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2012

### Local, Global and Plural Constitutionalism: Europe Meets the World.

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#### Publication Information & Recommended Citation

Halberstam, Daniel. "Local, Global and Plural Constitutionalism: Europe Meets the World." In *The Worlds of European Constitutionalism*, edited by Gráinne de Búrca and Joseph H. H. Weiler, 150-202.

Contemporary European Politics. Cambridge: Cambridge University Press, 2012. DOI: <https://doi.org/10.1017/CBO9781139026734.006>

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# 4 *Local, global and plural constitutionalism: Europe meets the world*

DANIEL HALBERSTAM\*

## 4.1 Introduction

The idea that constitutionalism is central to the legitimate exercise of public power has dominated the modern liberal imagination since the Enlightenment. The ideal of limited collective self-governance has spawned a rich and highly diverse tradition of hard-fought national constitutions from the time of the Glorious Revolution into the present. Today, however, constitutionalism faces its greatest challenge yet: the question of its continued relevance to modern governance. With the explosion of governance beyond the state, many wonder whether constitutionalism as we know it is being marginalized or altogether undermined.

The dilemma of constitutionalism in the age of global governance has elicited two principal responses – one local and one global. On the one hand, there are those who, alarmed by the threat of global intrusion, have sounded the retreat into local constitutionalism as the only source of legitimate public power. Local constitutionalists (or ‘new sovereigntists’, as they are sometimes called)<sup>1</sup> deny the normative pull of international, transnational and global governance by anchoring all legal authority in local (i.e. national) constitutions.<sup>2</sup> The realm beyond the

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<sup>1</sup> See Spiro, Peter J., ‘The New Sovereigntists: American Exceptionalism and its False Prophets’, 79 *Foreign Affairs* 6 (2000) 9–15.

<sup>2</sup> See, e.g., Posner, E. and J. Goldsmith, *The Limits of International Law* (Oxford University Press, 2005); Yoo, John, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (University of Chicago Press, 2005); Bradley, Curtis, ‘International Delegations, the Structural Constitution, and

state is, on this view, pure power politics with resort to legalism as a simple tool of self-interest alone. On the other hand, there are those who view global governance optimistically as overcoming the inherent limitations of local constitutionalism.<sup>3</sup> The strong version of this second response seeks nothing less than to redefine constitutionalism itself by placing the local in the service of the global.<sup>4</sup> These global constitutionalists view the state simply as playing one particular role within a rational design for a comprehensive system of multi-layered governance that spans all issues and all people around the globe.<sup>5</sup>

This chapter seeks to chart a middle course between these two dominant responses by joining constitutionalism and pluralism into an alternative to the purported choice between the local and the global. The basic idea is to understand the competing claims of local and global authority as fundamentally unresolved and – at a general level – unresolvable. The only solutions that emerge are specific solutions derived

Non-Self-Execution’, 55 *Stanford Law Review* (2003) 1557; Ku, Julian G., ‘The Delegation of Federal Power to International Organizations: New Problems with Old Solutions’, 85 *Minnesota Law Review* (2000) 71; Swaine, Edward T., ‘The Constitutionality of International Delegations’, 104 *Columbia Law Review* (2004) 1492; Young, Ernest A., ‘Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception’, 69 *The George Washington Law Review* (2001) 139. For a discussion of this approach, see Spiro, ‘The New Sovereignists’ (2000), at 9–15; Hathaway, Oona A. and Ariel N. Lavinbuk, ‘Rationalism and Revisionism in International Law’, 119 *Harvard Law Review* (2006) 1404 (reviewing Posner and Golsmith). Cf. Section 4.2.1.

<sup>3</sup> See, e.g., Habermas, Jürgen, *The Divided West*, trans. Ciaran Cronin (Cambridge: Polity Press, 2006); Held, David, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995), at 17; Petersmann, Ernst-Ulrich, ‘The WTO Constitution and Human Rights’, 3 *Journal of International Economic Law* 1 (2000) 19–25; Tomuschat, Christian, ‘International Law: Ensuring the Survival of Mankind on the Eve of A New Century. General Course on Public International Law’, 281 *Recueil des Cours* (1999) 9–438; Fassbender, Bardo, ‘The United Nations Charter as Constitution of the International Community’, 36 *Columbia Journal of Transnational Law* (1998) 529–619. Cf. Section 4.3.2 at 170.

<sup>4</sup> A more moderate version of this second response seeks to avoid the register of constitutionalism altogether by speaking about good governance in global administrative law. This chapter does not specifically address the distinctions between constitutional pluralism and global administrative law. Suffice it to say, however, that global administrative law increasingly seems unable to elide the difficulties of constitutionalism in that administrative law, too, depends on an understanding of who is to be served and to what end by global agencies of administrative law. See, e.g., Krish, Nico, ‘The Pluralism of Global Administrative Law’, 17 *European Journal of International Law* (2006) 247–278.

<sup>5</sup> See Section 4.2.2.

from specific interactions among specific actors. To be sure, broad habits of reliable mutual accommodation emerge that provide a good deal of consistency and daily predictability across issues and over time. But in the absence of universal settlement these habits are ever open to revision by the participating actors.

Pluralism in this sense rejects hierarchy and foundation. But it does not operate in a legal or normative vacuum. The kind of pluralism of actors, systems, sources and norms described here is based not only on mutual autonomy and lack of hierarchy, but also on mutually embedded openness of the various participants to the authority of the other or to some form of collective governance.<sup>6</sup> Pluralism, then, is different from plurality. Pluralism is not the inevitable product of multiplicity but only a contingent possibility in the light of certain preconditions.

The idea of constitutionalism as limited collective self-governance can serve as a kind of grammar of legitimacy to which the various participants appeal in their mutual conflict and accommodation surrounding their competing claims of authority.<sup>7</sup> This, too, is not an inevitable fact, but a potential that arises out of the nature of the participating systems and their mutually embedded commitment to some kind of shared governance. Hierarchy in all this remains unsettled; contest, conflict and accommodation remain decentralized. The result is not troublesome fragmentation but beneficial multiplicity that fosters a collective yet piecemeal process of shaping and reshaping the practice of constitutionalism to suit our present needs.

The European Union figures strongly in this debate, as Union governance is perhaps the most advanced institutional embodiment of taking constitutionalism beyond the state.<sup>8</sup> The European Union itself is a response to the failure of local constitutionalism within Europe. And yet, the European Union is an attempt to forge a larger project of shared governance that can co-exist sympathetically with the continuation of

<sup>6</sup> Cf. Section 4.3.1.    <sup>7</sup> Cf. Section 4.3.2.

<sup>8</sup> For the sake of simplicity, the terms 'European Union', 'European Community', 'Union' and 'Community' will generally be used interchangeably – and the term 'European Economic Community' will be avoided entirely – despite the fact that doing so may at times lead to minor technical inaccuracies or anachronistic turns of phrases.

national constitutional traditions. As a result, the Union seems especially well suited to the project of constitutional pluralism.<sup>9</sup>

As the European Union matures, however, the question becomes whether it will follow a path of self-absorption and seclusion or whether it will reproduce the constitutional openness of its component states in its own dealings with the world beyond its borders. Put another way, will Europe retreat into a regional brand of local constitutionalism or will it take more innovative strides to serve as beacon for the possibilities of global governance? After discussing the dilemma of modern constitutionalism and the pluralist approach, this chapter analyses the European question, with a specific focus on the litigation over the implementation of the United Nations Security Council's targeted economic sanctions within Europe.<sup>10</sup>

This chapter will proceed in four parts. Section 4.2 will discuss local constitutionalism, global constitutionalism and the challenge of pluralism. Section 4.3 will take a brief step back and unpack the ideas of pluralism and constitutionalism into their component parts. Section 4.4 will then analyse the various judicial pronouncements in the *Kadi* case through the lens of local constitutionalism, global constitutionalism and plural constitutionalism. The last part is the conclusion.

## 4.2 From sovereignty to pluralism in global governance

In recent decades, we have witnessed the proliferation of global governance regimes as well as the expansion (and expanded assertion) of powers of both old and new actors in the international arena. Organizations such as the United Nations (UN), the World Trade Organization (WTO), the World Health Organization (WHO), the International Labor Organization (ILO), the Organization of American States (OAS), the African Union (AU) and the European Union (EU), to name only a few, have, to varying degrees, taken on governance functions previously performed by states. International

<sup>9</sup> MacCormick, Neil, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press, 1999); Walker, Neil, 'The EU and the WTO: Constitutionalism in a New Key', in G. de Búrca and J. Scott, eds., *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001) 31–57.

<sup>10</sup> Cf. Section 4.4 at 175.

(and supranational) organizations have become ‘law-makers’.<sup>11</sup> They have interpreted and applied laws, often through the creation of judicial bodies.<sup>12</sup> And, with the helping hand of participating states, they have increasingly taken effective enforcement action as well.

The broadening and deepening of European integration over the years has catapulted the EU into a league of its own, but even more traditional international organizations have significantly expanded their powers. The United Nations and its Security Council, for example, have become more active than ever before on several fronts. Since the end of the (first) Cold War, the number of Security Council Resolutions is on the rise, the number of peacekeeping missions is at an all-time high and the United Nations is increasingly taking on governance tasks in administering the territories of failed states.<sup>13</sup> With the creation of the criminal tribunals for Rwanda and Yugoslavia, as well as the UN-related International Criminal Court, the United Nations has begun to tighten its grasp on administering justice directly to individuals. And with UN Sanctions Committees ordering coercive action not only against states, but also against named individuals suspected of funding international terrorism, the UN is expanding its reach with regard to individuals here, too.

The WTO has been at the forefront of global governance as well. The ‘judicialization’ of the General Agreement on Tariffs and Trade (GATT)

<sup>11</sup> See Alvarez, José, ‘International Organizations: Then and Now’, 100 *American Journal of International Law* (2006) 324 at 333; Alvarez, José, *International Organizations as Law-makers* (Oxford University Press, 2005).

<sup>12</sup> Shany, Yuval, ‘No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary’, 20 *European Journal of International Law* (2009) 73.

<sup>13</sup> See Fry, James, ‘Dionysian Disarmament: Security Council WMD Coercive Disarmament Measures and their Legal Implications’, 29 *Michigan Journal of International Law* (2008) 197 (observing an increase in Security Council resolutions regarding disarmament after the Cold War); Ratner, Steven, ‘Foreign Occupation and Territorial Administration: The Challenges of Convergence’, 16 *European Journal of International Law* (2005) 695; United Nations Peacekeeping Operations, available at <[www.un.org/Depts/dpko/dpko/bnote.htm](http://www.un.org/Depts/dpko/dpko/bnote.htm)> (last accessed 21 April 2009) (depicting the eighteen current peacekeeping missions out of the sixty-three peacekeeping missions in the United Nations history); UN Security Council Resolutions, available at <[www.un.org/Docs/sc/unsc\\_resolutions.html](http://www.un.org/Docs/sc/unsc_resolutions.html)> (last accessed 21 April 2009) (recording that the Security Council adopted 1,144 resolutions from 1992 until present and 725 resolutions from 1946 to 1991).

in the 1970s and 1980s,<sup>14</sup> culminating in the creation of the WTO and its stringent Dispute Resolution Understanding in 1995, has established a practice by which domestic governance decisions affecting international trade are increasingly subject to a kind of global judicial review.<sup>15</sup> The creation of the WTO strengthened the legal effect of such review, expanded the importance of adjudication to the authoritative interpretation of the GATT/WTO and broadened the potential scope of questions (such as environmental policies) that might be drawn into the WTO's purview in the context of settling disputes.<sup>16</sup>

A vast array of scholarship has cropped up to help make sense of this proliferation and intensification of global governance activity. For present purposes, we can distinguish between three principle strands that have approached this phenomenon in the language of constitutionalism. The first seeks to ground international governance exclusively in local constitutions and the consent of states. The second, by contrast, seeks to reimagine states at the service of a cosmopolitan constitutional order. The third approach leaves the question of hierarchy among various sites of governance unsettled, and embraces the resulting multiplicity of authority in the spirit of pluralism. This section discusses each of these in turn.

#### 4.2.1 Local constitutionalism and the new sovereigntists

One group of scholars, sometimes referred to as 'new sovereigntists', resists the very idea of 'global governance' (in the sense of shifting

<sup>14</sup> E.g., Shapiro, M. and A. Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press, 2003), at 72–75.

<sup>15</sup> See, e.g., Jackson, J., 'The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligations', 91 *American Journal of International Law* (1997) 60. It would be mistaken, however, to view this kind of judicial review as being on a par with the role of courts in domestic legal systems. See, e.g., Howse, Robert and Kalypso Nicolaidis, 'Democracy without Sovereignty: The Global Vocation of Political Ethics', in T. Broude and Y. Shany, eds., *The Shifting Allocation of Authority in International Law* (Oxford, Portland: Hart Publishing, 2008), 163 ('The regulation of trade at the global level has not yet established the kind of dialogue and division of labour between the judicial and political sphere that has characterized governance both in the domestic and the European contexts.').

<sup>16</sup> See, e.g., Trebilcock, M. and R. Howse, *The Regulation of International Trade* (London: Routledge, 2005), at 507–556 (discussing the role of environmental disputes in WTO law).

authority beyond the state).<sup>17</sup> Building on the ‘realist’ approach to international relations<sup>18</sup> and traditional notions of state sovereignty, these scholars place international law strictly in the service of states. These scholars often go well beyond the traditional ‘dualist’ claim that international and domestic legal obligations are distinct.<sup>19</sup> They claim that domestic actors adhere to their international legal obligations only in so far as autonomously determined domestic legal norms or policy considerations induce them to do so.<sup>20</sup> Indeed, sovereigntists make an even stronger claim that goes to the very heart of what international law is. International law, these scholars suggest, is ‘*endogenous* to state interests’.<sup>21</sup> This means that ‘international law is not a check on state self-interest’ but merely ‘a product of state self-interest’.<sup>22</sup> The descriptive and the normative run together here: on the sovereigntists’ view, authority (whether legal, moral, democratic or epistemic) ultimately resides in domestic constitutional arrangements.<sup>23</sup>

From a purely domestic perspective, sovereigntists have thus restored order to the raging proliferation among international regimes. Any claim of normative pull from beyond the state is presented as illegitimate.<sup>24</sup> Conflicts among the various international regimes as well as between any given regime and the domestic legal order should therefore not arise – at least not in any troublesome manner. Although various rules of international law may point in different directions or may suggest a certain path of state behaviour, the various obligations will be (and should be)

<sup>17</sup> See, e.g., Posner and Goldsmith, *Limits* (2005); Yoo, *Powers of War and Peace* (2005); Bradley, ‘International Delegations’ (2003); Ku, ‘Delegation’ (2000); Swaine, ‘Constitutionality’ (2004); Young, ‘Dual Federalism’ (2001). For a discussion of this approach, see Spiro, ‘The New Sovereigntists’ (2000), at 9–15; Hathaway and Lavinbuk, ‘Rationalism and Revisionism’ (2006) (reviewing Posner and Goldsmith).

<sup>18</sup> E.g. Donnelly, Jack, *Realism and International Relations* (Cambridge University Press, 2000).

<sup>19</sup> For a critical review of this distinction see, e.g., Walker, Neil, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’, 6 *International Journal of Constitutional Law* 3–4 (2008) 373–396 at 378.

<sup>20</sup> Posner and Goldsmith, *Limits* (2005), at 39, 100–106.

<sup>21</sup> *Ibid.*, at 13 (italicization as original).

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

<sup>23</sup> See Rabkin, Jeremy, *Why Sovereignty Matters* (Washington, DC: American Enterprise Institute Press, 1998).

<sup>24</sup> See, e.g., Kagan, Robert, ‘America’s Crisis of Legitimacy’, 83 *Foreign Affairs* (March/April 2004) 65, at 65.



conclusively mediated by the rational self-interest of states. States, on this view, do not (and need not) observe international law that does not serve their autonomously defined rational self-interest.<sup>25</sup>

The new sovereigntists thus defend a rather traditional vision of hierarchy. On their view, international law is fully subordinated to the ultimate (and exclusively legitimate) authority of the state and its domestic legal process. To be sure, conflicts among the various regimes of global governance or among the (purported) norms of any of these regimes and state behaviour will emerge. For new sovereigntists, however, such conflicts are not the result of any novel proliferation of global governance regimes that represent multiple sites of public authority, but simply a reflection of the age-old conflict among nations based on power and interest.<sup>26</sup>

#### 4.2.2 *Global constitutionalism and the cosmopolitan ideal*

At the opposite end of the scholarly spectrum a different school of thought seeks to promote order in the arena of global governance and its interaction with the domestic sphere from a distinctly universal perspective. These authors strive to impose a cosmopolitan order based on the collective exploration of the common good, shared values or the common acceptance of a minimum set of rights.<sup>27</sup>

A frequent starting point for cosmopolitan approaches are basic Kantian ideas that the individual is the ultimate unit of concern, that all individuals can lay claim to this status, and that this status has global force.<sup>28</sup> Beginning from these premises, Thomas Pogge, for example, advocates ‘institutional cosmopolitanism’, which demands that each of

<sup>25</sup> Posner and Goldsmith, *Limits* (2005), at 202 ([I]nternational law can be binding and robust, but only when it is rational for states to comply with it.).

<sup>26</sup> Kagan, ‘America’s Crisis’ (2004).

<sup>27</sup> See Pogge, Thomas, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002); Backer, Larry, ‘From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems’, 113 *Penn State Law Review* (2009) 671; Besson, Samantha, ‘Human Rights, Institutional Duties and Cosmopolitan Responsibilities’, 23 *Oxford Journal of Legal Studies* (2003) 507; Feldman, Noah, ‘Cosmopolitan Law?’, 116 *Yale Law Journal* (2007) 1022; Pogge, Thomas, ‘Cosmopolitanism and Sovereignty’, 103 *Ethics* 1 (1992) 48–75. For a critical description of cosmopolitanism, see Goldsmith, Jack, ‘Liberal Democracy and Cosmopolitan Duty’, 55 *Stanford Law Review* (2003) 1667.

<sup>28</sup> Pogge, *World Poverty* (2002).

us take responsibility for the global effects on individuals of the national and global governance regimes we help establish. He makes out a moral argument for the dispersal of sovereignty into vertically nested regimes that are better suited to ensuring the satisfaction of a minimal set of universal social and economic human rights. David Held's conception of 'cosmopolitan democratic law', by contrast, focuses principally on the inability of national democracies to live up to the idea of self-government even with regard to their own populations in our modern interconnected world.<sup>29</sup> For this reason alone, 'national democracies require an international cosmopolitan democracy if they are to be sustained and developed in the contemporary era'.<sup>30</sup> And so, too, Held supports 'the subordination of regional, national and local "sovereignties" to an overarching legal framework'.<sup>31</sup>

A distinctly German school of scholarship presents a legal variant of these ideas under the rubric of global constitutionalism.<sup>32</sup> Christian Tomuschat, for instance, has prominently argued for turning the traditional sovereigntists' argument on its head.<sup>33</sup> In Tomuschat's view, international law does not serve the interests of states. Instead, states serve the function defined by the 'international community' and international law, such as fulfilling their obligation each 'to perform specific services for the benefit of its citizens'.<sup>34</sup> Tomuschat insists that the idea of an 'international community' is not 'simply *une façon de parler*', but that it 'constitutes indeed an entity which may be identified as a legal actor'.<sup>35</sup> For Tomuschat, the international community 'is not a homogenous organizational unit, but can be defined as an ensemble of rules, procedures and mechanisms designed to protect collective interests of

<sup>29</sup> Held, *Democracy and the Global Order* (1995).

<sup>30</sup> *Ibid.*, at 23. <sup>31</sup> *Ibid.*, at 234.

<sup>32</sup> Bogdandy, Armin von, 'Constitutionalism in International Law: Comment on a Proposal from Germany', 47 *Harvard Journal of International Law* (2006) 223–242 at 223–224. The roots of this tradition go back to Mosler and Kelsen. See, e.g., Kelsen, Hans, *Reine Rechtslehre* (2nd reprint of first edition, Leipzig und Wien; Aalen: Scientia Verlag, 1994 [1934]); Mosler, Hermann, 'The International Society as a Legal Community', 140 *Receuil des Cours* (1974) 1–320 at 11.

<sup>33</sup> Tomuschat, 'International Law' (1999). <sup>34</sup> *Ibid.*, at 95. <sup>35</sup> *Ibid.*, at 72–73.

humankind, based on a perception of commonly shared values'.<sup>36</sup> Tomuschat thus even speaks of a 'constitution of humankind' that comprises this normative framework at the international level.<sup>37</sup> The upshot is a global hierarchy built on the foundation of shared rights, according to which '[s]tates are no more than instruments whose inherent function it is to serve the interests of their citizens as legally expressed in human rights'.<sup>38</sup>

Building on revised Kantian premises, Jürgen Habermas similarly urges a 'constitutional' understanding of the United Nations as a 'framework for a [...] politically constituted world society'.<sup>39</sup> Like Tomuschat, Habermas hedges somewhat on the success of this enterprise,<sup>40</sup> and he recognizes the continued centrality of states as repositories of law and the legitimate use of power.<sup>41</sup> And yet, he, too, argues for the 'constitutionalization of international law'.<sup>42</sup> Habermas's vision focuses specifically on the UN Charter, on protecting human rights and on controlling the use of force.<sup>43</sup> But he nonetheless warns against underestimating the 'expanding horizon of a world society that is increasingly self-programming, even at the cultural level'.<sup>44</sup> Habermas thus promotes a vision of states, transnational and regional organizations operating within the overarching global order of the United Nations to address issues from the more basic preservation of fundamental rights and peace among nations to environmental regulation and social fairness.<sup>45</sup>

<sup>36</sup> *Ibid.*, at 88. Grand in aspiration as this is, Tomuschat injects a certain realism of expectations. See page 80 (noting that the international community can come about only in so far as it receives the 'backing from societal and historical realities to become a driving force in international relations'). As one illustration that this is not pure utopia, however, Tomuschat cites the system of criminal prosecution at the international level.

<sup>37</sup> *Ibid.*, at 90. <sup>38</sup> *Ibid.*, at 162. <sup>39</sup> Habermas, *Divided West* (2006).

<sup>40</sup> *Ibid.* <sup>41</sup> *Ibid.*, at 176. <sup>42</sup> *Ibid.*, at 143, 177.

<sup>43</sup> *Ibid.*, at 165. Habermas emphasizes the common recognition of rights, the inclusion of individuals as immediate subjects of international law, effective control of the (non-legitimate) use of violence at the UN level and the 'hierarchization' of international law in Article 103 of the UN Charter and *ius cogens*. See generally pages 160–175.

<sup>44</sup> *Ibid.*, at 176.

<sup>45</sup> Many others – too numerous to discuss in any detail here – write in this tradition. Suffice it to say that alongside generalists, such as Habermas, Tomuschat, Mosler and Kelsen, there are also regime-specific advocates in this tradition. In this latter vein, for example, Bardo Fassbender builds on Alfred

Putting aside the many differences among the various contributions in this tradition, global constitutionalists share several important intellectual commitments that are diametrically opposed to those of the local constitutionalists: first, an understanding (both descriptive and normative) of the arena of global governance as not grounded merely in the consent of states but as a legitimate site for the independent production of politics and norms; second, a desire to increase the normative strength of international law in terms of legal and moral obligation, as well as domestic internalization, application and enforcement; and third, an aspiration to subsume the multiplicity of global governance sites, along with states, under a single hierarchically ordered system of multilevel global governance.

Local and global constitutionalists, however, have one thing in common. Both perspectives impose a settled normative hierarchy on the arena of global governance. Whereas local constitutionalists anchor their vision in the supremacy of the rational self-interest of states, global constitutionalists privilege a cosmopolitan idea of community. One way or another, legal conflicts do not endure, but can be authoritatively resolved. Under either vision, the fragmentation of global governance is ultimately tamed.

#### 4.2.3 *The pluralist challenge*

In contrast to both local and global constitutionalists, a third group of scholars embraces fragmentation in the name of ‘pluralism’. What began as a theory about the distribution of constitutional authority within Europe is increasingly being presented as an attractive vision of global governance writ large.

Within Europe, the so-called ‘pluralist movement’ blossomed in reaction to the German *Bundesverfassungsgericht*’s Maastricht decision.<sup>46</sup> In that case, Germany’s constitutional court tolerated the

Verdross and Bruno Simma’s work to argue for an understanding of the UN Charter as a constitutional framework governing the international community (Fassbender, ‘The United Nations Charter’ (1998)), whereas Ernst-Ulrich Petersman argues for a constitutional vision of the WTO as a regime to bring order to the realm of global governance; see, e.g., Petersmann, ‘WTO Constitution’ (2000).

<sup>46</sup> See Baquero Cruz, Julio, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’, 14 *European Law Journal* (2008) 389–420 at 412–418.

Union's expansion of powers (including the assertion of supremacy and direct effect within Germany) while formally retaining the national court's ultimate control over German constitutional space.<sup>47</sup> Neil MacCormick originally described this as the idea of 'constitutional pluralism,' which he defined as follows:

Where there is a plurality of institutional normative orders, each with a functioning constitution (at least in the sense of a body of higher-order norms establishing and conditioning relevant governmental powers), it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another.<sup>48</sup>

To be sure, as a matter of formal rhetoric, both the Court of Justice of the European Union,<sup>49</sup> on the one hand, and national constitutional courts (such as the German *Bundesverfassungsgericht*), on the other, have each laid claim to the ultimate supremacy of (its own interpretation of) its own legal order. But the judicial practice has, in fact, been one of principled mutual accommodation.

The kind of mutual respect and accommodation within Europe thus represents a genuine third way between the particularism of the local constitutionalists (which subjects the global realm to national interests) and the cosmopolitanism of the global constitutionalists (which incorporates the national and the global into a single unity of interest). As a broader social ethos, Europe's pluralism reflects what Joseph Weiler has called the principle of 'constitutional tolerance'.<sup>50</sup> The pressing question, however, is the extent to which (if at all) these principles can find application beyond the special case of Europe's internal system of governance.

<sup>47</sup> *Manfred Brunner et al. v. European Union Treaty*, 89 BVerfGE 155 (1993), English translation at [1994] 1 C.M.L.R. 57.

<sup>48</sup> MacCormick, *Questioning Sovereignty* (1999), at 104.

<sup>49</sup> In the following, for the sake of simplicity, the terms 'Court of Justice of the European Union', 'European Court of Justice' and 'Court of Justice', as well as the abbreviations 'CJEU' and 'ECJ', will at times be used interchangeably despite the fact that doing so may create technical inaccuracies or anachronistic turns of phrases.

<sup>50</sup> Weiler, J. H. H., 'Federalism without Constitutionalism: Europe's Sonderweg', in Kalypso Nicolaidis and Robert Howse, eds., *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (Oxford University Press, 2001), 54, at 62–70.

Addressing this question, Neil Walker has suggested that just as we can relax the statist assumptions of constitutionalism within Europe, so, too, we can view constitutionalism (and hence constitutional pluralism) as applying to various sites of global governance. After disaggregating constitutionalism into seven indices,<sup>51</sup> Walker agrees that the European Union is in the vanguard of non-state entities exhibiting constitutional features.<sup>52</sup> But he argues that it would be mistaken to dismiss the ‘modes[t]’ constitutional elements present in other entities as well.<sup>53</sup>

Responding to this argument in the context of the WTO, scholars such as Robert Howse and Kalypso Nicolaidis resist constitutionalization on normative grounds.<sup>54</sup> Whether the goal is to protect certain economic rights by placing their enforcement above politics or to draw on the WTO system for an authoritative balancing of an ever-broadening scope of interests from human rights to labour to environmental concerns, Howse and Nicolaidis are wary.<sup>55</sup> This kind of constitutionalization does not help to alleviate the ‘legitimacy conundrum’ of global governance.<sup>56</sup> Nor does it lead to an adequate consideration of the multiple sites of norm production at the national as well as global level of governance:

Instead of presupposing that that the treaty text is animated by a constitutional *telos* of freer trade, or looking primarily *within* the WTO for the relevant structural principles, we emphasize the importance of non-WTO

<sup>51</sup> See Walker, ‘The EU and the WTO’ (2001). Walker indices are a self-conscious constitutional discourse, foundational (i.e. non-derivative) legal authority, ‘multi-functionality’ (in the sense of jurisdiction beyond the pursuit of a single regulatory goal or policy), interpretive autonomy, institutional structures of governance, specification of membership or citizenship (of individuals and non-state actors), and mechanisms for representing the members in the decision-making process of the organization or system.

<sup>52</sup> *Ibid.*, at 36 (referring to the EU as currently the ‘most mature non-state polity’).

<sup>53</sup> *Ibid.*, at 50.

<sup>54</sup> Howse and Nicolaidis oppose the general move towards allowing individuals to invoke WTO law as ‘rights’ in WTO review bodies and in domestic courts, making WTO law and the WTO *acquis* supreme and difficult to change, and unifying the ‘complex, messily negotiated bargain of diverse rule, principles, and norms’ of the WTO into a ‘single structure’; see Howse, Robert and Kalypso Nicolaidis, ‘Legitimacy through “Higher Law”? Why Constitutionalizing the WTO Is a Step Too Far’, in T. Cottier, P. Mavroidis and P. Blatter, eds., *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Ann Arbor: University of Michigan Press, 2003), 307 at 308.

<sup>55</sup> *Ibid.*, at 309–310. <sup>56</sup> *Ibid.*, at 310.

institutions and norms in treaty interpretation, which represent values other than free or freer trade. The WTO dispute settlement organs must display considerable deference to substantive domestic regulatory choices as well as draw on and defer to other international regimes whose rules, policies, and institutions represent and articulate such values, whether in respect of health, labor standards, environment, or human rights.<sup>57</sup>

Properly understood, then, this critique of constitutionalization responds less to a vision of plural constitutionalism than to a kind of global constitutionalism in which any one site is privileged over all others. Indeed, Howse and Nicolaidis make a plea for a kind of pluralism that, in principle, should be compatible with constitutionalism at least in the expansive use of that term. Even absent the kind of coherent polity creation that Walker ultimately seems to focus on, global governance sites and institutions may stand in a pluralist relation to one another as well as to state actors, and they may draw on the principles of constitutionalism to mediate conflict and contestation among these various sites of authority.

### **4.3 Unpacking pluralism and constitutionalism**

Two principal ingredients are necessary for pluralism to obtain: first, a plurality of partially autonomous sites or institutions of public governance with mutually conflicting claims of authority; and second, mutually embedded openness within these sites or institutions with regard to each other's claims of authority. This is often true for the relation between states and the realm of international law in which organizations of global governance operate, as well as in the relation among the various sites of public governance within the global arena. Furthermore, this is also often true for the co-existence of multiple systems or regimes as well as for the co-existence of multiple interpretative institutions within a single regime.

The claim here is not that every single regime and system – whether domestic, international, transnational or global – displays the same openness to every other system. Nor that every interpretive institution recognizes the claims of its rivals to an equal extent. Instead, the claim is that whenever we find a deeply embedded mutual openness among semi-

<sup>57</sup> *Ibid.*, at 311.

autonomous systems or regimes, the stage for pluralism is set. Whenever such openness is embedded in the law of one system or regime with respect to that of another, conflicts of authority may be negotiated by resort to conflict and accommodation based in principle not power.

This leads us to the final ingredient of the plural constellation discussed here: constitutionalism. To the extent that the idea of limited collective self-governance frames the understanding of the competing sites and institutions, and to the extent that the competing sites and institutions are structurally open to each other, constitutionalism can serve as a common grammar for making claims of authority acceptable. Constitutionalism can be further unpacked into the primary elements of legitimacy of modern governance. These can be combined with one another in various ways to make out a specific claim to public authority. Constitutionalism itself is thus not unitary, becoming plural instead.

#### 4.3.1 *The pluralist constellation in global governance*

The first kind of pluralism we see is a pluralism of legal systems, that is, the basic hierarchy of authority between international law and domestic law remains fundamentally unresolved. The rather unhelpful theoretical debate between ‘monism’ and ‘dualism’ ended long ago in a draw with each position effectively calling the other ‘illogical’.<sup>58</sup> Indeed, as Kelsen showed, even ‘monism’ itself can be turned on its head by arguing for ‘monism’ grounded in international law and ‘monism’ grounded in national law.<sup>59</sup> If we by-pass this debate and simply look to the content of both municipal and international law, the fundamental tension between multiple claims of authority is readily apparent. On the one hand, the general rules of international law bind state actors (and sometimes non-state actors and individuals as well) regardless of whether these actors are legally or constitutionally unwilling or unable to comply.<sup>60</sup> On the other hand, as far as domestic actors are concerned, domestic constitutions ultimately control the penetration of

<sup>58</sup> Bogdandy, Armin von, ‘Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law’, 6 *International Journal of Constitutional Law* (2008) 397 at 400.

<sup>59</sup> Kelsen, Hans, ‘Die Einheit von Völkerrecht und staatlichem Recht’, 19 *ZaöRV* (1958) 234.

<sup>60</sup> The Vienna Convention on Treaties, Article 27, 23 May 1969, 1155 U.N.T.S. 331.



international norms into the domestic legal sphere regardless of whether international law makes room for this choice.<sup>61</sup>

Furthermore, at the international, transnational or global level of governance, which might be thought of as generally organized under public international law, different actors, systems, sources and norms often stand in a similar relation of unsettled hierarchy to one another. As the International Law Commission's report on fragmentation suggests, for example, established principles of public international law, such as Article 103 of the UN Treaty, the lexical priority of *ius cogens*, or the Vienna Convention on the Law of Treaties, do not generally resolve the conflicts among different norms and regimes at the global level of governance.<sup>62</sup> There is no universally mandated rule that would authoritatively and conclusively mediate among all the rivalling claims of jurisdiction. Moreover, each of these systems or regimes – from the WTO to the UN to regional environmental or human rights conventions – comes with its own rules as well as 'its own principles, its own form of expertise and its own "ethos", not necessarily identical to the ethos of neighboring specialization'.<sup>63</sup> The advanced state of institutionalization of such bodies, as in the case of the UN or the WTO, further enhances these features. In short, at the global level of governance, we find a multiplicity of governance sites that are semi-autonomous from one another with overlapping (and rivalling) claims of legal authority.

Despite their separateness, however, these various levels and regimes are not entirely unconnected but often display a deeply embedded mutual openness to one another. For instance, many domestic legal systems in one form or another are fundamentally committed to recognizing the authority of international legal norms. At one end of the spectrum, there are provisions as simple as the United States Constitution's recognition that treaties to which the United States is a

<sup>61</sup> Even in the Netherlands, the (selective) incorporation of international law as directly operative domestic law is the result of a domestic constitutional choice embedded in the state's own founding constitution, not of an inexorable international command. See de Wet, Erika, 'The Reception Process in the Netherlands and Belgium', in H. Keller and A. Stone Sweet, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008), 229 at 235–242.

<sup>62</sup> See International Law Commission, *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) (finalized by Martii Koskenniemi).

<sup>63</sup> *Ibid.*, at para 15.

party become an integral part of the ‘law of the land’.<sup>64</sup> At the other, we find deeper commitments such as the German Constitution’s elevation of general principles of general international law above ordinary federal law as well as an authorization of the transfer of sovereign powers to international organizations.<sup>65</sup> Each in their own way, many domestic systems are constitutionally committed to the general project of law and governance beyond the state.<sup>66</sup> Even countries that strictly separate domestic from international legal orders, such as the United Kingdom, have at times adopted quasi-constitutional commitments to governance beyond the state by adopting special laws that broadly shape the interpretation and application of ordinary domestic laws so as to conform the latter to the needs of transnational norms.<sup>67</sup>

Conversely, the global level of governance is both normatively and institutionally deeply dependent on states. From customary law that grows out of state practice and the state-based system of international conventions to the general reliance on state judges to interpret global legal norms and on state resources for the effective enforcement of global legal norms, global governance deeply demands state support.<sup>68</sup>

<sup>64</sup> US Constitution Article 6. <sup>65</sup> Grundgesetz Articles 24, 25.

<sup>66</sup> See, e.g., Keller, H. and A. Stone Sweet, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008); Conforti, B. and F. Francioni, eds., *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff, 1997); Franck, T. and G. Fox, eds., *International Law Decisions in National Courts* (Irvington-on-Hudson, NY: Transnational Publishers, 1996); Jacobs F. G. and S. Roberts, eds., *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987); Slyz, G., ‘International Law in National Courts’, 28 *NYU Journal of International Law and Politics* (1996) 65 (discussing incorporation of international law in the United States, Germany and Canada); Walters, M., ‘Creeping Monism: The Judicial Trend Towards Interpretative Incorporation of Human Rights Treaties’, 107 *Columbia Law Review* (2007) 628 (discussing the incorporation of human rights treaties in common law courts).

<sup>67</sup> See European Communities Act of 1972, c. 68; *Thoburn v. Sunderland* [2002] EWHC 195 (Admin), paras 60–67 (classifying the European Communities Act of 1972 as a constitutional statute).

<sup>68</sup> See, e.g., Picker, Colin, ‘International Law’s Mixed Heritage: A Common/Civil Law Jurisdiction’, 41 *Vanderbilt Journal of Transnational Law* (2008) 1083 at 1090–1094; Charney, Jonathan, ‘Universal International Law’, 87 *American Journal of International Law* (1993) 529 at 534–543 (discussing the role of states in the formation of public international law). For an examination of self-enforcement and its alternatives in international law, see, e.g., Scott, Robert E. and Paul B. Stephan, ‘Self-Enforcing International Agreements and the Limits of Coercion’, *Wisconsin Law Review* (2004) 551.

Even those global regimes that are most advanced in terms of institutional development, such as the WTO, still depend critically on the participation of states in the creation, interpretation and application of norms.<sup>69</sup> This kind of structural embrace of states not only as subjects but as essential partners in governance is not a temporary defect of the international legal system but a core characteristic of global governance.

Mutual openness of the various regimes to one another also extends to the relationship among the various regimes at the level of global governance. At a basic level, international and transnational regimes are built on the common foundations of public international law. This suggests a presumptive respect of a common set of rules ranging from customary international law (including human rights law and the law of responsibility for states and international institutions) to general rules governing the creation, modification and interpretation of treaties.<sup>70</sup> Next, as different global regimes are often created by an overlapping set of signatory states, here, too, we find an embedded interconnectedness in that, for example, later regimes cannot legally undermine the functioning of earlier ones absent the consent of all parties to that earlier convention.<sup>71</sup> At the most detailed level, many regimes of global governance contain specific provisions that suggest openness to other global regimes, as in the UN Charter's apparent incorporation of international human rights law<sup>72</sup> or the European Union's apparent accommodation of treaties (including the UN Treaty) that precede the Treaty of Rome.<sup>73</sup>

<sup>69</sup> See Agreement Establishing the World Trade Organization, Article IX(2), 15 April, 1994; Bhuiyan, Sharif, *National Law in WTO Law* (Cambridge University Press, 2007); Cheyne, I., 'Gateways to the Precautionary Principle in International Law', 19 *Journal of Environmental Law* (2007) 155 at 171 (observing that state practice influences the interpretation of WTO law); Shell, G., 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization', 44 *Duke Law Journal* (1995) 829 at 897–98 (observing that WTO rules require a trade adjudicator to apply the customary rules of interpretation of public international law).

<sup>70</sup> See Alvarez, José, 'Governing the World: International Organizations as Lawmakers', 31 *Suffolk Transnational Law Review* (2008) 591 at 592 (noting the traditional view that international organizations are structured around the basic sources of international law: treaties, custom and general principles).

<sup>71</sup> See, e.g., The Vienna Convention on Treaties, Article 30, 23 May 1969, 1155 U.N.T.S. 331.; Fox, Gregory, 'International Organizations: Conflicts in International Law', 95 *American Society of International Law Proceedings* (2001) 183 at 184.

<sup>72</sup> UN Charter, Articles 1, 55. <sup>73</sup> Treaty on European Community, Article 307.

Moreover, in addition to this pluralism of legal systems ('systems pluralism'), we also find a pluralism of interpretive institutions ('institutional pluralism' or 'interpretive pluralism').<sup>74</sup> Put another way, alongside the combination of mutual openness and autonomy of legal systems and regimes, we find a similar combination of mutual openness and autonomy among different institutions that seek to access the norms of a common regime. The idea is rather simple. Individual interpretive institutions will often be situated within a particular national, supranational or international legal system. And yet, despite their structural separation, these various interpreters share a common purpose, such as interpreting a shared legal system or norm. Whenever this shared legal system does not definitively designate a final arbiter of meaning for the shared system as a whole, the stage for pluralism is set yet again.

We see this unsettled hierarchy of interpretive authority in the relation between international and domestic courts as well as in the relation among different institutions at the global level. As for the former, the United States Supreme Court, for example, recently asserted its authority to interpret international conventions to which the United States is a party according to its own best lights, as opposed to following the judgment of the International Court of Justice. As the US Supreme Court held in *Sanchez-Llamas*, '[n]othing in the structure or purpose of the [International Court of Justice] suggests that its interpretations were intended to be conclusive on our courts'.<sup>75</sup> In a subsequent iteration of the dispute, the Supreme Court rejected being bound by an ICJ determination that the United States had violated the rights of named individuals under the Vienna Convention on Consular Relations.<sup>76</sup> The Israeli Supreme Court has come to a similar conclusion about the significance of ICJ opinions for the Supreme Court's own interpretation of international law.<sup>77</sup> In another example, the United States, the United Kingdom and France disagreed with the UN Human Rights

<sup>74</sup> Halberstam, Daniel, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in Jeffrey L. Dunoff and Joel P. Trachtman, eds., *Constitutionalism, International Law and Global Government* (Cambridge University Press, 2009), 326–355, available at <<http://ssrn.com/abstract=1147769>>.

<sup>75</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 354 (2006).

<sup>76</sup> *Medellin v. Texas*, 552 U.S. 491, 128 S. Ct. 1346 (2008).

<sup>77</sup> HCJ 7957/04 Mara'abe v. Prime Minister of Israel, para 56., available at <<http://elyon1.court.gov.il/eng/home/index.html>>.

Committee's assertion of authority to determine whether a state reservation is inconsistent with the object and purpose of the International Convention on Civil and Political Rights (ICCPR).<sup>78</sup> And the United States disagreed with the Human Rights Committee's assertion of authority to interpret the ICCPR as containing an implicit obligation of *non-refoulement*.<sup>79</sup> These national assertions of interpretive authority are not deemed universally valid, but instead reflect particular, national views.

Among global institutions the question of hierarchy is frequently unsettled as well. Consider only the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) disagreeing with the previous judgment of the ICJ about attributing to a state only such actions of third parties over which the state had 'effective control'.<sup>80</sup> Although the ICJ has reiterated its original position in a subsequent case, there is no authoritative resolution of this conflict. Similarly, there have been prominent disagreements between the European Court of Human Rights and the Court of Justice of the European Union on the interpretation of certain provisions of the European Convention on Human Rights.<sup>81</sup> The WTO Appellate Body, International Court of Justice and the International Tribunal for the Law of the Sea (ITLOS)

<sup>78</sup> See U.N. Human Rights Comm., General Comment 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (11 April 1994); Report of the Human Rights Committee, U.N. Doc. A/51/40 117–19 (16 September 1996) (objections by France); Report of the Human Rights Committee, Vol. 1, U.N. Doc. A/50/40[Vol.1](Supp) 126–34 (4 February 1996) (objections by the USA and the UK); Guzman, A., 'International Tribunals: A Rational Choice Analysis', 157 *University of Pennsylvania Law Review* (2008) 171 at 232 and note 168.

<sup>79</sup> See U.N. Human Rights Comm., *Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee*, at 8–11, U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 (12 February 2008).

<sup>80</sup> Cf. *Nicaragua v. United States of America*, Judgment, I.C.J. Reports 1986, p. 14 (announcing an effective control standard); Case No. IT-94–1-A, *Prosecutor v. Tadic*, Judgment of 15 July 1999, paras 115–145 (ICTY Appeals Chamber) (rejecting an effective control standard); *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia & Montenegro)*, I.C.J. Reports 2007, paras 396–407 (reasserting an effective control standard).

<sup>81</sup> See Defeis, Elizabeth, 'Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights', 19 *Dickinson Journal of International Law* (2001) 301 (discussing disagreements between the ECJ and ECHR). Such conflicts may lessen with the impending accession of the Union to the ECHR.

have differed on the role of the precautionary principle in international environmental disputes.<sup>82</sup> And the ITLOS and an arbitral tribunal have rendered conflicting interpretations on the applicability of the UNCLOS (United Nations Convention on the Law of the Sea) dispute settlement provisions.<sup>83</sup>

#### 4.3.2 *A grammar of legitimacy: pluralism and constitutionalism rejoined*

Pluralism need not spell anarchy or chaos. As the English political pluralist Harold Laski observed, the ‘facts before us are anarchical’, but we ‘reduce them ourselves to order by being able to convince men [and women] that some unity we make means added richness to their lives’.<sup>84</sup> Contrary to what some scholars have suggested,<sup>85</sup> however, order, on this view, does not depend on subsuming the multiple claims of authority under an external hierarchy of institutions or of thick substantive norms. Instead, order may be created from the bottom up by accommodating claims of authority when they are warranted and resisting them when they are not. In this way, as Laski again put it, institutions ‘only secure obedience in terms of the values that obedience creates’.<sup>86</sup> Pluralism is therefore ‘consistently experimentalist in temper’.<sup>87</sup> It involves a contest for legitimacy among various institutions, each of which necessarily represents only a partial view of the balance of

<sup>82</sup> See *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Order of 27 August 1999, paras 77–80 (ITLOS); *EC Measures Concerning Meat and Meat Products*, Report of the Appellate Body, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R, sec. VI (1998); *Gabcikovo-Nagymaros (Hungary/Slovakia)* 1997 I.C.J. 3, 42–45. Cf. Shany, Yuval, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003), at 112–113.

<sup>83</sup> See *Southern Bluefin Tuna (Australia & New Zealand v. Japan)*, Award of 4 August 2000, 39 I.L.M. 1359 (2000); *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Order of 27 August 1999, paras 77–80 (ITLOS); cf. Shany, *Competing Jurisdictions* (2003).

<sup>84</sup> Laski, Harold J., ‘Law and the State’, in Paul Q. Hirst, ed., *A Pluralist Theory of the State* (London: Routledge, 1989), 197–227 at 226.

<sup>85</sup> See, e.g., MacCormick, *Questioning Sovereignty* (1999), at 121. MacCormick, for example, rejects radical pluralism in favour of pluralism organized under the hierarchical umbrella of public international law.

<sup>86</sup> Laski, ‘Law and the State’ (1989).

<sup>87</sup> Laski, Harold J., ‘The Pluralistic State’, in Paul Q. Hirst, ed., *A Pluralist Theory of the State* (London: Routledge, 1989), 188.

relevant interests to be struck. Pluralism might even be seen as a new form of legal process that brings together the New Haven School's vision of international (or, better, global) legal process<sup>88</sup> and ideas of 'jurisdictional redundancy'<sup>89</sup> to help us overcome the necessary limitations of any individual site of governance taken alone.<sup>90</sup>

If all this is true, pluralism must mean more than plurality. Pluralism is not the mere multiplication of mutually exclusive claims of authority across many domains (i.e. a kind of dualism among more than two systems). Instead, pluralism is a synthesis of monism and dualism in that it stands for conversation, contest and conflict among the different claims of authority by common reference to the values that obedience to one or the other of these actors, systems, sources or norms would promote.

This is where constitutionalism joins pluralism. Constitutionalism, simply put, is the idea of limited collective self-governance. Constitutionalism is a particular theory of public authority that grows out of the modern liberal enlightenment tradition. It is embodied most prominently in the modern constitutional movement with national constitutions as its dominant expression. But constitutionalism, as an idea and a theory of public power, is broader and more varied than its various instantiations in national constitutions might suggest. As a theory of the legitimacy of public power, the idea of constitutionalism provides an answer to the question of why we have constitutions. It tells us what constitutions are for. And in so doing, it ultimately provides a point of access for claims regarding the legitimacy of public power even from beyond the particular tradition of national constitutions from which the idea of constitutionalism first emerged.

The constitutional idea of limited collective self-governance can be broken down into three primary values – call them 'voice', 'rights' and 'expertise'. Let us define the first of these as asking which actor has the superior claim of representing the relevant political will; the second as asking which actor has the superior claim of vindicating individual rights; and the third as asking which actor has the superior claim of instrumental capacity (understood broadly as encompassing claims to

<sup>88</sup> See, e.g., Koh, Harold, 'Is there a "New" New Haven School of International Law?', 32 *Yale Journal of International Law* (2007) 559.

<sup>89</sup> See Cover, Robert M., 'The Uses of Jurisdictional Redundancy', 22 *William & Mary Law Review* (1980–81) 639.

<sup>90</sup> See Schiff Berman, Paul, 'A Pluralist Approach to International Law', 32 *Yale Journal of International Law* (2007) 301.

knowledge-based resources as well as bureaucratic capacity). These primary values are not set with any accepted particularity or richness, nor are they measured on a universally shared metric. Instead, these values frame the debate. They form a kind of grammar of legitimacy employed by the various competing actors as they make their respective claims of authority.

Simply and boldly put, voice, rights and expertise provide the basis for legitimacy of public power in modern liberal governance. The first two are informed by the ideas of positive and negative liberty, respectively – albeit with some notable modification. Positive liberty, as elaborated by Benjamin Constant and later popularized by Isaiah Berlin, is, of course, as old as democratic theory itself.<sup>91</sup> It grounds the legitimacy of public power in the individual's right to participate in the process of governance. Calling this 'voice' is meant to abstract from any actual process of collective self-governance by complicating the question of whose political will is relevant and who represents that will best. As applied to a national constitutional system like the United States, the idea of voice thus highlights such problems as legislative capture and other shortcomings of the ordinary political process as presently constituted.<sup>92</sup> As applied to the European Union, the idea of voice highlights such problems as the thin nature of the European polity, on the one hand, as well as the shortcomings of national political processes in representing all the relevant political wills within and throughout the nation states of Europe, on the other.<sup>93</sup> As applied to global governance, voice highlights such problems as, for example, various forms of capture within domestic and

<sup>91</sup> See, generally, Holmes, Stephen, *Benjamin Constant and the Making of Modern Liberalism* (New Haven: Yale University Press, 1984); and Berlin, Isaiah, *Four Essays on Liberty* (Oxford University Press, 1969) (discussing positive liberty).

<sup>92</sup> Cf. Farber, D. and P. Frickey, *Law and Public Choice: A Critical Introduction* (University of Chicago Press, 1991) at 12–62; Friedman, Barry, 'Dialogue and Judicial Review', 91 *Michigan Law Review* (1993) 577 at 629–44. This idea is also implicit in Bruce Ackerman's reconceptualization of the counter-majoritarian difficulty as an inter-temporal difficulty with democratic claims on the side of the judiciary; see Ackerman, Bruce, *We the People: Foundations* (Cambridge, Mass.: Harvard University Press, 1993).

<sup>93</sup> For a discussion, see Halberstam, 'Constitutional Heterarchy' (2009); Kumm, Matthias, 'Why Europeans Will Not Embrace Constitutional Patriotism', 6 *International Journal of Constitutional Law* (2008) 117; Grimm, Dieter, 'Integration by Constitution', 3 *International Journal of Constitutional Law* (2005) 193–208 at 197; Haltern, U., 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination', 9 *European Law Journal* 1



international legal institutions as well as the debate about the representation of interests of affected individuals and groups around the globe in the absence of a global demos.<sup>94</sup>

The idea of rights, as employed here, draws on the foundational insight of negative liberty as constitutive of legitimacy, albeit once again with some modification. Notoriously absent from Constant's and Berlin's formulations are modern rights to government assistance, such as education, housing or welfare.<sup>95</sup> Indeed, even more traditional anti-discrimination norms that sound in simple prohibition, may require considerable positive government action.<sup>96</sup> Benjamin Constant's felicitous phrase of the 'liberty of the moderns' seems open to this development (although imputing an understanding of affirmative rights to Constant himself would be anachronistic). In any event, the idea of rights as used here is not necessarily limited to negative rights, but may encompass rights to certain kinds of positive government action as well.

Expertise (in the expansive sense of instrumental rationality in which I use the term here) provides the third legitimating ingredient of public power in modern governance. At its core, the idea of 'expertise' stands for two connected concepts of instrumental rationality: knowledge and effectiveness. With its origins in Enlightenment thought and the rational production of knowledge, safeguarding the production and deployment of knowledge as a means of effective governance has become a central ingredient of the legitimacy of modern liberal authority.

Since the rise of Weberian bureaucracy in the nineteenth century,<sup>97</sup> and the explosive growth of the 'administrative state' in the twentieth,<sup>98</sup>

(2003) 14–44; Nicolaidis, Kalypso, 'The New Constitution as European Democracy?', *Federal Trust Online Working Paper No. 38/03* (2003), available at <<http://ssrn.com/abstract=517423>>; Maduro, Miguel, 'Europe and the Constitution: What If This Is As Good As It Gets?', in J. H. H. Weiler and M. Wind, eds., *European Constitutionalism Beyond the State* (Cambridge University Press, 2003), 74–102; Weiler, J. H. H., 'European Constitutionalism and its Discontents', 17 *Northwestern Journal of International Law and Business* (1996–97) 354.

<sup>94</sup> See Howse and Nicolaidis, 'Legitimacy through "Higher Law"?' (2003).

<sup>95</sup> See Holmes, *Benjamin Constant* (1984); and Berlin, *Four Essays* (1969), at 122–131 (discussing negative liberty).

<sup>96</sup> Sunstein, Cass, 'Judicial Relief and Public Tort Law' (book review), 92 *Yale Law Journal* (1983) 749.

<sup>97</sup> See, generally, Weber, Max, *Economy and Society*, trans. Max Rheinstein and Edward Shils (Cambridge, Mass.: Harvard University Press, 1954).

<sup>98</sup> See, e.g., Rabin, Robert, 'Federal Regulation in Historical Perspective', 38 *Stanford Law Review* (1986) 1189.

expertise in governance has been a key component of the legitimacy of liberal government. To be sure, there may be times when procedures for collective action are everything and the process of inclusive decision-making is more important than the accuracy of the outcome.<sup>99</sup> At the same time, however, the legitimacy of modern liberal governance also depends on getting certain jobs done and on getting them done right. This corresponds to what Fritz Scharpf has termed ‘output legitimacy’,<sup>100</sup> and which has figured strongly especially in the early arguments supporting the legitimacy of EU governance. A similar idea has at times been prominent in the United States, animating for instance the original enthusiasm for administrative agencies in the early part of the twentieth century.<sup>101</sup> Here the thought was to take certain decisions away from politics and lodge them in expert agencies in order to ensure effective knowledge-based governance that produced beneficial results. In the global war on terror or climate change, we are witnessing renewed arguments for global collaboration as the only practically feasible way to solve a given problem.

Note that, as defined here, the three foundational principles of legitimacy – voice, rights and expertise – are mutually constitutive. For example, a claim to represent the relevant political will invariably includes implicit claims about rights and expertise, as in the participatory rights of those represented or the minimal knowledge base of those expressing their political will. A claim to the vindication of rights also invariably depends on epistemic and representational claims to establish the basis for the particular right asserted. And finally, a claim to legitimacy based on knowledge and effectiveness invariably depends on certain conceptions of voice – as in understanding the impact of a given policy on the relevant interests or in understanding ‘knowledge’ and ‘effectiveness’ as inter-subjectively shared among the relevant parties. Despite (and perhaps even because of) their mutually constitutive

<sup>99</sup> Shapiro, S., ‘Authority’, in J. Coleman and S. Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), 382 at 437–438; Gutmann, A. and D. Thompson, *Democracy and Disagreement* (Cambridge, Mass., London: Belknap Press 1996) at 18; Hershovitz, S., ‘Legitimacy, Democracy, and Razian Authority’, 9 *Legal Theory* (2003) 201 at 216–19.

<sup>100</sup> Scharpf, Fritz, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999) at 6.

<sup>101</sup> See Frug, G., ‘Ideology of Bureaucracy in American Law’, 97 *Harvard Law Review* (1984) 1276.

nature, voice, rights and expertise can be usefully teased out as the primacy elements of the legitimacy of public authority.

The point of pluralism is not to settle any of these claims reliably in favour of one or another institution or system of governance. Instead, the pluralist practice is one of conflict and accommodation among semi-autonomous institutions or systems of governance in the absence of hierarchy. Accommodation is a bottom-up practice. It is decentralized and spontaneous but not arbitrary happenstance. Pluralism thus depends on an embedded openness of the various actors, systems, sources and norms to one another and a certain common ground for principled contest. The idea of constitutionalism, with all its problems and vagueness, so the argument here goes, can provide that common ground. On this vision, demands for deference draw not simply on claims of relative power or formal legality but on the foundations of legitimacy of public authority understood as limited collective self-governance. The specific terms will be contested, but the more general aspiration is, in an important sense, shared. Put another way, the choice among multiple claims of formal legality is managed by conversation, contest, conflict and, ultimately, mutual accommodation within this common grammar of legitimacy. And resort to this grammar on the part of the actors involved transforms what would otherwise be a clash of raw power into the more principled contest of authority that is pluralism.

#### 4.4 Taking pluralism seriously? The Court of Justice and the *Kadi* case

Pluralism opens up new possibilities in the stale and largely unfruitful debates between monism and dualism in international law. Unlike its binary counterparts, the idea of pluralism approaches the plurality of actors, systems, sources and norms in the arena of global governance as a source of strength, not weakness. On the pluralist view, fragmentation is not a problem to be 'solved' by institutional or normative hierarchies. Instead, the multiplicity of jurisdictional claims represents an element of unsettledness that can serve to strengthen the legitimacy of governance.

The possibility of pluralism as a kind of synthesis of monism and dualism presented itself in the recent *Kadi* case concerning the implementation of UN sanctions against individuals within the European Union. After discussing the background to the conflict, this section examines the various judicial responses in that litigation through the

lens of global, local and plural constitutionalism. As we shall see, the Court of First Instance (CFI)<sup>102</sup> in that case sought to resolve the multiplicity of systems by placing the European legal order strictly under the global hierarchy of the legal order of the United Nations. At the same time, however, the CFI sought to preserve interpretive pluralism by asserting its own authority to judge the common legal framework of international law in which the United Nations Security Council operates.

The Court of Justice sitting in its Grand Chamber formation took a more local approach. The judgment of the ECJ (European Court of Justice) sought to resolve both the multiplicity of systems as well as the multiplicity of interpretive institutions in favour of the Union. The ECJ focused not on pluralism but on vindicating the constitutional primacy of the European legal order. Although the Court of Justice was somewhat sympathetic to the preservation of the UN's legal authority, it appears to have rejected any pluralist claim of a coordinate status on the part of the United Nations vis-à-vis the European Union.

Only the Advocate General seems to have pushed for pluralism. His opinion suggests recognizing not only the autonomy of the European legal order but also its deep openness to international law. The Advocate General thus aimed for neither the constitutional submission of the CFI nor the constitutional resistance of the ECJ, but for a co-existence of the legal orders of the United Nations and the European Union in the spirit of pluralism.

Taking pluralism seriously, however, would have required something more than even the Advocate General suggested. As we shall see, by focusing on systems pluralism, each of the judicial pronouncements ultimately seems to have lost sight of the question of pluralism in the interpretation of international law itself.

#### 4.4.1 *The United Nations sanctions regime in Europe*

In 1999, as part of the collective battle against terrorism, the United Nations Security Council began to issue a series of Resolutions calling for sanctions against the Taliban and Osama bin Laden, as well as Al-Qaeda and its supporters. Beginning with Resolution 1267 (1999), the

<sup>102</sup> The Lisbon Treaty rebranded this court as the 'General Court'. The following discussion will, however, use the designation that was effective at the time the *Kadi* case was decided.

Security Council demanded that all states freeze the assets and ban the travel of groups and individuals with connections to Al-Qaeda.<sup>103</sup> The Security Council established a Sanctions Committee, composed of members of the Security Council, to promulgate and to periodically review a list of named individuals subject to these measures.<sup>104</sup> Individuals at first had no access to the Sanctions Committee directly but had to petition the government of their citizenship or residence to intervene and demand information from the designating government. In the absence of disagreement between the two governments, the matter would come before the Sanctions Committee (which acts by consensus) and ultimately before the Security Council itself.<sup>105</sup>

In response to criticism about the lack of individual access, the UN Security Council modified its procedure in December 2006.<sup>106</sup> The Secretary General established a 'focal point' within the Secretariat to receive de-listing petitions directly from individuals. Even under the modified procedures, however, individuals are unable to participate directly – either in person or via a representative – in the deliberations surrounding a de-listing request. Nor are individuals entitled to any additional information about their case other than the status of the consideration of their request. The collective evaluation of an individual de-listing petition remains, at bottom, a diplomatic matter for resolution among the governments represented in the Security Council.<sup>107</sup>

<sup>103</sup> S.C. Res. 1267, U.N. Doc. S/RES/1267 (1999) (15 October 1999).

<sup>104</sup> *Ibid.*, at para. 6.

<sup>105</sup> As an exception to the freezing of assets, a state can release funds for basic expenses and fees, including legal fees, but must give advance notification to the Sanctions Committee, which may object to such exceptions within forty-eight hours; see S.C. Res. 1452, U.N. Doc. S/RES/1452 (2002) (20 December 2002).

<sup>106</sup> See S.C. Res. 1730, U.N. Doc. S/RES/1730 (19 December 2006).

<sup>107</sup> In addition to the Resolution 1267 Sanctions Regime, in which the UN promulgates a specific list of individuals connected with the Taliban and Al-Qaeda, the Security Council issued a broader anti-terrorist Resolution 1373 (2001); see S.C. Res. 1373, U.N. Doc. S/RES/1373 (28 September 2001). This second resolution creates less immediate friction with domestic legal systems in that it leaves the determination of individual blacklisting targets up to the states. Although the matter of individual blacklisting has led to considerable litigation here as well, the states' (and the EU's) autonomous decision to target certain individuals has therefore not conjured up the same multiplicity of claims to legal authority that arose in the implementation of the anti-Taliban resolution. Fifteen law suits were filed in the national courts in Belgium, the UK, Germany Italy, Switzerland, the Netherlands, Pakistan, Turkey and the United States, all, with

In an effort to implement the Resolution 1267 Sanctions Regime, the Council of the European Union, acting under the Common Foreign and Security Policy (CFSP) provisions of the Treaty on European Union,<sup>108</sup> adopted a series of common positions calling for EC (European Community) measures to freeze the assets of individuals named by the UN Sanctions Committee as supporters of the Taliban and Al-Qaeda.<sup>109</sup> Responding, in turn, to these CFSP common positions, the Council, this time acting on the basis of Articles 60, 301 and later also 308 EC passed a series of EC regulations.<sup>110</sup> In particular, Community Regulations 467/2001/EC and 881/2002/EC (and subsequent amendments) ordered the freezing of assets of the UN-named individuals and groups throughout the territory of the European Union. Among these were Yassin Abdullah Kadi, a Saudi national residing in Saudi Arabia, and Al Barakaat, a Swedish organization connected to a Somali financial network.

Mr Kadi and Al Barakaat sued the Council and Commission before the European Court of First Instance in an effort to annul the EC Regulation that applied to them.<sup>111</sup> After the CFI upheld the contested regulation, the plaintiffs appealed to the Court of Justice. Following the Advocate General's recommendation in part, the Court of Justice set aside the CFI's judgment and granted the requested relief.

the exception of Belgium, without success. See Third Report of the Analytical Support and Sanctions Monitoring Team, Annex II, U.N. Doc. S/2005/572 (9 September 2005), pp. 48–49 (hereinafter Third Report) and Fourth Report of the Analytical Support and Sanctions Monitoring Team, Annex, U.N. Doc. S/2006/154 (10 March 2006), pp. 45–47. On implementation of Security Council Sanctions in Sweden, see Andersson, T., I. Cameron and K. Nordback, 'EU Blacklisting: The Renaissance of Imperial Power but on a Global Scale', 14 *European Business Law Review* (2003) 111–141 at 119.

<sup>108</sup> The relevant actions discussed here all predated the passage of the Lisbon Treaty. Accordingly, the discussion will reference the treaty provisions only as they stood at the time of the dispute.

<sup>109</sup> Council Common Position of 5 November 2001, 2001 O.J. (L 89) 36; Council Common Position 2001/154/CFSP, 2001 O.J. (L 57) 1; Council Common Position 1999/727/CFSP, 1999 O.J. (L 294) 1.

<sup>110</sup> Cf. note 108 above. Council Regulation (EC) No. 561/2003, 2003 O.J. (L 82) 1; Council Regulation (EC) No. 881/2002, 2002 O.J. (L 139) 9; Council Regulation (EC) No. 467/2001, 2001 O.J. (L 67) 1; Council Regulation (EC) No. 337/2000, 2000 O.J. (L 43) 1.

<sup>111</sup> Case T-315/01, *Kadi v. Council of European Union*, 2005 ECR II-3649 (21 September 2005) (hereinafter *Kadi* (CFI)).

#### 4.4.2 *The Court of First Instance: global constitutionalism with a pluralist twist*

The Court of First Instance took two significant steps with regard to this controversy. First, the Court of First Instance approached the relationship between the European Union and the United Nations from the perspective of global constitutionalism. By reading the provisions of the United Nations Charter alongside the foundational provisions of the European Union against the background of basic principles of public international law, the CFI privileged the operation of the UN system over that of the European Union. The CFI thus overcame the potential multiplicity of authoritative legal systems by subsuming the European Union – and possibly even the Member States as well – under the single global hierarchy of public international law. Second, within this unified hierarchy of systems, however, the CFI preserved a measure of institutional pluralism by claiming for itself the power to interpret international law alongside the UN Security Council. This latter step was bold in principle but turned out to be modest in application. The CFI limited its interpretation of public international law to the norms of *ius cogens*. The result, as we shall see, was untenable. It would have denuded the European Union of two of its principal claims of legitimacy – voice and rights – vis-à-vis the Member States.

Considering the Member States' obligations under customary international law (as codified by the Vienna Convention on the Law of Treaties), the CFI noted that Member States cannot invoke provisions of internal law to justify their failure to live up to their obligations under an international treaty such as the UN Charter.<sup>112</sup> The CFI pointed further to the fact that Article 103 of the UN Charter obligation expressly elevates a Member States' Charter obligations over those contained in any other international agreement.<sup>113</sup> From all this, the CFI concluded that Member States' UN obligations supersede those imposed by the EU/EC treaties.<sup>114</sup>

<sup>112</sup> *Ibid.*, at para 182.

<sup>113</sup> *Ibid.*, at para 181; see UN Charter, Article 103 ('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.').

<sup>114</sup> *Ibid.*, at para 190.

The CFI further noted that the primacy of a Member State's obligations under the UN Charter over its obligations under the EC Treaty is confirmed by the EC Treaty itself. Here, the CFI pointed to Article 307 EC (now 351 TFEU (Treaty on the Functioning of the EU)), which expressly privileges pre-existing international legal obligations over EC treaty obligations,<sup>115</sup> And the CFI pointed to Article 297 EC (now 347 TFEU),<sup>116</sup> which seems to recognize implicitly that Member States will take actions otherwise incompatible with their Community (now Union) obligations in an effort to comply with international legal obligations aimed at maintaining international peace and security.<sup>117</sup> Based on these provisions, the CFI concluded that, as a matter of international law as well as Community law, the Member States must 'leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law' whenever such law 'raises any impediment to their proper performance of their obligations under the Charter of the United Nations'.<sup>118</sup>

Having subsumed Member States' various legal obligations into a single hierarchy ordered under public international law with the United Nations at the apex, the CFI turned to the Union's own obligations. According to the CFI, the EU, too, must abide by Security Council Resolutions. To be sure, the CFI recognized that the Union is not bound directly by the UN mandate. The Union is neither a member nor a successor of a member of the United Nations.<sup>119</sup> Nor, in the CFI's

<sup>115</sup> See *ibid.*, at paras 185–186; EC Treaty, Article 307 (now Article 351 TFEU) ('The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.').

<sup>116</sup> EC Treaty, Article 237 (now Article 347 TFEU) ('Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common [now "internal"] market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.').

<sup>117</sup> See *ibid.*, at paras 185–186. <sup>118</sup> *Ibid.*, at para 190. <sup>119</sup> *Ibid.*, at para 192.



view, was the Union an addressee of the Security Council Resolution in question.<sup>120</sup> Nonetheless, several factors led the CFI to conclude that the Union is bound to implement the Security Council Resolution. The CFI noted once again that the Member States cannot circumvent their international legal obligations by creating the Union, and that this preservation of international legal obligations is expressly recognized in the Treaty itself.<sup>121</sup> Second, the CFI suggested that the Community (as it then was) had functionally succeeded the Member States in the area of economic sanctions, which the CFI took to mean that the international legal obligations of the Member States in this area had transferred to the Community.<sup>122</sup> Finally, the CFI pointed to Article 301 EC (the provision authorizing the Community at the time to pass economic sanctions)<sup>123</sup> as confirming the conclusion that the EC was bound to implement UN Security Council's sanctions Resolutions.<sup>124</sup>

Putting aside for purposes of this discussion the soundness of the CFI's doctrinal reasoning,<sup>125</sup> the CFI's judgment is significant for having opted for global constitutionalism. The CFI absolutely rejected the idea of systems pluralism, that is, of multiple conflicting claims of coordinate authority among different legal systems. Instead, it subsumed the various legal spaces of the Member States, the European Union and the United Nations under a single nested hierarchy in which the UN system reigns supreme. As a result, the CFI rejected the

<sup>120</sup> *Ibid.* <sup>121</sup> *Ibid.*, at paras 195–196. <sup>122</sup> *Ibid.*, at para 198.

<sup>123</sup> EC Treaty, Article 301 ('Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.'). Article 301 has been replaced by Article 215 TFEU.

<sup>124</sup> *Ibid.*, at para 202.

<sup>125</sup> For a discussion, see de Wet, Erika, 'Holding the United Nations Security Council Accountable for Human Rights Violations through Domestic and Regional Courts: A Case of Beware What You Ask For?', in J. Farrall and K. Rubenstein, eds., *Sanctions Accountability and Governance in a Globalised World* (Cambridge University Press, 2009); Halberstam, D. and E. Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', 46 *The Common Market Law Review* (2009) 13; Tridimas, Takis, 'EU Law, International Law, and Economic Sanctions Against Terrorism: The Judiciary in Distress', 32 *Fordham International Law Journal* (2009) 660.

possibility of reviewing the contested regulation for compatibility with the EU's internal fundamental rights norms. Such review, on the CFI's reasoning, would only pit the EU's legal order against that of the United Nations and thereby run contrary to the systemic unity and hierarchy that privileges the United Nations.

Having rejected the idea of *systems* pluralism, however, the CFI introduced a certain measure of *interpretive* pluralism within the public international legal system. The CFI held that UN Security Council commands are authoritative as a matter of public international law only in so far as Security Council Resolutions preserve the rights embodied in the norms of *ius cogens*.<sup>126</sup> Implicit in this judgment was the CFI's claim of authority to determine that public international law demands the observance of rights on the part of the United Nations. And implicit further in considering the substance of *ius cogens* was the CFI's claim of authority to interpret the actual rights that make up this *ius cogens* limitation on UN authority. The CFI thereby asserted the power to review the legality of UN actions – even though conducting such review only indirectly in judging the Union's implementation measures, and even though such review was limited to compliance with the norms of *ius cogens*.

The CFI's bold assertion of interpretive authority with regard to the UN system, however, was ultimately muted by the decision's substantive approach on the applicable law. The CFI gave *ius cogens* broad scope but little depth. The CFI held that *ius cogens* contains rights to property and due process, but found that neither was breached in this case.<sup>127</sup> As for the right to property, the exemptions for basic expenses from the asset-freeze regime, coupled with the important (and hence non-arbitrary) interest served in preventing the funding of terrorism, and the periodic review of the asset-freeze orders, sufficed to protect this right.<sup>128</sup> The CFI was satisfied by the individual's ability to approach the UN Security Council through his or her state, again especially in the light of the important interest in preventing the funding of terrorism and the temporary nature of the deprivation.<sup>129</sup>

<sup>126</sup> Case T-315/01, *Kadi v. Council of European Union*, 2005 ECR II-3649 (21 September 2005) at paras 226, 230.

<sup>127</sup> *Ibid.*, at paras 233–292.

<sup>128</sup> *Ibid.*, at paras 239, 245, 251. <sup>129</sup> *Ibid.*, at paras 249–250.

Putting aside, once again, the soundness of the CFI's doctrinal interpretation of *ius cogens*,<sup>130</sup> the radical significance of subordinating the EU's legal order to that of the United Nations is not substantially muted by the CFI's assertion of review of the UN Security Council Resolutions for compliance with *ius cogens*. Taken as a whole, the CFI's approach, if followed by the Court of Justice, would have had profound implications for the legitimacy of the European legal order. In one fell swoop, the CFI would have effectively eliminated two core elements of constitutional authority – namely voice and rights – from the European Union's arsenal of legitimacy.

Take rights first. The CFI would have imposed upon the Member States an obligation to respect an EC Regulation in the absence of any protection of fundamental rights at the Union level of governance. To be sure, the CFI may well have read *ius cogens* rather generously to include protection of property and due process despite the fact that both are likely beyond the generally recognized non-derogable floor of international human rights. And yet, by restricting its rights review to *ius cogens* and by giving the rights so recognized rather limited effect in application, the CFI substantively eliminated fundamental rights as a significant restraint on the EU's implementation of economic sanctions.

In so doing, the CFI would have led the Member States to reconsider their own deference to the European Union within the constellation of pluralism that reigns inside the Union itself. Here, Member State and EU claims of authority have clashed, in that each system has claimed primacy over the other. As is well known, the Member States have only accommodated the primacy and direct effect of Union law because the latter incorporated a meaningful protection of fundamental rights. This has been the governing accommodation of constitutional pluralism within Europe on the dimension of rights. Now, however, the CFI would have effectively abandoned that arrangement by eliminating meaningful human rights review of individually targeted economic

<sup>130</sup> The CFI's decision raises significant questions, as, for example, whether *ius cogens* encompasses the right to property or, indeed, any interest that is subject to be overridden for non-arbitrary reasons. For a critical discussion, see, e.g., Halberstam and Stein, 'The United Nations' (2009); Tridimas, 'EU Law', (2009); Defeis, Elizabeth, 'Targeted Sanctions, Human Rights, and the Court of First Instance of the European Community', 30 *Fordham Journal of International Law* (2007) 1449.

sanctions. In response, national courts would have been justified in abandoning their accommodation of the Union's claim of authority under the *Solange* compromise.<sup>131</sup> Member States could have rightly reasserted their review of the Union's own compliance with fundamental rights – at least within this particular area of Union law from which the Union courts would have effectively withdrawn.

Second, by integrating the European Union into a constitutional hierarchy of legal systems in which UN decisions are binding and supreme, the CFI would have eliminated the Union's political processes as a separate locus of voice. Put another way, the CFI's judgment denied the creation of any authoritative political will at the Union level of governance. Under the CFI's reasoning, the European legal order would become a mere instrument in Member State compliance with international law.

Indeed, the consequences of this approach would have been even more extreme. The CFI would have set up the Union as a bootstrap to the Member States' implementation of their own international legal obligations. First, on the CFI's reading, both international law and EU law require the EU to implement Security Council sanctions. Next, EU law generally demands that Member States heed EC/EU Regulations. As a result, the CFI would have circumvented not only the voice of the European Union level of governance, but effectively that of the Member States, too. Enforcement of the Member States' international legal obligations, on this view, would be an inexorable product of the operation of EU law.

This view from nowhere could hardly have been sustained. The CFI's proposed path of decision would have eliminated two core elements of the EU's constitutional legitimacy: voice and rights. By thus eliminating any relevance of the Union's independent creation of political will as well as any meaningful control for fundamental rights, the CFI would have undermined the autonomy and legitimacy of the European legal order.

#### 4.4.3 *The Court of Justice: consolidating local constitutionalism*

The Court of Justice was well aware of the damage that the CFI's global constitutionalism could have done to the authority of the European

<sup>131</sup> See Frowein, J., '*Solange II*', 25 *Common Market Law Review* (1988) 201.

legal order. Under the CFI's vision, the Union's authority would be wholly derivative of that of the Member States and organized under the overarching system of public international law with the United Nations at its peak. This would have rendered the Union ineffectual as a separate site of governance, thereby undermining its legitimacy in the eyes of the Member States.

The ECJ's response was to reject the CFI's approach by taking a more local path of dualism, that is, protecting the constitutional autonomy of the European legal order itself. The ECJ saw the Union's implementation of the UN sanctions regime as a matter of European voice, i.e. the product of a European political choice not of an inexorable international command. And the ECJ chose to protect a conception of rights that was distinctly European, not international. And despite some sympathy for complying with the international rule of law, the Court of Justice focused on one task above all else: laying down the final constitutional building block to consolidate the autonomous European legal order that the Court had been promising since *Van Gend*.

Prior to the *Kadi* case, the gaze of European 'constitutionalism' had mostly been focused inward. The evolution of an autonomous legal order with supremacy and direct effect throughout the Union – all too well known to bear repetition here – was all about setting the European legal order off from, while at the same time integrating it with, the legal orders of the Member States.<sup>132</sup> The primary theme of this story was the relationship between the European Union and its Member States. Even external relations decisions (in so far as they were part of the constitutional canon) concerned, for the most part, distinctly internal aspects of Union governance, i.e. the division of powers and the elements of cooperation among the European and national levels of governance in foreign affairs.<sup>133</sup> Call this relationship between the European Union

<sup>132</sup> See Mancini, F., *Democracy and Constitutionalism in Europe* (Oxford: Hart Publishing, 2000) at 1–30, 51–66, 243–258; Weiler, J. H. H., 'The Transformation of Europe', in J. H. H. Weiler, ed., *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, 1999), 10–101; Stein, Eric, 'Lawyers, Judges, and the Making of a Transnational Constitution', *75 American Journal of International Law* (1981) 1.

<sup>133</sup> See, e.g., Opinion 1/03 of 7 February 2006, 2006 E.C.R. I-1145 (upholding the Community's exclusive competence to conclude the Lugano convention); Case C-233/02, *France v. Commission*, Judgment of the Court of 23 March 2004, 2004 E.C.R. 2759 (upholding the Community's competence to negotiate an

and the Member States' legal orders the 'internal dimension' of European constitutionalism.

The internal dimension of European constitutionalism, however, is only half the promise of an autonomous legal order. The internal dimension speaks only to the relationship between the Union's legal order and that of the Member States. This aspect of constitutionalism does not immediately address the relationship between the Union's legal order and that of international law. To be complete, however, the claim of constitutional autonomy of the European legal order must ultimately address this latter dimension as well. Understanding the Union as an extension of Member State legal orders would render the Union a mere tool in the hands of Member State governments. So, too, understanding the Union as thoroughly grounded in, and controlled by, international law would render the European enterprise an empty vessel for international governance writ large. Properly understood, the Union is neither.

To complete the promise of an autonomous legal order, then, the Union must assert a measure of independence from international law as well. Call this the 'external dimension' of European constitutionalism. This has old roots, too. Only one year after having coined the idea of a 'new legal order of international law' in *Van Gend*, the Court quietly restated the existence of that 'new legal order' without reference to the realm of 'international law'.<sup>134</sup> And so it has been ever since.<sup>135</sup> As Europe's 'new legal order' asserted supremacy and direct effect within Member State legal orders, it implicitly challenged its connection to

agreement with the United States); Opinion 2/00 of 6 December 2001, 2001 E.C.R. 9713 (addressing the legal basis for entering an agreement with a non-Member State); Opinion 1/94 of 15 November 1994, 1994 E.C.R. I-5267; Case 22-70, *Commission v. Council (European Agreement on Road Transport)*, Judgment of the Court of 31 March 1971, 1971 E.C.R. 263. See, generally, Stein, Eric, 'External Relations of the European Community', 1 *Collected Courses of the Academy of European Law (1991)* 115-132; Tridimas, Takis and P. Eeckhout, 'The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism', 14 *Yearbook of European Law (1994)* 143; Kapteyn, P. J. G. and P. Verloren Van Themaat, *Introduction to the Law of the European Communities*, trans. C. Dikshoorn (The Hague: Kluwer, 1973) at 348-370; Steinberger, E., 'The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO', 17 *European Journal of International Law (2006)* 837 (discussing difficulties arising from the breach of a mixed agreement).

<sup>134</sup> Cases 90/63 and 91/63, *Commission v. Luxembourg and Belgium*, 1964 E.C.R. 625.

<sup>135</sup> E.g. Opinion 1/91 of 14 December 1991, 1991 E.C.R. I-6079.

the *Grundnorm* of international law. Now, in the *Kadi* opinion, the Court of Justice finally made whole on its promise of an autonomous legal order by clarifying the external dimension of European constitutionalism.

The ECJ firmly anchored European public power in the European legal order itself, rejecting the claim that the European Union was bound to act due to any political determination made beyond its borders. Instead, it was Europe's political voice that mattered. Nor was the Union to compromise on the protection of rights as they were specifically conceived of within the Union. (In a related case about the Union's own system of identifying individual targets, the ECJ further questioned the UK Home Secretary's decision to designate a particular target of individual sanctions. This raised concerns about the instrumental rationality of the diplomatic process by which targets are identified at the UN level as well.<sup>136</sup> The *Kadi* case, however, most prominently focused on voice and rights, not expertise.)

On the matter of voice, the ECJ asserted the independence of the European Union's political will from the international legal order by rejecting the CFI's notion that either the Community or the Union as a whole was somehow bound to give effect to UN sanctions within its own legal order. To be sure, the ECJ judgment gives a highly sympathetic treatment of international law. The ECJ suggested that Community action would indeed need to conform to international legal obligations and that the Community would have to heed its international legal obligations more generally.<sup>137</sup> And yet, the ECJ insisted that 'an international agreement cannot affect [...] the autonomy of the Community legal system'.<sup>138</sup> The decision makes clear that the Union's implementation of the Security Council Resolution was ultimately grounded not in an international decision

<sup>136</sup> Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, 2006 ECR II-4665.

<sup>137</sup> See Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council of European Union*, Judgment of the Court of 3 September 2008, paras 6, 291, 293–294 (hereinafter '*Kadi* (Judgment)').

<sup>138</sup> *Ibid.*, at para 282. See also at para 281 ('[N]either the Member States nor its institutions can void review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which establishes a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.').

of the UN Security Council but in a political decision on the part of the European Council acting under the CFSP provisions.<sup>139</sup>

Never before was the assertion of a European voice and the protection of European constitutional integrity from intrusion by the international legal order as emphatic as in this judgment.<sup>140</sup> No international agreement (not even one entered into by the Member States prior to the existence of the Union) could affect the fundamental principles of the Union's legal order, so the Court held. Although it may be possible to read these statements as compatible with a softer, more hospitable attitude towards public international law, in this case the final emphasis was on the autonomy of the Union, not on the latter's openness towards international law.

On the matter of rights, the Court of Justice judgment begins by striking a conciliatory tone with regard to international law and ends with an assertion of the autonomy and supremacy of European rights. The ECJ suggests an interpretation of the UN Security Council regulation that would allow for just the kind of fundamental rights review at the Union level that the Union itself demands. In the Court's charitable interpretation of the UN Security Council Resolution, the latter only calls for implementation of sanctions in conformity with whatever procedures govern within the domestic legal system that effectuates the implementation.<sup>141</sup> According to the ECJ, then, there is ultimately no incompatibility between UN command and ECJ review in this case. Nevertheless, the ECJ strongly suggests that if there were any incompatibility between fundamental principles of EU law and an international command, the Court would be obligated to vindicate the EU's conception of rights above all else.

The Court further rejects the idea of any deference to other institutions, such as the UN Security Council, in reviewing the lawfulness of the sanctions even under a common standard of rights. Even a system of

<sup>139</sup> *Ibid.*, at para 295.

<sup>140</sup> There was some precedent for protecting principles of European law from being eroded by international legal compliance. See Joined Cases C-317/04 and C-318/04, *Parliament v. Council and Commission*, 2006 E.C.R. I-4721; Opinion 2/94, 1996 E.C.R. I-1759 (barring the Community's accession to the ECHR via Article 308 EC); Case C-122/95, *Germany v. Council*, 1988 E.C.R. I-973. Cf. *Kadi* (AG), Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council of Europe*, Opinion of the Advocate General on January 23 2008, para 23.

<sup>141</sup> See Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council of Europe*, Opinion of the Advocate General on 23 January 2008 at paras 298–299.



human rights protection at the UN level would not seem to obviate the need for the ECJ to conduct its own review with regard to the protection of the EU's own version of these rights. Ruling out any 'Solange' compromise such as that governing the EU's relationship with the legal order of its Member States, the Court holds:

[T]he existence, within th[e] United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community.<sup>142</sup>

Although this passage (along with much of the judgment) is open to several interpretations, the choice of words and the location of the passage within the opinion suggests that the ECJ does not merely reject deference under the particular circumstances of this case. Instead, the ECJ seems to rule out categorically even the possibility of dialogue or deference between the UN and the EU on the question of rights.

Finally, the Court of Justice makes plain that in no case would the Court's review or the EU's rejection of an international command implicate the legality of the Security Council Resolution under international law:

[T]he review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such [...] [A]ny judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.<sup>143</sup>

This, then, is nothing short of the formal separation of legal orders – a kind of dualism – albeit a sympathetic version in which an autonomous EU legal order aims to fulfil whatever international legal obligations it may have. The control of voice and rights are consolidated exclusively within the constitutional confines of the European legal order itself.

In conceiving of the relationship between the European Union and the international legal order, the ECJ thus seems to have rejected both global and plural constitutionalism. The ECJ judgment in *Kadi* separates the international legal order from that of the European Union and

<sup>142</sup> *Ibid.*, at para 321. Caveat about interpretation here. <sup>143</sup> *Ibid.*, at para. 4.

then asserts the simple supremacy of the latter over the former. As such, the external dimension of European constitutionalism rejects the more fluid nature of authority that has been the hallmark of the Union's relation to the Member States. And it shifts away from an earlier jurisprudence that suggested the possibility of a similar kind of openness to the realm of international law.<sup>144</sup> The approach we seem to see now is one of dualism and of insistence on the supremacy of the local constitutional legal order of the European Union alone.

#### 4.4.4 *The Advocate General: a path to pluralism?*

Advocate General Miguel Maduro's opinion, by contrast, had urged the Court to move beyond constitutional resistance and towards more open engagement and dialogue with the United Nations. To be sure, the Advocate General's opinion, too, emphasizes the foundational nature of the European constitutional order and the centrality of the Court of Justice as its 'constitutional court'.<sup>145</sup> At the same time, however, the Advocate General's opinion recognizes the potential multiplicity of claims of authority that lie beyond. Maduro's opinion thus entails significant strides towards taking pluralism seriously.

The Advocate General begins by emphasizing the constitutional credentials of the EU's legal order, and of the Court of Justice in particular. Using the international law term hitherto reserved for the domestic legal orders of states, the Advocate General for the first time in the history of published decisions of the Court refers to the European 'municipal' legal order,<sup>146</sup> albeit one of 'transnational dimensions, of which [the Treaty] forms the "basic constitutional charter"'.<sup>147</sup> Much as the ECJ's final decision does, the Advocate General thus separates the Union's legal order from that of international law and anchors the relationship between the two orders firmly in the constitutional law of the European Union.<sup>148</sup> Recognizing the constitutional nature of the Treaty, the

<sup>144</sup> The court's earlier jurisprudence seemed more open to this idea. See Schuetze, R., 'On "Middle Ground": The European Community and Public International Law', *European University Institute Working Paper LAW No. 2007/13 2007*, available at <<http://www.ssrn.com/abstract=995780>>; Gráinne de Búrca, Chapter 3 in this volume.

<sup>145</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council of Europe*, Opinion of the Advocate General on 23 January 2008, para 37 (hereinafter '*Kadi* (AG)').

<sup>146</sup> *Ibid.*, at para. 21. <sup>147</sup> *Ibid.* <sup>148</sup> See *ibid.*, at para 24.

Advocate General's opinion suggests that '[t]he duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community'.<sup>149</sup> In that capacity, the Court must 'determine the effect of international obligations within the Community legal order by reference to conditions set by Community law'.<sup>150</sup> So far there is not too much difference between the Advocate General and the Court of Justice. Nor need there be any great departure on this basic point of the constitutional foundation of the Union for the idea of pluralism to flourish. Pluralism, after all, demands a solid claim of authority not only on the part of international law, but on the part of European Union law as well.

The Advocate General's opinion also rejects the idea of the EU's compliance with the EU's (or the Member States') international legal obligations as a matter of inexorable (international, EU or Member State law) command. In so doing, the Advocate General rejects the CFI's move to subsume the European Union under the voice of the United Nations. Instead, compliance with international law is based on an expression of the EU's political will. As the Advocate General puts it, there is a '*presumption* that the Community *wants* to honor its international commitments'.<sup>151</sup> This statement both suggests the existence of an independent political voice on the part of the Union and, at the same time, recognizes a structural openness to international legal compliance that runs deeper than whatever the latest vote in the Council may be on a given regulation. Although the presumption can, of course, ultimately be overcome, it nonetheless significantly 'guide[s]' the 'application and interpretation of Community law'.<sup>152</sup> As the Advocate General explains:

[T]he Community's municipal legal order and the international legal order [do not] pass by each other like ships in the night [...] [T]he Community has traditionally played an active and constructive part on the international stage [...] The Community Courts therefore carefully examine the obligations by which the Community is bound on the international stage and take judicial notice of those obligations.<sup>153</sup>

When it comes to the protection of rights and to the recognition of the expertise of the United Nations, the Advocate General similarly shifts ever so slightly off the course charted by the ECJ. To be sure, the

<sup>149</sup> *Ibid.*, at para 37. <sup>150</sup> *Ibid.*, at para 23.

<sup>151</sup> *Ibid.*, at para 22 (emphasis supplied). <sup>152</sup> *Ibid.* <sup>153</sup> *Ibid.*

Advocate General is equally keen on protecting rights that form part of the constitutional framework of the European Union. In the Advocate General's view, as in the ECJ's, no implementation of international legal obligations within the Union can override the protection of fundamental rights. And yet, in contrast to the ECJ's judgment, the Advocate General's opinion admits of the possibility that the EU might defer to the institutions of another legal system that might be better equipped to balance the fundamental interests at stake in a particular case:

In an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other's jurisdictional claims. As a result, the Court cannot always assert a monopoly on determining how certain fundamental interests ought to be reconciled. It must, where possible, recognize the authority of institutions, such as the Security Council, that are established under a different legal order than its own and that are sometimes better placed to weigh those fundamental interests.<sup>154</sup>

Such deference, however, is not automatic. Nor can it rest on presumed subject matter expertise alone. Instead, 'respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them'.<sup>155</sup>

The Advocate General thereby leads the way towards a pluralist stance with regard to the relationship between the European Union and the realm of global governance. This entails the recognition that the EU legal order is not the sole source of authoritative guidance on realizing the appropriate balance between collective security and individual liberty. To be sure, as an EU actor, the Advocate General locates (as he must) the ultimate regulation of the relationship between the EU's legal order and international law within the foundational treaties of the Union. And yet, this admits of a structural openness of the EU to the various systems as well as institutions (interpretive and otherwise) in the realm of global governance. These systems and institutions beyond the borders of the European Union may, on this vision, at times lay a superior institutional claim to vindicating the constitutional values that underlie the European Union itself. This, then, is the essence of pluralism. In contrast with the unilateral approach of the ECJ, the Advocate General suggests a dialogue.

<sup>154</sup> *Ibid.*, at para 44.    <sup>155</sup> *Ibid.*

Whereas the ECJ's path of local constitutional resistance seeks to protect the particularistic conception of EU rights, the Advocate General implicitly invokes the pluralism paradigm of *Solange*:

Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists.<sup>156</sup>

The Advocate General would accordingly not insist on the ECJ's own application of the Union's particular conception of rights in every case. Instead, the Advocate General acknowledges the possibility, in principle, of an accommodation of both systems pluralism and some measure of interpretive pluralism.

In contrast with the Court of Justice, the Advocate General thus draws on the model of pluralism that governs the internal dimension of European constitutionalism to approach the external dimension of constitutionalism as well. Whatever multiplicity of authority might exist in the Union's relation with the Member States, the ECJ's judgment recognizes no such multiplicity in the Union's relation with international law. For the Advocate General, by contrast, certain elements of pluralism may transfer from the internal to the external dimension of European constitutionalism. Although the specific calculus of accommodation will differ (especially in the fact that claims to voice will become more problematic at the international level than they are even at the European Union level), pluralism in the external dimension of European constitutionalism nonetheless suggests an openness to the authority of the other here as well.

#### 4.4.5 *Taking pluralism seriously: the curious case of international law*

In taking up the suggestion of pluralism in the *Kadi* case, however, one important link still seems to be missing: the interpretation of international law. With the exception of *ius cogens*, customary international law was conspicuously absent from all three judicial pronouncements in *Kadi*. And the law of the United Nations was similarly pushed off stage, except in the

<sup>156</sup> *Ibid.*, at para 54.

ECJ's interpretation of the Security Council Resolution as allowing ample room for the implementation of sanctions subject to local procedural dictates. A more systematic or comprehensive consideration of customary international law or the law of the United Nations was nowhere to be found.

With regard to the Court of Justice this neglect is understandable. The focus of the final judgment was, after all, on consolidating local constitutionalism against outside intrusion. With regard to the CFI, however, the absence of a more searching review of international law is somewhat puzzling. To be sure, the CFI opted for a global hierarchy of systems. But the CFI nonetheless asserted its own authority within that global system of systems to interpret the principles of *ius cogens* as governing the exercise of UN authority. Finally, Advocate General Maduro's opinion, which most openly acknowledges the idea of pluralism, seems to have focused on the pluralism of systems as well as the lack of multiple institutions committed to rights protection at the international level, while neglecting the potential pluralism of institutions with regard to the interpretation of the UN system and of public international law more generally.

As a doctrinal matter, fundamental principles of both UN law and public international law could have played into the legality of the contested regulation in three basic ways. First, such principles might serve as a limitation on the UN Security Council's powers and thus figure into a determination of the scope and legality of the underlying international legal obligation to which the European Union measure responded.<sup>157</sup> Second, public international law (such as customary international human rights law) may figure into the international legal responsibility that the EU would incur by implementing a smart sanctions regime.<sup>158</sup> And third, principles of public international law might

<sup>157</sup> The United Nations, along with the UN Security Council and all states implementing a UN mandate, may be bound by international human rights norms by virtue of the provisions of the UN Charter itself. Moreover, the United Nations, as a legal person under international law, may be bound directly by customary international law. Finally, UN law may have begun to incorporate certain principles of rights that go beyond what customary international law or general principles currently demand. See, generally, Halberstam and Stein, 'The United Nations' (2009).

<sup>158</sup> Cf. e.g. Orakhelashvili, A., 'The Idea of European International Law', 17 *European Journal of International Law* (2006) 315–347 at 345–346 and [note 151](#) ('That the European institutions operate within the field of international law is also affirmed by the fact that they are bound by customary international law in the same way as any legal entity is', citing Lowe, Vaughan, 'Can the European Community Bind the Member States on Questions of Customary International

determine the domestic scope or legality of the EU's own decisions and implementation measures.<sup>159</sup> Without presuming to bind the UN Security Council with its judicial pronouncements, the Court of Justice had ample doctrinal means to consider the international dimension of the alleged infringement on individual rights.<sup>160</sup> The ECJ could have drawn on fundamental principles of customary international law, as well as the UN Charter and the UN Security Council Resolution itself, in reviewing the scope and legality of an EC/EU regulation implementing that Resolution.

The mere fact that the UN Security Council may have implicitly judged the international legality of its own Resolution should not

Law?', in Koskeniemi, Martti, ed., *International Law Aspects of the European Union* (The Hague, London: Kluwer Law International, 1998) 149–196).

<sup>159</sup> See Case C-308–06, *The Queen v. The Secretary of State for Transport*, Judgment of 3 June 2008, 2008 E.C.R. I-4057, paras 42–45 ('[T]he validity of a measure of secondary Community legislation may be affected by the fact that it is incompatible with such rules of international law [, referring to an international agreement concluded by the Community.]); Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz.*, Judgment of the Court of 16 June 1988, 1988 E.C.R. I-3655, paras 45–46 ('[T]he European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country.');

Koutrakos, P., *EU International Relations Law* (Oxford: Hart Publishing, 2006) (discussing the ECJ's incorporation of customary international law as an interpretational method for the EC Treaty).

<sup>160</sup> A nuanced doctrinal case can be made that puts together the principles of implementation and indirect effect to allow for jurisdiction over customary international law here. See Case C-69/89, *Nakajima All Precision Co. v. Council*, Judgment of the Court of 7 May 1991, 1991 E.C.R. I-2069 (upholding an anti-dumping regulation that did not go against the spirit of GATT); Case 70/87, *Fediol v. Commission*, Judgment of the Court of 22 June 1989, 1989 E.C.R. 1781 (allowing a party to rely upon GATT to define an illicit commercial practice); Case 188/85, *EEC Seed Crushers' and Oil Processors' Federation (Fediol) v. Commission*, Judgment of the Court of 14 July 1988, 1988 E.C.R. 4193 (upholding the Commission's definition of subsidy while noting that the definition was not incompatible with GATT); Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz.*, Judgment of the Court of 16 June 1988, 1988 E.C.R. I-3655. Fitting these precedents together carefully would allow the ECJ to interpret fundamental principles of public international law (even those that do not themselves have direct effect) when interpreting a Community directive that implements a CFSP Common Position, which, in turn, is intended to implement a UN Security Council Resolution. For an elaboration on this doctrinal argument, see Halberstam and Stein, 'The United Nations' (2009), at 37–39, 43–46, 51–53.

present an impediment to the ECJ's consideration of the same. Interpretive pluralism comes alive by just this sort of lack of settled hierarchy among the various institutions laying claim to interpret the same norms. On this point, too, there is some precedent. The Court of Justice has in the past resisted being legally bound even by the decisions of international judicial tribunals.<sup>161</sup> The Court will give varying degrees of deference to these other actors in their interpretation of the relevant international treaty norm without being legally bound by their decisions.<sup>162</sup>

Although the idea of interpretive pluralism was not entirely lost in *Kadi*, the various opinions seemed to avoid considering customary international human rights law or the law of the United Nations out of a sense of deliberate avoidance. This concern was palpable as the CFI cautiously approached its limited review of *jus cogens*.<sup>163</sup> And it undoubtedly explains the painstaking disclaimer on the part of the ECJ as well as the Advocate General that the judgment would not in any way implicate the legality of the United Nation's actions under

<sup>161</sup> To be sure, the Court has acknowledged, in principle, the possibility of being bound by the decisions of international tribunals on the interpretation of international treaties. See, e.g., Opinion 1/91 of 14 December 1991, 1991 E.C.R. I-6079, at para 39. And yet, time and again, it has refused to find that the conditions obtain under any particular treaty to so bind the Court. For instance, the Court has found itself to be not legally bound by the EFTA (European Free Trade Association) Court, the European Court of Human Rights or WTO dispute resolution panels. The reasons differ from case to case, but the practical result is the same. For example, the EFTA treaty does not make the decisions of the EFTA court binding on the ECJ, see Agreement on the European Economic Area, Article 6, 1994 O.J. (L 1) 3 and The Surveillance and Court Agreement, Article 3, 1994 O.J. (L 344) 3; the EC/EU is not (yet) a member of the European Convention on Human Rights, cf. Opinion 2/94, Opinion of the Court of 28 March 1996, 1996 E.C.R. I-1759; and the Court has held that WTO decisions do not have direct effect. See, e.g., C-377/02, *Van Parys v. BIRB*, Judgment of the Court of 1 March 2005, 2005 E.C.R. I-1465; C-351/04, *Ikea Wholesale Ltd. v. Commissioners of Customs & Excise*, Judgment of the Court 27 September 2007, 2007 E.C.R. I-7723.

<sup>162</sup> See generally, Bronckers, Marco, 'The Relationship of the EC Courts with Other International Tribunals: Non-Committal, Respectful or Submissive?', 44 *Common Market Law Review* (2007) 601.

<sup>163</sup> See Case T-315/01, *Kadi v. Council of European Union*, 2005 ECR II-3649 (21 September 2005), at paras 234–292; Shelton, Dinah, 'Normative Hierarchy in International Law', 100 *American Journal of International Law* 2 (2006) 291–323 at 312 (describing *jus cogens* review in *Kadi* as '[winning] a battle only to lose the war').



principles of international law. Indeed, for the ECJ to declare that the Union's implementing measures themselves infringed customary international human rights or the law of the United Nations would have placed the conflict of norms squarely within the realm from which the UN Security Council draws its legitimacy. And finally, even declaring only that the EU's implementing measures were illegal under EU law because the Court believes they violate principles of customary international human rights law or the law of the United Nations might also have bled into questioning the international legality of UN action itself.

And yet, taking interpretive pluralism seriously suggests that EU courts can and should draw on, and interpret, international legal norms where such norms legally apply to cases before them. This is especially true where no alternative institution with a superior claim of authority has considered these issues. In the decentralized system of international governance, a host of courts (including domestic and supranational courts) take on the function of authoritative interpreters of international law. In recognizing this, we need not commit to Georges Scelle's theory of '*dédoublement fonctionnel*',<sup>164</sup> with its overly optimistic view of particularly situated courts' universal perspective.<sup>165</sup> Putting aside any unwarranted idealism about the predilections of particularly situated courts (such as national courts or EU courts), these institutions form an important part of the institutional framework for the creation and interpretation of international law.

Even where domestic institutions' structural commitment to the universal is less than complete, the interpretation of international law is still ultimately a collective endeavour, i.e. a shared enterprise among the various judicial and other participants around the world who can lay claim to interpret these common legal norms. Domestic courts must accordingly not give a purely partial interpretation that considers only their particularistic point of view; they must consider the international norm – whether it be treaty, custom or general – as a norm shared by all

<sup>164</sup> See Scelle, Georges, *Le Phénomène juridique du dédoublement fonctionnel*, in W. Schätzel, ed., *Rechtsfragen der internationalen Organisation – Festschrift für Hans Weberg su seinem 70* (Frankfurt-am-Main: Vittorio Klostermann, 1956), 324, e.g. at 331.

<sup>165</sup> Cf. e.g. Cassese, Antonio, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law', 1 *European Journal of International Law* (1990) 210 at 213.

participants.<sup>166</sup> All this means, of course, that in the absence of a designated international institution with a superior and exclusive claim of interpretive authority with regard to international law, domestic courts do not overstep their jurisdictional bounds by participating in the interpretation, and hence development, of international law. Accordingly, the Court of Justice (even as it conceives of itself as being situated in a ‘municipal’ legal order) can and should interpret international law and even the law of the United Nations to the extent that such law is a component of a dispute about EU law over which the Court has jurisdiction and there is no other tribunal or institution with a superior claim to interpretive authority.

This recognition of interpretive pluralism would have allowed the Court to consider in this case whether the EU’s implementation measures violated international law, as well as the far more delicate question of whether individual rights norms legally bind the UN Security Council itself. No other presently constituted institution has been formally granted superior interpretive authority in this case. And no forum can lay a superior claim of interpretive authority in this case relative to the Court of Justice to examine even the most delicate question whether the UN Security Council had overstepped its bounds by neglecting individual rights.

There was no other institution with a greater claim in either political will, functional expertise or a promise of protecting rights to which the Court of Justice should have deferred on these questions. To be sure, a case between two states might conceivably arise or a request for an advisory opinion could be made before the International Court of Justice raising the validity of the UN Security Council measure. But the ICJ has not yet reliably conceived of itself as able to question the validity of UN Security Council actions.<sup>167</sup> What is more, by enlisting states and regional organizations to impose economic sanctions on individuals, the Security Council has reached out to burden individuals directly without

<sup>166</sup> See Maduro, Miguel, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in Neil Walker, ed., *Sovereignty in Transition* (Oxford University Press, 2003), 501–538; Van Alstine, M., ‘Dynamic Treaty Interpretation’, 146 *University of Pennsylvania Law Review* (1998) 687.

<sup>167</sup> Alvarez, José, ‘The New Dispute Settlers: (Half) Truths and Consequences’, 38 *Texas International Law Journal* (2003) 405 at 418–419, 431. Cf. Case IT-94–1-T, *Prosecutor v. Tadic*, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 4, 15–19 (distinguishing a tribunal from a subsidiary organ entirely within the control of the UN Security Council and supplementing the Statute of the International Tribunal).

providing them with a corresponding forum in which to contest the action. In the absence of any such forum at the international level, the United Nations should be open to challenges based on individual rights as well as the accuracy of the underlying substantive decisions. In short, the Security Council's actions on this score should not be insulated from indirect judicial review at the level of domestic courts.

The Court of Justice is uniquely situated to engage in a dialogue with the United Nations on the international rule of law. As a court charged with considering the Member States' underlying international legal obligations, the ECJ would have the same warrant to engage with international law and the law of the United Nations as would any domestic high court, despite the fact that the European Union is not a member of the UN. The Court of Justice is furthermore in a unique position with regard to international law by virtue of the Union's historical grounding in international law,<sup>168</sup> its normative commitment to international law,<sup>169</sup> and the continued structural significance of international law to its internal operations.<sup>170</sup>

The Court of Justice sits at the intersection between domestic and international law like no other court in the world. By relying solely on domestic constitutional rights as a backstop, the Court of Justice seemed to have ignored its special standing on this score. By taking pluralism seriously and relying on the law of the United Nations and public international law as well, the ECJ could have led the way for a broader conversation about the public international law constraints that help ensure the legitimacy of United Nations action for all.

## 4.5 Conclusion

Globalization challenges constitutionalism. As interactions across diverse jurisdictions multiply and deepen, the idea of limited collective

<sup>168</sup> Kapteyn and Verloren Van Themaat, *Introduction* (1973), at 1–19; Nuttall, S., *European Political Cooperation* (Oxford: Clarendon Press 1992); Koutrakos, *EU International Relations Law* (2006), at 244–249 (discussing the ECJ's incorporation of customary international law as binding on the Community and as an interpretational method for the EC Treaty).

<sup>169</sup> See, e.g., Treaty on European Union, Article 11 (listing as an objective of the Common Foreign and Security Policy 'to promote international cooperation').

<sup>170</sup> See Koutrakos, *EU International Relations Law* (2006), at 137–182, 184–185, 217–249.

self-governance seems increasingly unattainable. The interconnectedness of modern life around the world has challenged the ability of the modern state to meet the security and policy demands of their local constituencies and has raised questions of distributive justice writ large. Regimes of global governance have sprung up to provide a kind of global public order, but these seem to strain the conventional demand for legitimacy in the exercise of public power. Although states still stand generally as intermediaries between the global and the local, governance beyond the state increasingly takes on a life of its own, shaping – if not coercively determining – local choices.<sup>171</sup>

Whereas some would retreat into local constitutions as the exclusive site of legitimate public power, others have urged what has been critically called a ‘constitutional *fuite en avant*’ in the arena of global governance.<sup>172</sup> Where local constitutionalists seek to deny the power and influence of transnational regimes, global constitutionalists seek to augment the authority of global governance often by turning some of these regimes into sites of super-supranational governance. On the global constitutionalist view, the United Nations, or the WTO, as the preferred case may be, would sit at the apex of a comprehensive regime of globally constituted governance.

Instead of viewing constitutionalism in binary terms – as either local or global – this chapter has explored a third alternative, that of plural constitutionalism. This view cautiously builds on the European experience of pluralism within its borders. Without suggesting a wholesale transplant of the idea to the global arena, this approach nonetheless suggests certain parallels: first the partial autonomy of the various sites of governance at national, supranational and global levels of governance; second, the mutually embedded openness of certain sites to one another; and third, the resort to the disaggregated values of constitutionalism as a common grammar of legitimacy in the conflict and accommodation of competing claims of authority. The argument is not that plural constitutionalism is the inevitable product of a plurality

<sup>171</sup> See, e.g., Bogdandy, Armin von, Phillip Dann and Matthias Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, 9 *German Law Journal* (2008) 1371 at 1381–1382.

<sup>172</sup> Cf. Howse and Nicolaidis, ‘Democracy without Sovereignty (2008)’, at 177 (criticizing the ‘constitutional *fuite en avant*’ in the trade arena).

of authority. Instead, it is a contingent possibility whenever the three elements of plural constitutionalism obtain.

Plural constitutionalism embraces the lack of settlement and hierarchy as generating productive decentralized engagement for a piecemeal approach to limited collective self-governance. On the pluralist vision, the state is only one site among many for fulfilling the aspiration of self-governance. Pluralists do not simply reverse the logic of legitimacy in favour of the global over the local as global constitutionalists do. Neither the global nor the local is necessarily privileged over the other. And even at the global level itself, no single site of governance takes general precedence over the others.

Whereas internationally minded critics complain about an inconvenient, inefficient or even dangerous fragmentation,<sup>173</sup> pluralists see the lament of fragmentation as misplaced nostalgia for a time that never was. Indeed, at its worst, the critique of fragmentation displays a self-interested dismay on the part of champions of a particular organization about the inability to consolidate power and authority in their own institution.<sup>174</sup> Pluralists add to this a normative claim: that the multiplicity of pluralism is all the more beneficial as there are no worldwide democratic institutions that could hope to consolidate governance meaningfully and legitimately into a single settled structure – even a nested one based on federal principles.

The Court of Justice of the European Union recently engaged with these questions in the *Kadi* litigation surrounding the implementation of UN sanctions against individuals in Europe. In the various judicial pronouncements all three positions in one way or another came to the fore. Whereas the Court of First Instance opted for a global constitutionalism, the Court of Justice seems to have kept constitutionalism local – at least with regard to Europe; at least for now. Only the

<sup>173</sup> Critics charge that fragmentation undermines the coherence and credibility of international law and allows for particular interests to evade considerations of global justice through forum shopping. See, e.g., Koskenniemi, Martti and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 553–579 (discussing complaints on the part of ICJ members); Shany, Yuval, 'The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures', 17 *Leiden Journal of International Law* (2004) 815 (describing some of these concerns in cases of jurisdictional competition without mutual comity).

<sup>174</sup> See Koskenniemi and Leino, 'Fragmentation' (2002).

Advocate General clearly opted for the path of pluralism, by suggesting a greater openness to governance beyond Europe.

In the context of Europe's relation with the world, one might venture to describe the pluralist vision as one of the *primacy, not supremacy* of EU law. Although a difference between these two terms is frequently not drawn out – and at other times is drawn in a fashion that simply wreaks havoc<sup>175</sup> – one might nonetheless cautiously fashion the following useful distinction. Whereas the idea of supremacy denotes hierarchical superiority to the exclusion of all other claims of authority, the idea of primacy suggests a more tentative claim of *primus inter pares* – a kind of precedence in the horizontal accommodation among equals.

When Europe meets the world, the constitutional law of the Union is necessarily privileged for actors within that system. Supremacy would therefore reject any competing claim of authority. Primacy, by contrast, invites actors within the Union nonetheless to engage in a practice of conflict and accommodation with claims of authority from beyond the Union. The choice between local and global constitutionalism, then, is a false one. But to see our way out of the fly bottle, pluralism dares us to rethink constitutionalism itself.

<sup>175</sup> See *Re EU Constitutional Treaty and the Spanish Constitution* (Spanish Constitutional Court) [2005] 1 CMLR 981, at paras 52–54.