresses this.[42] Instead of being the supreme power of a state, existing apart from and prior to international law, or as indicative of the self-referential autonomy and supremacy of the domestic constitutional legal order, 'sovereignty' is now seen as a set of rights and a legal status ascribed, conditionally by positive public international law to states. In other words, '[…] sovereignty is a collective or umbrella term denoting the rights which at a given time a state is accorded by international law and the duties imposed upon it by that same law. These specific rights and duties constitute "sovereignty"; they do not flow from it.'[43]

The second shared assumption is that an international community of states and individuals now exists, although the global constitutionalists differ as to its institutional structure. According to the version centering the global constitution in the UN Charter system, the new principle of sovereign equality, articulated in Article 2.1 of the Charter, along with the principle of equal rights and self determination of peoples (Article 1.2) respect for human rights (Article 1.3 and the preamble) together with the aim that the UN be a centre for harmonizing the actions of nations to attain these common ends, all entail and help constitute 'community oriented' content rather than national (state) self-interest:

Level Panel on Threats, Challenges and Change: 'A More Secure World: Our Shared Responsibility' (New York, United Nations, 2004). Available at:< http://www.un.org/secureworld>.

[39] Slaughter and Burke-White, *supra*, note 33.

[40] G. Fox, *Humanitarian Occupation* (Cambridge: Cambridge University Press, 2008); S. Talmon, 'The Security Council as World Legislature' *The American Journal of International Law,* 99/1, 2005, pp. 175-93 and P. Szasz 'The Security Council Starts Legislating' *The American Journal of International Law*, 96/4, 2002, pp. 901-5, both of whom are enthusiasts of this development.

[41] Fassbender, *supra,* note 20, pp. 115-45.

[42] Ibid., pp. 134-41; UN Charter Article 2(1).

[43] Ibid., at p. 212. See also P. Macklem, 'Humanitarian Intervention and the Distribution of Sovereignty in International Law', *Ethics and International Affairs,* 22/4, 2008, pp. 369-93.

hence, the shift from the concept of 'international society' to 'international community'.[44] The international (global) legal and political community is committed to 'human kind' as a whole with its own (common) purposes enforceable against recalcitrant states.[45] It is equipped with its own organs: it can articulate and enforce community law through 'supranational' majoritarian voting rules that applies even to non-members.[46] The Charter also provides the global community's supreme enforcement organ: the Security Council. According to one noted analyst, there is thus now a hierarchy of rules and sources of global international law: those with constitutional quality enjoy the highest rank.[47] On this reading, the Charter is not only supreme over international treaty law and domestic constitutional law, as per article 103, it also 'incorporates' prior customary international law and 'world order treaties' like the two human rights covenants and the genocide convention, deemed 'constitutional by-laws' of the international community.[48] In short, the centered constitutional reading '[…] dissolves the dualism of 'general international law' and the law of the Charter […]'[49] The UN Charter system, and the associated jus cogens rules, is construed as the pinnacle – the highest layer in a hierarchy of legal norms, of a global monist constitutional legal order of constitutional quality.[50]

On the decentered reading normative hierarchy also obtains as does the unity, universality, and supremacy of the global constitutional legal order and the existence of global remedies (courts both supra national and domestic acting to enforce global law).[51] Indeed, the third common assumption of the global constitutionalists is *monism*. Accordingly for a legal order to be autonomous and of constitutional quality, it is not enough that it be supreme. The subordinate legal orders must belong to the same legal system: supremacy and hierarchy require unity. Thus states (their courts, executives and

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[44] Fassbender, *supra,* note 20, pp. 116-40.

[45] Fassbender, *supra,* note 20, at p. 130; Weiler, *supra*, note 15, pp. 556-7 on 'common assets' as the hall mark of the conception of International Community, including material assets such as the deep bed of the high seas, functional assets as per collective security and spiritual assets as per internationally defined human rights or ecological norms. The point is that states may not assert their exclusive sovereignty over any of the above. Nor can of these common assets be accounted for in contractarian terms: they require stipulation of a community whose purposes and values may be distinct from those of any one of its members.

[46] M. W. Doyle, 'The UN Charter – a Global Constitution?' in J. L. Dunoff and J. P. Trachtman (eds) *Ruling the World. Constitutionalism, International Law and Global Governance* (Cambridge: Cambridge University Press, 2009), pp. 113-15 on supranationality as the key element distinguishing a constitution from an ordinary treaty. Budgets can be adopted by a 2/3 vote, the United Nations Security Council (UNSC) under chapter 7 can take action with 9 out of 15 votes with no veto by the P5 and its rulings bind all states, even non-members. Doyle acknowledges what he calls sovereign pushback by states and does not construe all international law as subject to the UN or the Charter as the highest legal source of all international law. The Charter thus does not constitute a unified system of international law from which all others derive their validity and by which they are controlled, nor is its 'constitution' pervasive.

[47] Fassbender, *supra*, note 6, at p. 103.

[48] Article 103 of the Charter states that in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

[49] Fassbender, *supra,* note 20, at p. 135 and pp. 118-19. Fassbender argues that there is no room for a category of 'general international law' existing independently the Charter. Instead the Charter is the supporting frame for all international law and at the same time the hightest layer in a hierarchy of norms of international law.

[50] Fassbender, *supra*, note 6, at pp. 585, 283.

[51] Fischer-Lescano, *supra,* note 4.

even legislatures) are construed as organs of the politically constituted world society and its constitutionalized legal system. This legal order grants them a wide range of autonomy although the intrusions on domestic jurisdiction are not trivial. The point is that on this reading their legal domestic systems ultimately have their condition of validity not in themselves but in the higher, supreme, autonomous international legal order.

If we focus on the Charter-centered version, the thesis seems to invoke all of the meanings of constitution and constitutionalism described above.[52] Strictly speaking, the rules of the international community bind states as members of a legal order whose validity inheres in the Charter itself. The supreme international constitutional order decides the competence and jurisdiction of domestic legal orders. Unlike the earlier League of Nations, there is no provision for exit from the UN and every state (member or not) is subject especially to the binding resolutions of the Security Council as 'higher law' trumping other treaty obligations and domestic law.[53]

Despite the fact that the UN Charter was established as an international treaty by the diplomatic representatives of the governments of the relevant states – the only legal method available under the conditions in 1945 – the reference in the preamble to 'we the peoples of the United Nations', together with the super-majoritarian amendment rule (as distinct from unanimity typical of a treaty) is taken to indicate that it was established on behalf of and by the peoples of the United Nations through their representatives.[54] In other words, the Charter as a constitution (process) has to be understood in the foundational legislative sense and ascribed to the peoples (demoi) of the member states of the UN as the respective constituent power(s).[55] As a material constitution, the Charter clearly involves a set of substantive norms, purposes, and procedures that establish organs and articulate their powers, including primary and secondary rules. As a formal constitution, the Charter is a written document that may be changed only via the stipulated amendment procedure requiring a 2/3 majority of the members of the General Assembly including all the P5 members of the SC (ratified in accordance with respective domestic constitutional processes).[56] The super-majority requirement for amendment establishes its formal character, its relative rigidity, and its superior rank vis-à-vis the rules its organs make. By implication the constituent units (states) are legally subordinated to their new creation: its rules apply to them irrespective of their continuing individual consent. This, again, is the meaning of an autonomous legal order of constitutional quality.

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[52] The decentered version especially the Luhmannian one dispenses with legislation and the foundationalist element for the concept of constitution. See Luhmann, *supra*, note 28.

[53] Article 2(6) of the Charter. One cannot opt out, or make reservations to decisions made by the Security Council even if a state voted against them. Majority decisions bind the minority. Thus there is a shift from self-binding state-based consent to general legislative procedures in this form of international law-making. But this does not mean that such decision-making is democratic. See Cohen, *supra*, note 8, for an analysis.

[54] Fassbender, *supra,* note 6, pp. 269-90.

[55] Ibid.

[56] UN Charter Chapter XVIII, Article 108.

The risks of symbolic constitutionalism: legitimation problems

The Charter-centered version of the global constitutionalist approach is clearly both anachronistic and overdrawn.[57] Not only does it fly in the face of the self-understanding of the states (as sovereign), it also oversimplifies and misreads the dualistic structure of the UN Charter (a constitutional treaty), the hybrid nature UN Charter system, and the complex geology of the international/global political system. Challenging this reading would be a merely academic exercise, were it not for a spate of relatively recent resolutions of a newly active (and active in new ways) Security Council that make reflection on the nature and status of the legal order articulated in the UN Charter system, of particular importance today. I have in mind the resolutions passed in the context of the war on terror creating what amounts to a new global security regime.[58] These resolutions entail the direct impact of harsh rights-violating sanctions on individuals and legislative commands distinct from crisis management 'measures' addressed to states: two important innovations that raise serious legitimacy questions.

Even those who insist on its constitutional status grant that the constitutionalist dimensions of the Charter are rudimentary in at least three respects. First, there is no organ (court) within the Charter system able to police the formal constitution or enforce the material one. Nor is there an adequate internal separation of powers or set of checks and balances: there exists no compulsory dispute settlement system, and no mechanism to establish the accountability of any organs, including, most dramatically the SC (despite the fact that the latter issues binding resolutions). No court has the jurisdiction to assess or ensure that the global powers established in the UN Charter system do not act in ways that are ultra vires regarding the purposes, and competences established in the Charter. Nor is there a Court of Human rights with compulsory jurisdiction able to protect the basic cosmopolitan values of the Charter system. Even though the sovereign equality of states is listed as one its core principles, what the Charter actually established internally is a legalized hierarchy that privileges the five great powers – the victors and/or allies in WWII.

The greatest impediment to the constitutionalist reading is its deficiencies with respect to even the most minimal normative dimension. Constitutionalism as already indicated means at the very least that the powers and governing organs established in a constitutionalized legal order are regulated and limited by it. There can be no space for holders of authoritative public power constituted by a constitutionalist order to somehow still stand outside it.

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[57] For a critique of the decentered version see Cohen, *supra,* note 3 and Koskenniemi, *supra*, note 22. For a critique of anachronistic backward projections of understandings of the UN Charter and an informed historical analysis of how expressions like 'we the peoples' got into the preamble, see M. Mazower, *No Enchanted Place* (Princeton: Princeton University Press, 2009).

[58] UNSC Resolution 1267 in 1999 (concerning the Taliban); UNSC Resolution 1333 in 2000 (concerning Osama Bin Laden and Al Qaida); UNSC Resolution 1373 on September 28 2001 (in the aftermath of 9/11); UNSC Resolution 1540 (2004). Follow up resolutions include UNSC Resolution 1390 (2002), UNSC Resoltution 1483, and UNSC Resolution 1452. See Scheppele, *supra*, note 8.

It is in this regard that the constitutionalist nature of the Charter falls short, for the permanent members of the Security Council are absolute in the old fashioned sense thanks to the peculiar hybrid structure of the UN established by virtue of the veto in the Council and in the Amendment rule. As is well known, the veto in the Security Council means that the latter cannot act against the P5 – it cannot enforce its rules or impose its decisions on any of them. As I argued at length elsewhere, what the new forms of Council activism have made evident since 1989, however, is that the veto in the amendment rule places the P5 in a structurally different relationship to the UN than the all of the other members.[59] While the veto in the first instance serves as a negative check, to block alterations to the Charter or Council decisions undesired by the P5, in the second instance, it also has an enabling function, it allows the Council to informally amend the Charter (provided they get the requisite votes) and to block any constitutionalist response within the system. It is not just that the veto blocks needed reforms unwanted by any of the P5. Whatever decisions, new rules, expansive interpretation of Council powers the P5 manages to push through the Council cannot be undone via amendment, because any permanent member can veto the corrective. As indicated there is no court ascribed the legal competence to decide the competence of UN organs, or to police the distinction between the two tracks established by the formal constitution: i.e. between ordinary rule and decision making and constitutional change. This means that for the P5, the Charter remains a treaty, the UN an ordinary treaty organization: these five states remain the principals not subject to their agent's control without their consent. For all other states, the UN functions like a binding constitutionalized supranational global governance institution (somewhat akin to an asymmetrical federation) whose legal order and majoritarian decision making procedures and amendment rules binds them.

One can hardly call such a structure constitutionalist in the democratic foundationalist sense because despite the rhetoric of the preamble, the peoples regulated by the UN Charter had no say in its construction and have no role in the law making its organs engage in. I discuss below the loss of output legitimacy with respect to terror listing practices and the constitutionalist counter-reactions on the part of the EU and other actors. This loss is the tip of the iceberg of the legitimacy problematic, for the deeper issue is the absence of input or process (democratic) legitimacy, once the organs of this organization engage in global governance, undertake legislative initiatives and pass resolutions directly and adversely impacting individuals and their rights, all the while claiming a supremacy parasitic on a constitutionalist reading of the Charter. In short, the new forms global governance and constitutionalist discourse (higher law, supremacy) both invite the charge of liberal and democratic legitimacy deficits.

While the UN has always had this hybrid structure, it is the unprecedented use of its powers by the Council since the 1990s that creates the new legitimacy problematic. The resolutions referred to above have brought this problem home to an increasing range of commentators and scholars. Here I shall be brief. Resolutions 1267 passed in 1999, 1373 adopted 9/28/2001, and 1540 adopted in 2004, among others, involved the erection of an innovative 'smart' sanction regime directly targeting alleged individual terrorists, the creation of monitoring committees to ensure state compliance, and the imposition of far

[59] Cohen, *supra*, note 8.

reaching general obligations for states to prevent and combat terrorism, and to change their domestic laws to criminalize it with harsh penalties attached.[60] The first resolution established the now infamous 1267 Committee, a subsidiary organ of the Council, to monitor state compliance with Council imposed sanctions and to maintain a list of individuals and entities deemed to be involved in terrorism. Those placed on the list by state executives are to have their assets frozen and their movement restricted regardless of the fact that they have been convicted of no crime, regardless of the lack of an accepted definition of terrorism, and regardless of the absence of due process mechanisms for those listed. The latter have no right to a fair hearing, there is no procedure for a formal appeal or review mechanism, no means for a Court to evaluate the evidentiary basis on which a person or entity has been placed on the list. The executive of any state can place a person or organization on the list with no evidentiary guidelines and very few requirements for the submitting state and delisting is a very onerous process.[61]

What is important to note is that this is the underside of the 'individualization' of international law celebrated by human rights activists and cosmopolitans. Here, however the direct link between public international (or, global) law and the individual undermines instead of securing their basic constitutional and/or human rights. In these cases, the overriding legal obligations of the international system are invoked to strengthen, not to limit executive discretion, in ways that eviscerate domestic democratic and constitutionalist controls.[62] Indeed executives of national governments work thought the Counter-Terrorism Committee (CTC established under resolution 1373) under the aegis of Chapter VII to limit judicial review by national courts and to deprive individuals of national judicial protection, exposing them, unprotected by a legal persona, to the full force of the global security system.[63] Unlike the past strategies of democratic constitutionalists in countries transitioning to democracy or creating supranational legal regimes (the EU) that sought to 'lock in' international (human rights) law in their constitutions or to condition membership on democratic constitutionalism (the EU) to doubly ensure against executive depredations and dictatorship, this version of the upward drift of political authority or 'governance' to international institutions has the effect of undermining executive accountability on two levels: domestic and international, with serious detrimental effects on constitutionalism and democracy everywhere.[64]

The second and third resolutions are innovative in another respect: they entail a shift in Security Council action from enforcement measures in specific crises to universal

[60] Resolutions 1373 and 1540 also called for criminalizing the acquisition or transfer of WMDs to non state actors and to sanction organizations providing funding to terrorists.

[61] In 2006 the Council responded to criticism about the lack of individual access see UNSC Resolution 1730 of 19 December 2006. The Secretary General established a 'focal point' within the Secretariat to receive de-listing petitions directly from individuals. But it is generally acknowledged that individuals still cannot participate directly either in person or via a representative in the deliberation surrounding a de-listing request. Ultimately de-listing is deemed a diplomatic matter.

[62] Scheppele, *supra*, note 8, pp. 347-73.

[63] E. Benvenisti and G. W. Downs, 'National Courts, Domestic Democracy and the Evolution of International Law' *European Journal of International Law*, 20/1, 2009, pp. 59-72, at p. 70.

[64] A. Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization*, 54/2, 2000, pp. 217-52.

legislation insofar as the requirements they impose on states to make laws or alter their existing laws are open-ended and meant to be permanent.[65] These requirements are unrelated to any specific crisis or dispute. Instead of having the status of specific commands or 'measures', they establish binding general rules of international law.[66] If we define legislation as the enactment of abstract norms directly binding on all members states and which regulate their rights and obligations on general issues with long term effects, it is clear as many have argued that the Council has started legislating.[67] However, some of us question whether the Council's authority to make binding decisions and order measures necessary for resolving a crisis amounts to a constitutional right to legislate for the world. The Council is not a representative body and was not designed for that purpose.

I have argued elsewhere that this self-arrogation of legislative competence amounts to 'usurpation' of the constituent power of the member states insofar as the formal amendment rule has not been resorted to in this substantial expansion of Council competence.[68] Perhaps that is too strong. Maybe one can make the case that according to the Vienna Convention on the Law of Treaties (VCLT) the Council does technically have the competence to interpret its own competence regarding the necessary measures to accomplish its purpose (international peace and security) under the constitutional-treaty (the Charter) that established it. Perhaps legislation is such a 'measure'. In that case, at the very least one must conclude that the design of the Charter as a constitutional treaty is deeply flawed, and utterly deficient from a constitutionalist perspective.[69]

As the recent ground-breaking Kadi and Al Barakaat ruling by the ECJ indicates, there are serious legitimacy problems raised by the new global governance functions adopted by the Council.[70] It is indisputable that Article 24 of Chapter V of the UN Charter states that the Security Council has primary responsibility for maintaining international peace and security, and that in discharging these duties it shall act in accordance with the purposes and principles of the United Nations, among which, as clearly stated in Chapter 1 Article 1, are respect for human rights. Indeed the executive-strengthening (domestic and international), constitutionalism-eviscerating and rights-violating effects of the new global security law, is beginning to trigger a constitutionalist reaction by Courts, a

[65] Under Article 39 of Chapter VII of the Charter, the security council is given the competence to decide what 'measures' shall be taken to maintain or restore international peace and security pursuant to articles 41 and 42. It could be argued that 'measures' means discretionary executive enforcement actions and not, as I believe, legislation

[66] The UN Charter provides for the SC to use whatever measures it deems necessary.

[67] P. C. Szasz, 'The Security Council Starts Legislating', *The American Journal of International Law*, 96/4, 2002, pp. 901-5; S. Talmon, 'The Security Council as World Legislature', in *International Journal of Constitutional Law*, 99, 2005, pp. 175-93 and A. Marschik, 'Legislative Powers of the Security Council' in R. Macdonald and D. Johnston (eds) *Towards World Constitutionalism* (Leiden: Brill, 2005); pp. 431-92.

[68] Cohen, *supra*, note 8, pp. 464-66.

[69] I am unconvinced that one can blur the meaning of 'measure' and 'law making' i.e. classic executive versus legislative functions and the Charter provides only for measures under Chapter VII.

[70] European Court of Justice, Joined Cases C-402/05 P and C-415/05P 2008. Case T-315/01 *Kadi v. Council and Commission* (2005) ECR II-36649 (Kadi CFI) and Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* (2005) ECR II-3353 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and commission of the European Communities*, September 2008.

salutary development.[71] In the process serious reflection is being given to the relation between international, regional and domestic legal/political orders, and the conditions under which it is appropriate to defer to the alleged supremacy of the first two, when individual rights and legislative autonomy and domestic constitutionalism are at stake.

The Kadi case and the conundrum of global governance

The Kadi case reveals in striking terms the legal and political dilemmas posed by the new forms of global governance. The case addressed the listing of Yassin Kadi, a Saudi national, as a terrorist by the special sanctions committee established by the Security Council in Resolution 1267 adopted under Chapter VII.[72] At issue was the EU's compliance with the resolution by freezing his assets within the Community. Since the EU acts for member states in this area of foreign policy, even though neither it nor the EC is a party to the Charter, it passed the relevant implementing regulations.[73] The EU Council and Commission argued they had no choice but to implement binding Chapter VII resolutions without alteration and without review. Kadi sued, maintaining he was wrongly identified and absent any way to legally challenge the listing under international law, that that his rights to a fair hearing, to judicial remedy and to property, enshrined in the European Community's legal order were violated by the Community's implementing regulation.

The case thus involved a confrontation between the legal orders of the EU, its member states, and international law. The efficacy of highest norms in the international legal system was at issue: Article 103 of the UN Charter that asserts its supremacy over all other treaties or obligations of states, and the binding status of Chapter VII resolutions.[74]

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[71] For other challenges see E. De Wet, 'Distilling Principles of Judicial Protection From Judicial and Quasi Judicial Decisions', paper presented at the expert workshop on 'Due Process Aspects in the Implementation of Targeted United Nations Security Council Sanctions', organised by the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame, New York, 30 October 2009, pp. 4-6. Report to the Sanctions and Security Research Program Fourth Freedom forum and the Kroc Institute for International Peace Studies recent summary of cases subsequent to *Kadi*. The Security Council passed a resolution on 17 December 2009 under pressure brought by more than 30 court challenges since Kadi, in Europe, Pakistan, the U.S., Canada and Turkey. The resolution provides for the creation of an ombudsperson to hear complaints from those who believe they have been singled out erroneously but it does not empower the ombudsman to recommend whether a name should remain on the list or not. Thus individuals now have a right to raise questions though it remains to be seen whether judges will accept the ombudsman as a sufficient redress given that the office is not a legal process. *New York Times*, 18 December 2009, p. A10.

[72] Case T-315/01 , *Kadi v. Council of European Union*, 2005 ECR II-3649, 21 September 2005. This was linked to another case which involved was the freezing of the assets of Al Barakaat Foundation, a Somali charity registered in Sweden, designated as an organization providing financial support to Al-Qaeda and the Taliban (the 1267 Committee).

[73] EC regulation 467/00 and later 881/02 which replaced it. The EC/EU is not bound directly by the Charter under international law but it is under EC law (*Kadi*, pars 193 and 207). The Council of the European Union acting under the common Foreign and Security Policy provisions of the EU treaty adopted a series of common positions calling for EC measures to freeze the assets of those listed by the UN Sanctions Committee. The EC passed a series of regulations including EC regulation 467/00 and later 881/02 which replaced it, freezing the assets of the listed individuals and groups throughout the territory of the EU. This included Kadi and Al Barakaat, a Swedish organization connected to a Somali financial network.

[74] See the discussion in De Burca, *supra,* note 9.

The conundrum is the following: states presume they are legally compelled to implement Chapter VII resolutions without alteration or review. They can thus disclaim responsibility for and deny the reviewability of their own implementing measures. But the measures at issue directly affect individuals and impinge on their basic rights. As commentators have pointed out, the result is a vacuum of legal responsibility and an utter dearth of accountability mechanisms, since, as already indicated, there's no tribunal within the UN Charter system or international law generally to which affected individuals can appeal. [75] They thus have no redress against arbitrary, biased or politically motivated listing by states' executives via the Council and then domestically. Listed individuals are in potentially placed into a legal black hole.

As is now well known at least in legal circles, two EU courts took up the challenge each reaching opposite conclusions. What is of interest is the conceptual basis for their reasoning as it latches onto the very dichotomy with which I opened this paper: monist constitutionalism vs. legal pluralism (construed as a contemporary version of dualism). In my view, commentators have (mis-)read and either defended or criticized these decisions on similar grounds. I'll summarize, offer a different kind of reasoning and point to a way to resolve to the legitimation problems highlighted by the case, from the perspective of constitutional pluralism.

The cosmopolitan constitutionalist analysis of the CFI
The primacy of globalizing public international law

The first court to hear Kadi's case was the Court of First Instance of the European Communities (CFI).[76] Citing Article 103, it argued that the obligations of member states under the U.N. Charter prevail over other obligations of domestic or international law, including those under the EC treaties and the European Convention on Human Rights.[77] It found that it had no authority to review the contested Council regulation, or to indirectly review Security Council resolutions to assess their conformity with fundamental rights as protected by the Community legal order.[78]

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[75] While specific individuals are directly affected by SC resolutions, insofar as the domestic or EU implementing resolutions are deemed obligatory there is not the complement of direct effect that exists in domestic or in the EU constitutional legal order for the sanctioned individuals do not have the right to sue in an international court to challenge their listing nor do they have the right to sue in a domestic court for the enforcement of international human rights law and thus to obtain due process in such cases. Thus apart from suing in a domestic (or EU regional) Court no other comparable legal remedy is available.

[76] Case brought in 2001, Case T-315/01, *Kadi v. Council of European Union*, 2005 ECR II-3649 (21 September 2005).

[77] CFI par. 159, Article 103 of the UN Charter states: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' This extends to binding SC decisions.

[78] The court states: 'It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations'. Ibid. par. 218-25, see also par. 178, and 184. The CFI argued that it is indirectly bound by the obligations of member states under the UN Charter pars 192-204. The court assumed that the EC had no margin of appreciation when implementing UNSC resolutions and

The Court then went on to assert its jurisdiction to assess the lawfulness of SC resolutions with regard to *jus cogens* – a body of higher rules of public international law binding, so it claimed, on all subjects including the bodies of the UN.[79] It made what seems like a classic Marbury move in exercising this review, asserting its jurisdiction to do so (indirectly reviewing he Security Council itself) but determining that no jus cogens rights were violated in this case.[80]

According to one commentator, the judgment represents a picture of a regional organization at once faithful and subordinate to yet simultaneously constituting itself as an independent check upon the powers exercised in the name of the international community under the UN Charter.[81] Accordingly, the assertion of jus cogens was intended to demonstrate deference to the international legal order and subordination of EU treaty law to the higher law of that order to which it belongs. In short, the Court positioned itself as an organ of the international legal system under a single global hierarchy of public international law.

This 'dedoublement fonctionelle' of the Court as an organ both of the European legal order *and* of the globalized international legal order, was a striking move.[82] It treats the legal order coupled to the global political system as if it already constituted a unified, monist and hierarchical system with higher norms of constitutional quality, binding all other domestic legal orders or treaty organizations, deemed to be integrated parts of that order.[83] In this respect it indirectly confronts the innovation at issue in Security Council's step into a legislative role and the concomitant direct impact of its legislative resolutions on individuals and states (insofar as implementation is obligatory) and places itself on the same constitutional plane.[84] I see the 'Marbury' move is a classic exercise in 'political justice' – an attempt via adjudication to foster the further integration/constitutionalization of the international legal order, and to assert its own power within such a

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indeed that the EC must enable its member states in exercising its own competences, to fulfill their international obligations.

[79] CFI par. 226. *Jus cogens* norms are norms based on consensus, not state consent. Treaties violating them are considered null and void. For a discussion, see D. Shelton, 'Normative Hierarchy in the International Law', *The American Journal of International Law*, 100/2, 2006, pp. 291-323.

[80] *Marbury v. Madison* 5 U.S. 137 (1803) in which the US Supreme Court ascribed to itself the competence of judicial review while not overturning the contested redulation at issue. In pars 261-68, 274 and 285-90 the Court argued that insofar as the rights to property, a fair hearing and to a judicial remedy were not arbitrarily abrogated and involved limits in a time of public emergency or in the context of state immunity the sanctions were compatible with jus cogens norms.

[81] De Burca, *supra,* note 9.

[82] G. Scelle, 'Le Phenomene juridique du dedoublement fonctionnel' in W. Schatzel and H.-J. Schlochauer (ed.) *Rechtsfragen der internationalen organisation – Festschrift fur Hans Wehberg zu Seinem 70* (Frankfurt am Main: Vittorio Klostermann, 1956), at p. 331. See also Georges Scelle, 'Le Droit constitutionnel international' in *Melanges r. Carre de Malberg* (Paris: Sirey, 1933), pp. 503-15.

[83] The CFI at pars 195-6 noted that member states cannot circumvent their international legal obligations by creating another treaty organization such as the EC to do what they are not permitted to do and that this is expressly recognized in the Treaty itself.

[84] The court thus acts as a court of the global constitutional legal order ascribing supremacy, unity and constitutional quality to that order and reviewing legislation and commands by the SC for compatibility with the global constitution which regulates it.

system.[85] At the same time, the Court appeared to be a good citizen of the international legal system.

One problem with this move, apart from the fact that it gave no relief to Kadi, is that if other courts followed this reasoning they would reduce domestic (or in the case of the EU, regional) constitutional protections vis-à-vis global governance along with the constitutional standards for global governance institutions to a minimum, for very few international norms have or are likely to attain a jus cogens status. The Court designated the right to a fair hearing, to judicial process and to property as *jus cogens* norms but denied that they had been arbitrarily violated in this case, given the humanitarian exceptions, and the security considerations at issue.[86] Thus this rather generous reading of jus cogens rights was complemented by a stingy application. Given debates over which norms have the status of jus cogens – and hence can be deemed non-derogable higher norms of the system – and given the fact that no Court can simply decide this on its own, not to mention doubts as to whether the SC is subject even 'indirectly' to review although many agree that it must comply with peremptory norms of international law, this was a startling and much criticized move.[87]

There are two additional problems (conceptual and normative) with this approach to the relations among legal orders. First, the Court reasoned from a standpoint of a systemic (UN centered) hierarchical global constitutionalism that does not yet exist, in my opinion. Second, by treating the European Union as an ordinary international treaty organization, subordinate to and fully permeable by the higher norms and rules of public international law, it ignored and even tended to undermine the constitutional quality and unique political form of the legal/political order of the European Union that does in fact exist.

To act as if Community and by implication domestic courts of other countries are already organs of a cosmopolitan legal order and global legal/political community whose core values and institutional structure are already constitutionalized and thus directly binding on all actors, as if the international legal order already were sufficiently integrated, in short as if the descriptive pluralism of legal sources and legal orders in the international system were already construable as internal elements of the same singular overarching hierarchically structured monist global legal order – is a paradigmatic example of 'symbolic constitutionalism'.[88] This approach undermines the link between the courts of a particular political community, domestic political processes and internal constitutionalist

[85] O. Kirshheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961).

[86] Pars 242-52. The CFI stated that the right to property had not been arbitrarily transgressed and only an arbitrary deprivation of property would be regarded as contrary to jus cogens.

[87] D. Halberstam and E. Stein, 'The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', *Common Market Law Review*, 46/13, 2009, pp.19-23 and 31-2 arguing that the *jus cogens* standard is too restrictive and proposing indirect review of SC measures for compatibility with customary international human rights law and with general principles of law derived from the constitutions and practice of States (including human rights treaties) against which SC acts must be balanced. See also T. Tridimas and J. A. Gutierrez-Fons, 'EU Law, International Law, and Economic Sanctions Againt Terrorism: The Judiciary in Distress', *Fordham International Law Journal,* 32/2, 2009, pp. 660-730.

[88] By symbolic constitutionalism I mean the invocation of the normative plus that constitutionalist discourse carries in an inappropriate context, thereby cloaking power relations in universalistic garb.

structures and the legitimacy they enjoy flowing from them in the name of a higher legitimacy that in my view is lacking. This is especially disturbing in the case of polities enjoying democratic legitimacy. Such an approach prevents autonomous courts from undoing the constitutionalism – and democracy-eviscerating effects of global governance described above. Indeed, the nature and form of the globalizing political system is deeply contested: even those who insist on its constitutional quality tend to finesse the question of political form. Since no one considers the UNO to be a quasi federation or even a confederation, since it does not have democratic legitimacy, construing its charter as a constitution created by 'we the peoples' is unconvincing. In short, the structure of the global legal/political system at present does not warrant such deference when it comes to SC legislative resolutions that directly impact individuals and violate their most basic due process rights. But the CFI's assumption to the contrary, it is not up to a domestic or regional Court to produce the missing legitimacy.

On the other hand, the autonomous, constitutional status of the EU legal order within the European Union has been insisted upon by the ECJ for years and has been accepted by member states.[89] The complex dynamic that simultaneously distinguishes and integrates the legal order of the EU with those of member states internally has been analyzed by many from the internal perspective. Surely the fact that it is an integrated legal order in which the validity of EU law also implies immediate validity within member states' national legal orders makes this a distinctive political formation. However, as others have noted, the constitutional integrity of the Union also has perforce an external dimension that entails its autonomy and self determination internationally. As Halberstram and Stein correctly put it:

> To assert its constitutional integrity, the Union must not only challenge the superiority of national constitutional law but also tug at the umbilical cord that ties the Union to the Grundnorm of international law. Call this the 'external dimension' of European constitutionalism...Just as understanding the Union as subordinate to the Member States' legal orders would render the Union a simple tool in the hands of Member State governments, so, too, understanding the Union as immediately beholden to international law would render the European enterprise an empty vessel for international governance writ large. The idea of 'constitutional integration' – even when applied to the European Union – suggests an element of political self-creation and autonomy that is incompatible with viewing the Union as a mere instrument of either the national or international legal orders.[90]

[89] Since the 1960's the ECJ has insisted that the legal order of the EU is autonomous. See *Costa v ENEL* [1964] ECR 585 and *Van Gend en Loos* [1963] ECR 1. This means its other legal system inheres in its constitutional treaties and not in a higher legal order domestic or international.

[90] Halberstram and Stein, *supra,* note 87, at p. 26. The Swiss Constitutional Court copied the CFI's reasoning in a case concerning the blacklisting of an individual in compliance with the Al Qaeda and Taliban sanctions regime in Switzerland, *Youssef Mustapha Nada v. Staatsekretariat fur Wirtschaft* case No 1AA 45/2007 BGE 133 II 450, even though Swizterland is not a member of the EU and not bound by the jurisprudence of its courts. The Swiss court accepted the reasoning that the Security Council resolution left no room for interpretation. This case, decided before the ECJ, laid down its ruling in Kadi is now on appeal and pending before the European Court of Human Rights (ECtHR).

The 'sovereignist' analysis of the ECJ
The primacy of domestic constitutionalism and the revival of dualism?

It is unsurprising that the ECJ took the opposite approach to the CFI and proceeded with its review in light of the fundamental rights guarantees found among the general principles of Community law, and determined that Kadi's rights to be heard, and to effective due process were violated. The Court annulled the relevant regulations.[91]

The arguments the Grand Chamber of the ECJ deployed in favor of review were based on a constitutionalist understanding of the nature of the European Community and its relation to international law. Instead of treating it as just another international treaty organization, porous and subordinate to the binding dictates of the Security Council, the Court construed the Community's legal order as an autonomous one of constitutionalist quality.[92] Accordingly the Community is based on the rule of law, equipped with a complete system of legal remedies and procedures such that neither member States nor its own organs can avoid review of the conformity of their acts with its 'constitutional charter'.[93] The Court rejected the idea that an international treaty – the UN Charter – could affect the internal constitutional allocation of powers, the autonomy of the Community legal system, or its core constitutional principles which include fundamental rights, in any way.[94] It thus rested its case squarely on the internal requirements of the integrity of the Community's legal order construed as distinct and independent from public international law – and asserted the primacy and autonomy of its core constitutional principles.[95] The Court filled the vacuum of legal responsibility created by the legislative acts of the Security Council, by holding national and Community executives responsible for the implementing legislation and itself capable of reviewing that legislation when basic rights and the fundamental principles of EC constitutionalism are at issue.

In so doing, the court asserted and reinforced the autonomous constitutional(ist) dimensions of the European legal order in two respects. On the internal axis, the ECJ's decision was an integrative move insofar as it asserted the primacy of the European legal order over member states regarding their international relations, in effect denying them the prerogative of bypassing or prejudicing Community *constitutional* law in order to

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[91] Regulation 881/02. It let the EU Council maintain the effects (listing and freezing of assets) for 3 months to allow a possibility to remedy the infringements found. Kadi's name was subsequently put back on the black list only a few months after it was removed by the ECJ.

[92] Par. 281, in line with many earlier decisions. Since the 1960s the ECJ has insisted that the legal order of the EU is autonomous. See *Costa v. ENEL* [1964] ECR 585 and *Van Gend en Loos* [1963] ECR 1. This means it is not rooted in any other legal system, domestic or international: its validity inheres in its constitutional treaties and not in a higher legal order.

[93] Par. 281.

[94] This refers to primary EU law. Pars 281 and 316-17.

[95] Par. 285 states 'it follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition for their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty'. See also par. 304 . The Court also disclaimed any jurisdiction to review, even indirectly, the actions of the Security Council and did not rule on the legality of the UNSC resolutions themselves.

comply with Security Council resolutions. The Court insisted that '…obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty.'[96] From this internal perspective, the ECJ reinvents itself as a domestic constitutional court, taking yet another step in fostering the evolution of the supremacy and direct effect of the constitutionalist European legal order vis-à-vis its member states with which it is integrated yet distinct.

On the external axis, the Court solidified the autonomous status of the European legal order by treating it as one of constitutional (-ist) quality whose completeness and integrity preclude unreviewable intrusion by the international legal order or by any international agreement of member states that affects the fundamental principles of that order. Indeed it went so far as to argue that even if the obligations imposed by the UN Charter were to be seen as part of a hierarchy of norms within the Community legal order they would be secondary in rank to the constitutional principles of the European Community.[97] Clearly the Count assumed an asymmetry in the nature of the distinct legal (and political) orders involved. The autonomous legal order of the EU is accorded constitutional quality, while international legal order of the UN Charter system is not. Indeed, given the well documented and extensively discussed institutional defects within the UN Charter system from a normative constitutionalist perspective, it would be irresponsible to open up the legal order of the EU unconditionally to intrusive acts of the latter's legal system especially when they directly target individuals in ways that violate their fundamental rights.[98]

Unlike the approach of the CFI, the Grand Chamber did not reason as if there already exists a monist global public international legal order of constitutional quality whose highest norms and institutions can claim unconditional supremacy vis a vis its member states or regional orders. It seemed to opt instead for a classical dualist stance, insofar as it rested its case squarely on the internal requirements of integrity of the European constitutional legal order – and asserted the primacy and autonomy of European constitutional law over public international law.

This decision has been hailed by some, as a victory for human rights against executive predation in the name global security and the war on terror.[99] But others have criticized it for its alleged revival of classical dualist (today, legal pluralist) arguments regarding the

[96] Par. 284.

[97] Pars 288 and 309.

[98] The Court implicitly followed the line of argument of the Advocate General Maduro in his opinion: 'Just as executives of these Member States may not use the Community to circumvent fundamental rights within their own national legal orders, nor may they use their powers to enter into commitments to do an end run around the general principles or fundamental rights within Community or their own domestic constitutional law. Indeed, that Member states of the EC are under a duty of loyal cooperation and especially those sitting on the Security Council (and wielding a veto) should act so as to prevent as far as possible the adoption of decisions by organs of the UN that are liable to enter into conflict with the core constitutional principles of the Community legal order. Constitutional review of implementing regulations of Security Council resolutions protects domestic constitutionalism against executive depredation should member states fail to act accordingly.' Par. 25.

[99] S. Griller, 'International Law Human Rights and the Community's Autonomous Legal Order', *European Constitutional Law Review*, 4, 2008, pp. 528-53.

relation among legal orders.[100] By insisting on the autonomy of the European legal order internationally and on the determination of the rank of international law within the European legal order by EC law, and by asserting the supremacy of the European conception of human rights, without reference to customary international human rights law or to the UN Charter's commitment to human rights, the Court's reasoning appears sovereigntist in the old fashioned sense.[101] Its allegedly inward looking stance and 'dualist' logic is seen as bad international citizenship and coming at a high price: it impugns the EU's image as a law abiding international actor, and it dims the prospects that this regional order and its Courts might play a role in building a global constitutionalism of shared values and principles via inter-institutional dialogue.[102] By eschewing direct engagement with the international legal order the decision allegedly fails to come to grips with the innovations in global governance in a constructive way and instead takes a parochial stance sealing off the European order from the rest of the international system.[103] It thus allegedly exacerbates the legitimacy problematic at the heart of that system in which the EU is, despite its alleged dualist reasoning, nonetheless situated.[104] Others defending that reasoning argue that: 'it is not the responsibility of a constitutionally based jurisdiction to instruct the institutions of other entities whether or not they adhere to their own legal standards. It is certainly not its duty to create a global ordre public'.

All of these assessments obviously draw on (and are trapped in) the dichotomy described above: either there is a single (monist) international legal order of constitutional quality to whose higher norms and decisions the Community and member states must defer, or one embraces the dualist/legal pluralist stance and protects one's own constitutionalist values come what may. Neither approach offers much help in resolving the legitimacy problems at issue. Is there another way to consider the matter?

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[100] De Burca, *supra,* note 9.

[101] Some have compared its reasoning to the arrogant stance of the United States in the Medellín case. Ibid. I think this is an unconvincing comparison an ungenerous reading of the decision. The ECJ, in the absence of a credible dialogue partner in the form of a court on the international level with the appropriate compulsory jurisdiction, the ECJ's reasoning makes sense. One does not have to read the invocation of fundamental rights to due process, property, a hearing, protected in the constitutional legal order of the Community as a parochial sovereigntist claim, meaning 'this is the way we do things here' – instead it could be interpreted as implying that the EU has institutionalized universal principles in its legal order and thus is not ready to sacrifice constitutionalism to unbridled executive discretion at locally or internationally. One can read this decision as an effort to spur further constitutionalization of global international law and the creation of a suitable dialogue partner, for the court. Indeed, the Court did mention general principles and human rights law. Indeed it states explicitly that 'In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the member states have collaborated or to which they are signatories'. Pars 283 and 291.

[102] De Burca, *supra,* note 9; Halberstram and Stein, *supra*, note 87.

[103] Halberstram and Stein, *supra*, note 87, pp. 31-2.

[104] De Burca, *supra,* note 9; Halberstram and Stein, *supra*, note 87, at p. 64, criticizing the inward focus of the ECJ and its failure to engage international law directly by invoking as did the CFI, *jus cogens* or customary international law of human rights.

The case for constitutional pluralism

There is and it was articulated by Advocate General Maduro in his Opinion delivered to the ECJ upon Kadi's appeal of the CFI's judgment.[105] It was Maduro's argument, adopted by the Grand Chamber, that the appropriate way to address the relation between the international system and the Community is to proceed from the assumption that the latter is an autonomous legal order 'beholden to' but 'distinct from' public international law.[106] He thus insisted that the primary obligation of the ECJ, the constitutional court of the Community, is to enforce Community constitutional law.

But fully aware of the interdependence and increased communication among the plurality of globalizing legal orders in the international system, and of the potential external impact of an ECJ decision, Maduro's Opinion was not purely inward looking. It articulated a strategic, communicative stance vis-à-vis the outside while denying that non-compliance would amount to judicial review of SC resolutions or entail extra-systemic jurisdiction on the part of the EU.[107] The Advocate General noted the presumption that the Community wants to honor its international commitments and insisted that his analysis does not mean that the Community's 'municipal' legal order and the international legal order pass by each other 'like ships in the night'.[108] It explicitly addressed the deficiencies of the UNSC processes in its legislative initiatives and resolutions involving targeted sanctions, noting that annulment of the implementing legislation in the EU could have a positive political consequence of prodding the UN, in the face of likely other legal challenges and threats of non-compliance, to respect the basic human rights principles of due process.[109] But the legal effects of an ECJ ruling would remain confined to the EC.[110]

While Maduro's reasoning obviously influenced the ECJ, I argue that it was informed by the premises of a constitutional pluralist, rather than a cosmopolitan monist or sovereigntist dualist analysis. Though his Opinion ultimately reached a conclusion similar to that of the Grand Chamber, due to its distinctive underlying conceptual framework, it was more open to dialogue with the international legal system and to

[105] For the original and so far as I know first argument to the effect that Maduro's opinion must be understood within the framework of constitutional pluralism rather than the dualism/monist divide, see J. L. Cohen, *supra*, note 8, pp. 476-8. Others are also beginning to reason along those lines but in a somewhat different way. See Halberstram and Stein, *supra*, note 87, pp. 23-7. They maintain that the AG should have referenced customary international law of human rights and the references to human rights in the UN Charter and the fact that the SC is bound by it. I agree this would have been a useful way to indicate that the rights at issue are not idiosyncratic ones defended by the EU but universal ones that all coercive public institutions must secure and refrain from violating. But the distinctive conceptual and political thrust of Maduro's argument lies elsewhere.

[106] Because the EC treaty, unlike the intergovernmental European Convention on Human Rights and Fundamental Freedoms, has founded a legal order in which states and individuals have immediate rights and obligations—the former is a distinctive constitutional order, the latter an international law treaty 'designed to operate primarily as an interstate agreement that creates obligations between the contracting Parties at the international level'. Par. 37.

[107] Se also Cohen, *supra*, note 8, at p. 477.

[108] Par. 22.

[109] Par. 38.

[110] Par. 39. In other words it would not void internationally binding law or resolutions.

spurring its further constitutionalization without however sacrificing the rights of the plaintiff. However, it is also clear that Maduro understood that the necessary institutional preconditions for a viable constitutional pluralist relationship among EU's legal order, the globalizing international legal order in general and that of the UN Charter system in particular, are lacking at present.[111] Hence the hopes that institutional reform on the international level might follow from a challenge by the ECJ to the validity of the measures implementing the rights-violating resolutions of the Security Council. Let me explain.

Throughout his opinion Maduro refers to the treaties constituting the European Community as its basic 'constitutional charter'– one that constituted an autonomous legal and political community, an approach followed by the ECJ. Because the EC treaties, unlike the intergovernmental European Convention on Human Rights and Fundamental Freedoms, has founded a legal and political order in which States and individuals have immediate rights and obligations – the former is deemed a distinctive constitutional form, the latter an international law treaty 'designed to operate primarily as an interstate agreement that creates obligations between the contracting Parties at the international level.'[112] This means that the ECJ is designed to be and has a duty to act as the constitutional court of the 'municipal' legal order – a polity of transnational dimensions – that is the Community as regards its jurisdiction ratione personae and as regards the relationship of the autonomous legal system of the Community to public international law. It was Maduro's argument, also adopted by the Court, that the 'constitutional charter' of the EC established a complete system of legal remedies and procedures designed to enable Court of Justice to review the legality of acts of the institutions of the Community and that its constitutional treaty and its law thus enjoy the same autonomy as any municipal legal order.[113]

This sounds like a classical dualist interpretation of the relation between the autonomous 'municipal' legal order of the European Community, and international law, indistinguishable from the one ultimately put forth by the ECJ. However, Maduro's argument is more nuanced than this and rests on a different conceptual framework. Unlike the latter, Maduro articulated a conditional, alternative conceivable relationship between the Community's legal order and that of the UN. He argued that neither Article 103 nor Chapter VII Security Council resolutions can preclude Community courts from reviewing domestic implementing measures to assess their conformity with fundamental rights, *so long as* the UN doesn't provide a mechanism of independent judicial review that guarantees compliance with fundamental rights.[114] Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, this might have released the Community from the obligation to provide

[111] That issue is shifting between external theoretical and internal participant perspectives. See Cohen, *supra*, note 8, at p. 473.

[112] Par. 37.

[113] Par. 22, 23-5. It is worth pointing out that the use of the term 'municipal' is borrowed from international law usually referring to the domestic legal orders of states. Although he does not use the term federation or confederation, this is the continent on which the conceptual apparatus of the Opinion seems to place us.

[114] Pars 51-4.

for judicial control of implementing measures that apply within the Community legal order.[115] However, as the system governing the functioning of the United Nations *now* stands, the only option available to individuals seek access to an independent tribunal so as to gain adequate protection of their fundamental rights is to challenge domestic implementing measures before a domestic court.[116] Under these circumstances, the relationship between international law and the Community legal order must be governed by the Community legal order itself, '…and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.'[117] This stance is itself premised on the assumption that the human rights at issue – due process rights, rights to a fair hearing, property rights – are not idiosyncratic features of a single jurisdiction. They are universal, as the relevant international human rights documents and the UN Charter indicate: thus it is incumbent on all legal orders to institutionalize and protect them in the appropriate manner.[118] At the present time, however, given the fact that neither the global political system generally nor the UN Charter system in particular is sufficiently integrated or adequately constitutionalized, given the lack of direct effect and the absence of legal remedies on these levels, unquestioning deference to the international legal order(s) is unwarranted.

The Advocate General clearly meant to evoke the well known *Solange* jurisprudence characteristic of the non-hierarchical legal relations among the plural constitutional orders within the EU that conditions the supremacy of EU law on the degree to which it secures an equivalent respect for fundamental constitutional rights to that which exists in the domestic constitutions of member states.[119] The point is to foster the highest level of individual rights and constitutionalist, rule of law protections within all the relevant legal orders. While some fear that the 'constitutional pluralist' approach this jurisprudence initiated is dangerously centrifugal and dissociative, others have pointed to the dialogic

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[115] Par. 54.

[116] Par. 38.

[117] Ibid.

[118] It is true that Maduro does not explicitly invoke customary international human rights or the UN Charter. But constitutional pluralism can involve this idea. J. A. Frowein, 'Fundamental Human Rights as a Vehicle of Legal Integration in Europe' in M. Cappeletti, M. Seccombe and J. H. H. Weiler (eds) *Integration through Law: Europe and the American Federal Experience,* Volume 1 (New York: Walter de Gruyter, 1986), at p. 302.

[119] Opinion of Advocate General Poiares Maduro, par. 19. In the case that became known as 'Solange I',

Case 2 BVL 52/71 *Internationale Handelgsellschaft mbH v. Einfur- und Vorratstelle fur Getreide und Futtermittel*, Decision of May 29 1974 37 BVerfGE 271 CMLR 540, the German Federal Constitutional Court (GFCC) famously reserved for German Courts the right to review EC acts for their conformity with the German Basic Law (Grundgesetz) so long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights which is adequate in comparison with the catalogue of fundamental rights contained in the Constitution. Once the ECJ came to consider that fundamental rights constitute part of the general principles of Community law according to which it would review the validity of Community acts, the German Constitutional Court in effect agreed not to exercise its jurisdiction in reviewing those acts (Case *Wunsche Handelsgesellschaft Bundesverfassungsgereicht* 2,197/83; 1986 BVerfGE, 339). This case came to be known as 'Solange II'. The operative concept, as Maduro points out is 'exercise' the GCCC maintains its jurisdiction over EU law but prevents specific collisions by not exercising its jurisdiction so long as EU law satisfies basic principles of the German constitution. For an analysis of the 'solange' approach see N. Lavranos, 'Towards a Solange-Method between International Coursts and Tribunals?', in T. Broude and U. Shany (eds) *The Shifting Allocation of Authority in International Law* (Oxford: Hart Publishing, 2008). See also Maduro, *supra*, note 21, at p. 509.

dimension it opens up among the relevant legal actors and its integrative potential.[120] At issue is the threat to the uniformity of law and implementation of EU or UN resolutions posed by insistence on domestic constitutional supremacy, on the one hand, and the threat to fundamental constitutionalist principles if unconditional hierarchy were accepted, on the other. But if reference is to the highest level of protection of human rights that are acknowledged in the relevant legal orders, then the judicial suspension of an external legal obligation is not solipsistic but rather meant to trigger a equivalent level of protection among the relevant interconnected but not hierarchically related legal orders and to initiate dialogue among the respective judicial organs.[121]

The theory of constitutional pluralism was developed to account for this dialogic mutually accommodating practice of constitutional tolerance among autonomous legal orders and organs (Courts) within an overarching shared legal order of the EU.[122] In other words, the *Solange* approach is theorized as a dynamic process that involves conflict, contestation, (the pluralist dimension) but also initiates dialogue among actors and legal organs with a view towards fostering reciprocity and legal resolution on the basis of shard constitutionalist (basic rights) standards that are or should be common to all jurisdictions (the constitutionalist dimension). The focus is not on parochial understandings but on arriving at compatible interpretations of constitutionalist principles – an integrative not a dissociative logic.[123]

This is not the approach or discourse of a dualist or of a traditional sovereigntist. However, and this is the next crucial step in my argument, any attempt to analogize the ECJ's Kadi decision with the *Solange* jurisprudence the GFCC, is, nonetheless, premature.[124] For what Maduro's argumentation and the decision of the ECJ (which did not use the Solange language) indicate is that in the absence of an appropriate interlocutor—an international Court with jurisdiction to review Council legislation and enforce human rights, (with standing for individuals) – a conflict between the two legal orders could hardly be avoided or resolved via constitutional toleration, or judicial comity.[125] Human rights exist in the Charter system and in international legal order generally. What is missing is an appropriate independent body (court) which could serve as an interlocutor for domestic or Community courts! The absence of a suitable a

120 N. MacCormick, *Questioning Sovereignty*, (Oxford: Oxford University Press, 1999). Walker (*supra,* note 21), Maduro (*supra*, note 21) and Cruz (*supra*, note 21) are among the latter group. This text summarizes the various positions.

121 W. T. Eijsbouts and L. Besselink, 'The Law of Laws – Overcoming Pluralism' *European Constitutional Law Review,* 4, 2008, at p. 205.

122 Frowein, *supra,* note 119, at p. 302; J. H. H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999).

123 Arguably the impact of *Kadi* internally to the EU is strongly integrative and empowering of the ECJ. But insofar as it is constitutionalist, rights protecting and reigns in state and EU executives preventing them from making commitments that undermine universal human rights as institutionalized in that order or as articulated as legal principles internationally, this apparent 'power grab' on the part of the court is salutary.

124 See Halberstam and Stein, *supra,* note 87, at p. 68.

125 Par. 54.

dialogue partner on the international level is one reason why the Solange logic cannot simply be ratcheted up to the next level.[126]

By implication, the theory and practice of constitutional pluralism as developed within the EU (whereby national courts can and do double as EU courts, dialogue with and cite the ECJ and one another,) that characterizes the relations among the autonomous yet interconnected legal orders of the member states and the legal order of the Community, is not yet applicable or appropriate to the globalizing international political system. The legal order of the UN Charter system is neither sufficiently integrated with national legal orders (or with that of the EU) there is no direct effect operative between them, nor is it adequately constitutionalized for this. Until it is, the primary obligation of the constitutional court of an autonomous legal order is to protect the latter's liberal/democratic constitutionalist principles if the effect of a norm or act under international law severely conflicts with those principles. To do so however is not to indulge in idiosyncratic solipsistic behavior or to exit the international system. Rather, given the likelihood (and reality today) of other legal challenges and instances of non-compliance in the name of constitutionalism and human rights being triggered by this decision, it may well foster a general political debate as well as a constitutionalist response on the international level. In other words, the analysis of the Advocate General and the decision of the ECJ both aim at protecting constitutionalist principles enshrined in the Community legal order and its democratic constitutionalist member states, and at inciting the further constitutionalization of the international legal order so as to protect international human rights and other constitutionalist (rule of law) principles put at risk by the highest executive body in the international system: the UN Security Council, made up of executives focused on security rather than human rights as the relevant resolutions indicate.

Indeed, the ECJ's decision, did address the SC, insofar as it indicated what would be necessary in order for a Court of a constitutionalist, rights-respecting rule of law system to accept the supremacy and direct impact on individuals of Council acts. Both the ECJ and the Advocate General noted the presumption that the Community wants to honor its international commitments.[127] But given that the CTC created by the Security Council is a body coordinating security oriented executives, designed precisely to bypass domestic constitutional due process provisions and limit judicial review, this 'dialogue' is different

[126] It would also be difficult to apply the Bosphorous test to the UN and to Security Council decisions. *Bosphorus v. Ireland* (2006) 42 EHRR 1. In this case, the ECtHR dealt with the possible inconsistencies in human rights protection between the EC and ECtHR legal orders with a two-stage test that asks: a) whether there is protection equivalent to the ECtHR at the EC level; and b) whether there has there been a manifest deficiency in the system of protection in a particular case. A presumption of convention compliance by the EC (itself not a member of the ECHR) is acknowledged. This issue is now before the ECtHR in the *Nada* Case. But it is widely acknowledged that the efficacy of human rights protections offered by the ECHR, given the presence and mandate of the EctHR, is much stronger than anything pertaining to the CCPR globally. The CCPR was adopted 16 December 1966 and entered into force 23 March 1976. 999 UNTS 171 (ICCPR).

[127] The ECJ stressed the Community's obligations under international law in pars 290-7. In par. 301 the Court even imagines allowing derogations from primary law in certain cases but not from the principles that form part of the foundations of the community legal order. It is the special importance of basic rights standards and not blanket supremacy of community law that the court was asserting.

in kind than what occurs between constitutional courts situated within an encompassing legal order of constitutional quality.[128]

The deeper conceptual issues involved here have to do with the constitutional quality, political form and degree or type of legitimacy of the respective legal/political orders. The distinction between the 'internal constitutional' and 'external legal pluralism' made by Maduro in a different context is helpful for reflection on the legitimacy basis for the juridical and political practice of constitutional pluralism. Here I can only summarize a complex argument.[129] Briefly, legal pluralism as we saw refers to the descriptive fact of a multiplicity of competing independent legal orders, sources and jurisdictions. Internal constitutional pluralism refers to a plurality of constitutional orders and sources internal to an overarching legal order without a hierarchical relationship among them. The latter involves the co-existence of several political communities within a particular overarching political community of communities each of which has its own legal order of constitutional quality. The EU is the prime example of internal constitutional pluralism.[130] Its multiple autonomous constitutional orders, sites of norm creation and power coexist within an overarching order of orders, which are mutually recognized and yet are organized in a heterarchical and horizontal, rather than in a hierarchical and vertical manner. The internal legal pluralism of the EU thus involves a plurality of constitutional sources whose interrelation cannot be analyzed in either monist or dualist terms. EU law has direct effect, thus isn't dualist; it is supreme but conditionally so, and the courts within each autonomous legal order cite and dialogue with one another and are thus involved in a dynamic, yet orderly process of developing EU and domestic constitutional law: this is not hierarchical monism.[131] On the internal constitutional pluralist analysis, the coordination among the distinct legal orders proceeds through dialogue and mutual accommodation: EU law has a 'negotiated' yet binding, supreme yet sometimes contested normative authority.

To be sure, it is part of the dynamics of internal constitutional pluralism that each constitutional legal order sees itself as autonomous and supreme: each has its own internal validity such that the basic constitutional norms and legal sources are not derived from or subordinate to any higher legal system. Thus, from the internal legal/normative perspective of the constitutional order of each member state, the reason why the rules of the Union are directly effective, enforced and supreme is ultimately that the member state's constitutional order has accepted its rule making capacity and supremacy given the appropriate provisos. From the perspective of the autonomous constitutional legal order of the Union, however, its own rules are supreme in its relevant domain and that is why they are directly binding on and effective in national courts. The internal perspective of each is perforce 'monist'.[132] But from the external sociological or

[128] E. Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', *American Journal of International Law*, 102, 2008, pp. 241-74.

[129] M. P. Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism', in Dunoff and Trachtman (eds) *supra*, note 10, pp. 356-80.

[130] Ibid.

[131] M. Delmas-Marty, *Le Pluralisme Ordonne* (Paris: Seuil, 2004).

[132] Reasoning from the internal participant perspective oriented to legal validity and what the law requires, Somek deems Kelsenian monism unavoidable. A. Somek, 'Monism: A Tale of the Undead', University of

theoretical perspective, these are interrelated, distinct constitutional orders in a dynamic non-hierarchical relationship with one another. Reflexivity on the part of participants (shifts back and forth from the participant to the observer perspective) allows for a dynamic non-hierarchical yet not disorderly relationship among the legal orders informed by an ethic of political responsibility and constitutional tolerance (grounded in commitment to the constitutional 'acquis', and to the ongoing political project of European Union).[133]

In such a context – i.e. where constitutional pluralism is internal to a legal order supported by its own political community – the competing courts inside that community see themselves as bound both by their particular legal order and by the broader legal order in which they are also situated. These courts can and do make the effort, reflexively, to anticipate, avoid and reconcile potentially conflicting claims – by framing relevant decisions in generalizable terms that other courts in the system could apply to similar situations.[134] In other words, the duty of a domestic court within a transnational polity such as the EU is to frame arguments that challenge an EU law or decision in general terms, invoking substantive norms that are held also to be applicable on the general level even while referring to the autonomy of its own legal order.[135] All the courts must commit to the integrity and coherence of that overarching legal order. 'Such commitment flows from their own domestic political community's commitment to a broader political community.'[136] In short, the legal relationships are based on an underlying political legitimacy, not only on inter-judicial cooperation and coordination.

Clearly this approach and the very idea of constitutional tolerance or internal constitutional pluralism, is predicated on a background culture of mutual accommodation and compromise. But it is important to see that this political achievement is itself predicated on a political reality: membership within and commitment to a discrete, overarching political community or polity. The distinctive political form of the European Community is not named by Maduro in his advisory opinion. But his deployment of the international law concept of a 'municipal order' of transnational dimensions is certainly more evocative of the concept of federation of states than it is of an international treaty organization. This is not the place to enter the debate over the precise nature of the polity to which EU member states belong. As others have pointed out, the European Union is a complex hybrid – a union of states composed of institutional arrangements partly typical of international organizations (unanimity rules for amendment) and partly typical of federal states (e.g. majority voting rules called here

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Iowa Legal Studies Research Paper No. 10-22, 2010. But one can also construe the relation among plural legal systems as a form of 'inter-legality' such that they communicate with one another by reference to the abstract and rather indeterminate code of legality, involving legal communication and reflection on the legal medium. This entails a communication among legal instances that combines the internal attitude with reflexivity regarding the fact of pluralism of legal orders and the need to come to a legal decision or to decide that this is not possible. K. Gunther, 'Legal Pluralism and the Universal Code of Legality', draft paper, 2003.

[133] On the ethic of political responsibility see Walker, *supra*, note 21, pp. 337-8; Weiler, *supra*, note 21, pp. 173-90, advocating constitutional tolerance.

[134] Maduro, *supra*, note 129, pp. 374-9.

[135] Ibid.; Eijsbouts and Besselink, *supra*, note 122, at p. 397.

[136] Maduro, *supra*, note 129, at p. 374.

'supranationality'), of constitutional arrangements typical of federations of states and/or of confederations, depending on one's taxonomy, and of a level of material integration (and aspects of its material constitution) evocative of a federal state.[137] Clear analysis and conceptual resolution of this issue would require another paper. Two points are however worth emphasizing here: first, what makes the stance and practice of internal constitutional pluralism possible is that the non-statal, quasi-federal character of the European Union (however complex and hybrid its actual institutional and behavioral aspects are) renders the external internal: relations among member states of the EU with respect to EU law, institutions and public policies are understandable not as international but as internal relations. The treaties constituting the European Union do have constitutional quality and constitute today an autonomous legal order integrated with domestic legal orders and bound up with a political project of forming an ever closer union among the peoples of Europe.[138] But this does not mean that the quasi-federation which is the European Union is a federal *state* or that the political community subtending the legal community of the Union is a supranational demos composed of directly or exclusively of individuals. Rather it means that the political community is composed of multiple political communities, or multiple demoi.[139] Understanding themselves in this way, as members of an overarching legal and political union of states and as involved in a common project towards an ever closer union, plus the requirement that all member states be constitutional democracies constitutes the self-determining political context in

[137] According to the ECJ, the EU is a *sui generis* organization (ECJ, Opinion 1/91, Draft Treaty on the establishment of a European Economic Area (EEA) (1991) ECR I-6079, par. 21. It is a new legal order (of international law) because it is autonomous and integrated into national legal orders. The EU legal order determines its own validity and sources autonomously. ECJ, Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belatungen* (1963) ECR 1, par. 9. For some it is thus a unique, highly integrated form of international organization. B. de Witte, 'The European Union as International Law Experiment', draft version for the workshop 'The EU Between Constitutionalism and International Law', New York University, 5-6 October 2008.. To Maduro, it is a municipal order of transnational dimensions (AG, *Kadi*, pars 21 and 24). Others argue the EU is an economic federation of states, see Forsythe, *supra*, note 18; Beaud, *supra*, note 18; while some see it is a complex hybrid composed of elements typical of federal states and international organizations, see Weiler, *supra*, note 122.

[138] The project of forming an ever closer union among the peoples of Europe is articulated in the Preamble, Treaty of Rome 1957. The treaty signed at Maastricht incorporates this project into the name of the entity it established, the European Union Article 1, Treaty of the European Union (TEU) 1992, which also established citizenship in the union. The First article of the TEU proclaimed that the establishment of the EU marks a new stage in the process of creating an ever closer union among the peoples of Europe and is thus a stage not the end product.

[139] If one avoids the statist model of federation that assumes a federation of states must itself be a state, then this type of political formation makes sense. See Beaud, *supra*, note 18, drawing on Forsythe, *supra*, note 18, for a critique of the statist understanding of unions of states. The debate between Grimm and Habermas around the no demos thesis is thus based on the flawed premises that a federation and constitutional order must be a state and have a single individualized demos to which to impute the constituting making power. Instead a union of states can have multiple demoi. See J. Habermas, 'Why Europe needs a Constitution' *New Left Review*, 11, 2001, pp. 19-34; D. Grimm, 'Treaty or Constitution? The Legal Basis of the European Union after Maastricht' in E. O. Eriksen, J. E. Fossum and A. J. Menendez (eds) *Developing a Constitution for Europe* (New York: Routledge, 2004). On the concept of democracy see K. Nicolaidis, 'The Federal Vision Beyond the Federal State: Conclusion' in K. Nicolaidis and R. Howse (eds) *The Federal Vision* (Oxford: Oxford University Press, 2001), pp. 439-537.

which internal constitutional pluralism in Maduro's sense is possible and productive instead of disintegrative.[140]

But the same stance is inappropriate in a context of the external pluralism characteristic of the global political system. There is increased juridification of the international political system and the emergence of a new layer of a new form of law: 'humanity law', that brings together humanitarian, law of war and human rights focused on persons and peoples rather than sovereignty and states.[141] Nevertheless, and despite increased communication and coordination among the proliferating judicial actors and legal orders on the world scene – there is no order of orders supported by commitment to a new political community, there is little democratic legitimacy underlying the international legal system and surely no democratic conditionality for membership. International human rights law lacks the efficacy and does not serve the same function as fundamental rights protection within the EU. In such a context, constitutional courts are bound by the particular legal order of the political community which has directly delegated competence for constitutional review and from which they derive their legitimacy. Of course, in an increasingly interdependent world, different legal orders will have to endeavor to accommodate each other's jurisdictional claims and judicial coordination among existing supra-national courts and tribunals can be rights- and democracy-reinforcing as witnessed by the cascading impact of the Kadi case. As the proliferation of articles on judicial comity and cooperation indicate, domestic courts and the proliferating international and hybrid tribunals do communicate with and are influenced by one another. Be that as it may, it follows from considerations of political legitimacy, political form, and constitutionalist principles that in the context of external pluralism the allegiance of the ECJ, given the givens, must be first and foremost to its own and secondarily to generally acknowledged constitutionalist (human rights) principles.

Accordingly 'unilateral' non-implementation of Security Council 'law' by a constitutional court is justifiable as a right of resistance when the former imposes decisions that are manifestly inimical to the principles of domestic or regional constitutionalist systems as well as the substantive values (human rights) articulated by the UN Charter itself and international law generally (in human rights treaties or customary international law).[142] By explicitly referring to the deficiencies in the international legal system from a constitutionalist perspective, the Kadi judgment clearly hoped to prod the relevant actors to create due process remedies when targeting sanctions directly on individuals. The aim is obviously not to undermine the international legal system but to foster its further constitutionalization in light of its own universalistic principles. The obvious strategic point of the judgment is that a mutually beneficial cooperative, dialogic, positive-sum game among domestic, regional and international orders could (only) become possible with the further constitutionalization of the international legal system – but this would have to mean the creation of the appropriate new institutions and the redesign of existing ones within the UN Charter system.

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[140] This is not to say that there is no democratic deficit in the EU or that reforms are not required of its hybrid structure as a 'quasi' federation or complex international organization.

[141] R. G. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics', *Cornell International Law Journal*, September 2002. Humanity law is ambivalent from a normative perspective.

[142] Cohen, *supra*, note 8.

Conclusion

From the perspective of constitutionalism, the UN Charter system is obviously deficient in the power-limiting sense and in need of some type of a two pronged (re-)foundational reform: no residues of public power behind the law should remain untouched (transformation of the quasi-absolutist powers of the P5) and the organs established by the Charter should be adequately regulated by it. Clearly this would have to entail elimination of the hybrid structure of UN by abolishing at least the veto of the P5 in the amendment rule, thereby extending the 2/3 supermajority threshold to all the members of the General Assembly.[143] This would be a 'democratizing' move insofar as it would vindicate the principle of sovereign equality enunciated in the Charter within the UN itself, thus eliminating the worst aspects of legalized hierarchy in the system. The dramatic new legislative role of the Council should be scaled back as this is not an appropriate organ for global law making. In addition the constitutionalization of the global political subsystem would have to involve creation of a global court(s) with jurisdiction to review rights-violating resolutions that are legislative in character and directly affect individuals – possibly through some sort of preliminary reference procedure – by the organs of (or created by) global governance institutions like the UNSC. Some body or mechanism to police the (ideally reformed) dualist constitutional structure established within the UN Charter system is also crucial, especially as it assumes more governance functions.

Such a constitutionalist transformation, were it to occur via the amendment rule of the existing Charter could be understand in the republican foundationalist tradition as an act of political self-determination, ascribable to 'we the peoples' of the member states of the United Nations.[144] But the dimensions of that model that are relevant on the global level are not the idea of revolutionary founding, or the exercise of the 'constituent power' or will of a united and individualized global citizenry (a world demos), or as involving the establishment of a full congruity between the subjects and the authors of global law. The reconstituted albeit still functionally delimited global political system and its key global governance institution would not thereby become a monist polity. The dualism between the international society of states and the functionally differentiated world society would still be reflected in the UN Charter system through its reformed constitutional treaty. Its constitutionalization' and its relation to the constitutions of member states (and regional polities like the EU) would have to be understood in constitutional pluralist, not monist terms.

Whether it makes sense to use the terminology of federation for a such a project regarding a global functional organization – a form of political organization in which the members are states, not individuals but which binds actors on the basis of super-majoritarian rather than unanimity rules of decision-making and amendment but which also clearly depends on the cooperation of autonomous polities that are its members – is

[143] Perhaps with some form of double voting system. See K. Dervis, *A Better Globalization* (Washington, D. C.: Brookings Institution Press, 2005).

[144] It is anachronistic to take this discourse seriously for the founding of the UN, despite the preamble. Here I disagree with Fassbender.

debatable. It is also debatable how much integration of the global political system is desirable – surely it is not a feasible project for it to approximate the degree of integration warranted by a polity in formation like the EU. What matters is that all actors would be under law, and unlike in the current UN. Charter system, that a legal response would be possible to any informal amendment, or violation of the rules, principles and purposes of the Charter that the powerful might attempt to make. Given the degree of heterogeneity in the world, the 'legislative' role of such a body would have to be minimal. Freedom for individuals in such a constitutional legal order would be secured not through expansion of the list of human rights that become hard cosmopolitan law, but by blocking the constitution-eviscerating effects of an overly intrusive and legislative central instance while the transformations of global political culture in a more public-regarding and rights-respecting direction, has the chance to develop.

In order to conceive of this project as a third path one would have to abandon the legal monism of the Kantian-Kelsenian school and embrace the concept of constitutional pluralism.[145] In other words, the relations between the constitutionalized global political system and the constitutions of member states and regional polities would have to be seen as heter-archical, not hierarchical: they would all be autonomous legal orders interrelating in specified ways and supremacy would be conditional on constitutionalist principles. To the degree to which the relevant actors acquire the consciousness that their polities are part of a regional and global political system in whose just basic structure they wish to participate, preserve, and improve, they can gain the requisite reflexivity to develop what theorists of constitutional pluralism have called 'constitutional tolerance'.[146] Constitutional pluralism in this sense would provide a safeguard against hegemonic law making from the center. Again this is a long term project.

Such foundational constitutionalist reforms would not create a monist cosmopolitan world order. Instead the outcome would be a new sovereignty regime in which member states of 'global governance' institutions retain their legal autonomy and constituent authority but the supranational legal order of such institutions would also be construed as autonomous and of constitutional quality with important (rights reinforcing) cosmopolitan elements that constrain its members and organs. Along with the legal pluralists I agree that although functional equivalents for democracy are possible on the global level (accountability mechanisms, avenues of influence for civil society, communication about best practices, non-decisional parliaments, etc), they could never amount to the kind of representative and individualized electoral participation possible on the level of the state or even a federal polity. This is reason enough to value the autonomy of different national and international political orders and the concomitant legal pluralism. On the other hand the global constitutionalists are right to look to the further constitutionalization of international law and global governance institutions, and to the cooperation of domestic, regional, international courts in fostering such a project, but the outcome must not be imagined as a monistic cosmopolitan global legal order and the process must involve more than legal self-reflection.

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[145] Ibid.

[146] J. H. H. Weiler, 'On the Power of the Word: Europe`s Constitutional Iconography', *International Journal of Constitutional Law*, 3/2- 3, 2005, pp. 173-90.

The basic idea, then, is to acknowledge that autonomous legal orders of constitutional quality can exist in the global political system – of sovereign states and of the global political system and global governance institutions within it – and that the latter's claims to autonomy, supremacy and constitutional quality can co-exist alongside the continuing claims of states. The relations among these orders must be seen as heterarchical and horizontal, not hierarchical or vertical. Mutual cooperation and dialogue across legal orders, adequate receptors for influence within them to human rights and other concerns, and a legal/political ethic of responsibility should inform the efforts to handle competing claims and to cooperatively further develop the constitutionalist character of all the legal orders involved. Collisions and conflict, as the legal pluralists rightly note, can lead to reflexivity and cooperation; tension need not end in the fragmentation of either legal system for none of them are self-referentially closed – they are open systems. The integrity of a legal system (validity) requires that each new legal decision is coherent with previous ones: so long as the participants share a commitment to the project of maintaining and improving a global legal/political order of constitutional quality this is not impossible even given heterogeneity and diversity. Indeed the stance of constitutional pluralism would create the condition of possibility for constitutionalist minded courts and democratic domestic bodies (legislatures) to cooperate in salutary ways for all of us.

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