

## Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)

It is an understatement to say that the contemporary international society of states is deeply divided. Despite the happy consciousness of those who proclaimed the end of history and the worldwide triumph of the liberal democracy in the early 1990s, the legitimating principles for domestic polities around the globe remain diverse. True, the sovereign state form has been globalized in the aftermath of decolonization and the collapse of the Soviet empire. Yet we still inhabit a global pluriverse of 192 sovereign states whose political cultures, organizational principles, and conceptions of justice and legitimacy are diverse and at times in conflict with one another.

Superimposed on this segmentally differentiated, pluralistic international society of sovereign states are the legal and political regimes of the functionally differentiated global subsystems of world society, whose institutional structures, decision-making bodies, and binding rules have acquired an impressive autonomy with respect to their member states and one another.<sup>1</sup> These “regimes” or “subsystems,” of which the global political system is one, engage in new forms of global governance and lawmaking that reach beyond and penetrate within states. Individuals are increasingly ascribed rights and responsibilities under globalizing international law. This expanding individuation of international law seems to mark an important difference from the pre–World War II international legal system and from stereotypes of “Westphalian” sovereignty. Although states remain the main subjects that make international law, they no longer have the monopoly of the production of that law. Indeed the international organizations they have spawned seem to be transforming into “global governance institutions” (GGIs) which, like the sorcerer’s apprentice, tend to invert the principal/agent relationship extant at the time of their creation.<sup>2</sup> These GGIs now regulate states and individuals, including the conduct of states toward their own citizens, in the name of the “international community,” importantly redefining (some would say abolishing) the sovereignty of states. As a result, states are bound by rules and regulations that make the old images of international society and the consent-based production of international law appear anachronistic.

Yet there does not seem to be any overarching metarule for regulating interactions or conflicts among or within these globalizing legal and political orders.<sup>3</sup> The hierarchy of authority among global, international, and domestic law remains unresolved. Moreover, there is an increasing awareness that some GGIs that provide a framework for collective goal attainment and peaceful conflict resolution among sovereign states can themselves be rights-violating. Instead of fostering a global rule of law, they are in certain key domains having constitutionalism- and democracy-eviscerating effects.<sup>4</sup>

Organs of international organizations now engage in unanticipated forms of legislative, quasi-judicial, and administrative “governance” that directly (and sometimes adversely) affect individuals. The new “governance” functions do not come with oversight mechanisms, avenues of redress for those directly impacted, or new rules (higher laws) that regulate the expanded autonomy and powers of trans-, infra-, or supra-national bodies or globalizing international organizations.<sup>5</sup>

Unsurprisingly, it remains contested how to conceptualize the relationship among these entities and what it ought to become. The conceptual divide is between those who mobilize the discourse of constitutionalism to characterize the increased juridification and regulatory reach of regimes of international law and governance, and those who view the multiplicity of sites of rule- and lawmaking through the lens of legal pluralism and reject the language of constitutionalism.

What are the stakes of this dispute? The former see the constitutionalization of public international law as the way to tame the bellicose power politics and imperialist tendencies of nation-state sovereignty by constraining actors to solve their disputes through law while protecting human rights.<sup>6</sup> The latter insist that the heterogeneity of international society and the pluralism of the international political system (along with the proliferation of international legal regimes within it) is a desirable antidote to hegemonic imposition that too often occurs in the name of “universalist” global law.<sup>7</sup> This latter assessment expresses sensitivity to the asymmetry among global powers and to the emergence of new types of hegemony or imperial formations, not to mention the diversity of a still deeply divided international society.<sup>8</sup> From this perspective, global constitutionalist discourse appears naive if not apologetic. The discourse and project of constitutionalism with respect to the emergent global political system is rejected out of hostility to the leveling (*Gleichschaltung*) of the autonomy of the multiple legal and political orders that would apparently have to go with it.<sup>9</sup> It is seen as a strategy of power aiming at putting claims to final authority beyond contestation and at suppressing alternative policies or ways of ordering. Legal pluralists argue that the diversity of legal-political orders increases the avenues of contestation and protects domestic autonomy and local democracy, while also making the legitimacy of global law a question rather than a given.<sup>10</sup> But the constitutionalists counter that accepting the multiplicity of orders as is leaves the issue of coordination, authority, and hierarchy for the powerful to resolve.

I will adopt the discourse of global constitutionalism, focusing on the global political system. But I regard the idea of the constitutionalization of the global political system as not a *fait accompli* but a *vérite à faire*. It is a normative and political project necessary in light of the expanding scope, activism, and discretion of the key GGIs in the United Nations Charter System, particularly the Security Council. It is also indispensable to the legitimacy of the coercive public power increasingly exercised by these institutions over individuals and not only over state parties.

I also challenge the terms of the debate. Both approaches—those defending and those contesting the discourse of constitutionalism beyond the state—accept Hans Kelsen’s view that a mature autonomous legal system of constitutional quality must entail a clear hierarchy of norms *and* be monist in character. Accordingly, we seem to be faced with the following choice: Either we embrace the further integration and

constitutionalization of the global political system involving the step to a monist global legal order based on cosmopolitan principles (especially human rights), deemed primary and hierarchically superior to domestic legal orders. Or we accept a disorderly global legal pluralism that acknowledges the multiplicity of autonomous political and legal orders but renounces any attempt to construct an order of orders, leaving this up to contestation or, alternatively, to the power of the powers that be.

I argue instead that the dichotomy between constitutionalism and pluralism (mistakenly mapped onto the distinction between monism and dualism) is misleading because it screens out the most interesting alternative: constitutional pluralism. It prevents us from perceiving the possibility of a political and constitutionalist project that would relate the proliferating orders within (and perhaps beyond) the global political system and could vindicate much of what is valued by both sides.

The conceptual dispute turns, in part, on the image one has of the direction in which globalization is pushing our polities and our international institutions—and the appropriate response. We should avoid simplistic dichotomous and naive evolutionary thinking when we reflect on what is new and try to refine our analytic tools. New forms of global interrelations stand on what has been created before. Transnational, infranational, and supranational global institutions still lean on, supplement, and reorient—instead of completely displacing—the international relations they enter into and the international law they produce. We should not be too quick to abandon our concepts (sovereignty, sovereign equality, international law, and so on). In this regard, Joseph Weiler’s geological metaphor is very wise, for we have to avoid both infeasible utopias and unrealistic unimaginative realism.<sup>11</sup> As I have argued elsewhere, despite the expanding regulatory role of global governance institutions, increased integration of the international community (and of regional communities) does not amount to the end of sovereign territorial states.<sup>12</sup> Nor, however, has the universalization of the international society of states, or global functional differentiation and the emergence of “world society” and “international community,” left sovereignty or international law unchanged.

Certain competencies once associated with the sovereign state have been delegated to regional supranational or global actors and in this sense one can speak of divided or pooled “sovereignty.” But insofar as it entails the autonomy and supremacy of a legal order and the self-determination of a polity, sovereignty in the ultimate constitutional/constitutive sense cannot be divided or shared: it is irreducible to a bundle of competences.<sup>13</sup> As such, it is best to view the shifting prerogatives of sovereign states through the concept of changing sovereignty regimes, rather than through a *monistic* conception of cosmopolitan constitutionalism or through anachronistic sovereigntist assumptions.<sup>14</sup> Once we dispense with the dichotomies, the issue of the constitutionalization of global functional regimes (and of regional nonstate polities) can be broached in a nuanced manner, and the utility of the concept of constitutional pluralism for ordering the relations among the relevant legal and political entities can come into view.<sup>15</sup>

Given the debates over the viability of extending the concepts of constitution/constitutionalism beyond the state, I begin with an analysis of these concepts. I then address the ways in which the discourse of constitutionalism has been applied—inap-

propriately in my view—to the UN Charter system. Partly due to its assumption of novel global governance functions in the war on terror, the Security Council and the Charter system are beset with legitimacy problems, ones revealed by resolutions associated with global security law that directly sanction individuals and involve legislative initiatives of a new type. I'll then turn to an analysis of the high-profile Kadi case, the most important challenge to anti-constitutionalist effects of global security law and the new Council activism, arguing that the best way to grasp the meaning and potential of the constitutionalist reactions this case is triggering is not through the old monist/dualist frame or through the constitutionalist/legal pluralist dichotomy but through the lens of constitutional pluralism. I conclude by addressing the question of what circumstances would make such a lens even more useful, arguing that issues of political form and reform of GGIs are bound up with the discourse of their constitutionalization and their legitimacy. At the very least, if individuals are directly affected by international law and governance, there must be adequate mechanisms for protecting their human rights. However, most legal theorists who approach the issue do so from a legalist perspective: constitutionalization is seen as involving norms identified as higher law, as a subject-less process of legal self-reflection, as a matter of legal reason, not political will, and as the work of adjudicative bodies oriented toward the protection of fundamental rights. Instead, constitutionalism and constitutionalization must be understood in terms of political theory as well as law: they involve a process of political self-determination, not just one of regulation of power by law.<sup>16</sup> The issue of constitutional reform pertains not only to legal issues (with constitutions viewed as higher law and constitutionalization as limitation) but also to issues of political form.

### **Constitution/Constitutionalism**

Although associated through the modern period with the domestic legal order of states, there is no reason to restrict either the concept of a constitution or of constitutionalism to that framework automatically.<sup>17</sup> I start with the Kelsenian distinction between the material and formal meanings of a constitution. It is important to keep the analytical question of what a constitution is or does distinct from what it should do or what is a good constitution from a normative point of view—although there is inevitable slippage because the concept of constitutionalism invariably evokes normative associations.

A constitution in the material sense consists of those rules, procedural or substantive, that regulate the creation of general legal norms, establish organs, and delimit their powers.<sup>18</sup> A constitution in the formal sense is a written text that typically can be changed only through special procedures whose purpose is to render the change of these norms more difficult. The formal constitution serves to safeguard the norms determining the organs and procedure of legislation (the core features of the material constitution). Accordingly, the enactment, amendment, and annulment of constitutional laws are made more difficult than that of ordinary laws.<sup>19</sup> Typically, they require a supermajority—and a procedural mechanism that renders the formal constitution more or less rigid and accords its rules superior rank as “higher law” over the rules made by the organs established or regulated by the constitution. This creates a dualist structure that requires some body or mechanisms able to police the boundaries

between the formal and the material constitution, between the modes of change specific to each. However, as Kelsen points out, a formal constitution is not an essential element of every constitutional order. But normative hierarchy is a core feature of a legal system and in Kelsen's view that hierarchy culminates in (the supremacy of) the constitutional norms themselves. The chain of justification of validity and authority leads back to the constitution of the state, the ultimate positive legal "source" for validity of lower norms in the norm hierarchy.<sup>20</sup>

But more than a blueprint for government, the concepts of a constitution—and certainly of *constitutionalism*—are also freighted today with normative significations. The most minimal normative meaning of "constitutionalism" denotes the commitment on the part of a political community to be governed by constitutional rules and principles.<sup>21</sup> A step up the ladder of normative meaning is the idea that a constitutional legal order is autonomous and, to borrow a phrase from the Niklas Luhmann's followers, "structurally coupled" to the political system so that the exercise of authoritative political power proceeds through the legally determined procedures that secure the autonomy of each domain.<sup>22</sup> As such, constitutions delimit and interrelate the legal and political systems of a polity.

Constitutionalism is also associated with meanings that enable one to assess the quality of a constitutional order from a normative point of view. The two ideal-typical perspectives are the "liberal" and "democratic/republican" conceptions, or what are called somewhat misleadingly power-limiting versus power-establishing (foundational) constitutionalism. Liberal constitutionalism is accordingly associated with the idea of power limitation through mechanisms such as the articulation and protection of fundamental rights, the separation of powers, checks and balances, and so on. Liberal constitutionalism also involves the more general principle that government is limited and regulated by law (and the idea of the rule of law) and that the exercise of public power under law is for public purposes and the well-being of the individuals comprising the community.<sup>23</sup> A shared premise of liberal and democratic constitutionalism is that the addressees of authoritative (state) policy and rules are free and equal. That is why subjecting public power to the discipline of legal norms—to the form of law, which allegedly secures generality and impartiality—is deemed essential to the justification of power among those who conceive of one another as free and equal consociates under law.

Liberal constitutionalism also establishes some of the powers it separates, procedurally regulates, and limits by basic rights and, insofar as it requires a strong state to back it up, it enacts effective government. Nevertheless, democratic-republican constitutionalism is seen as comprehensively foundational in a distinctive sense: it involves a project to construct and ground an entirely new system of government, not only to shape or contractually limit a preexisting one. Crucially, it does not acknowledge any residues of public power that are not subject to constitutional law or remain outside it. In this model, all governmental powers derive their authority from the constitution which is supreme, and their legitimacy from the constitutive activity of the *demos*—the "constituent power" to whom it is imputed.<sup>24</sup> Thus democratic constitutionalism is not a contract between a ruler and the ruled; rather, it "defines a horizontal association of citizens by laying down the fundamental rights that free and equal founders

mutually grant each other.”<sup>25</sup> In the democratic model, the adoption of a constitution involves action or a series of acts ascribable to those free and equal persons or citizens—“the people” (or their representatives)—who will be regulated by the constitution.<sup>26</sup> This is the democratic version of the idea of the self-determination by a political community of its political, legal, and constitutional forms. Constitutionalism is seen as facilitating the exercise of collective self-legislation insofar as it provides the procedures needed to identify the popular sovereign (the *demos* as electorate), for selecting its representatives, and for determining its will on a coherent basis.

Taken together, liberal-democratic constitutionalism as a normative construct entails the ideal of limited collective self-government under law. Constitutionalism is central to the legitimate exercise of public power. Constitutionalized public power, if it is to be democratic, must in some sense be ascribable to a *demos* or *demoi* (in the case of a federation) whose welfare, interests, opinions, and will it enables (through the institutionalization of political rights as well as civil and decisional public spheres). It somehow reflects those sources and is responsible and accountable to them. It aims at orienting coercive public power to public purposes, thereby rendering it legitimate.

### **The Constitutional Quality of the UN Charter System: Global Constitutional Moments?**

Since the end of the Cold War, constitutional discourse regarding public international law and the UN Charter system has proliferated. Influential analysts have interpreted key changes in the international system since 1945 as “constitutional moments.”<sup>27</sup> Accordingly, the erection and subsequent development of the UN Charter system amount to the construction of an autonomous, supreme, increasingly integrated global legal order of constitutional quality that has profoundly modified state sovereignty.<sup>28</sup> The changes in the positive rules of international law this entailed are well known: the most important being the principle of collective security eliminating any justification for war except for self-defense—an unprecedented attempt to regulate the use of force through law. The legal principles of sovereign equality, territorial integrity, and self-determination and international human rights were enunciated, codified, and universalized. Since the dismantling of colonialism, wars of annexation became illegal, while political autonomy and territorial integrity of borders were ascribed to all states. The purposes articulated in the Charter also include protecting fundamental human rights.

The concern for human rights enunciated in the Charter and in the Universal Declaration was codified in important subsequent international covenants. Genocide, ethnic cleansing, and enslavement are not considered to be within the domestic jurisdiction of any state and no treaty will be deemed valid that involves an agreement to engage in or tolerate such action. These norms now have *jus cogens* status.<sup>29</sup> Since 1989, it has been argued that the responsibility of the sovereign state is to protect its civilian population against grave rights violations, and in case of default this “responsibility to protect” devolves onto the international community.<sup>30</sup> Some have referred to this expectation as a second “constitutional moment” involving the emergence of a new basic norm in the international system, described as a principle of civilian inviolability.<sup>31</sup> The new role assumed by the Security Council, reflected in its practices of humanitarian intervention and transformative “humanitarian occupation” in the

name of human rights, and its assumption of the power to sanction individuals and to legislate for the rest of the UN membership with respect to transnational terrorism, suggests to some that a third international constitutional moment has occurred.<sup>32</sup> These developments gave the idea of the progressive individualization and constitutionalization of international law a foothold in theoretical discussions.

The global constitutionalists share three key assumptions. The first is that the autonomy and constitutional quality of the global legal system spells the end of sovereignty. In one prominent interpretation the principle of sovereign equality enunciated in the Charter is not a principle of sovereignty at all.<sup>33</sup> The grammatical shift from noun to adjective in the term that appears in the Charter, “sovereign equality,” expresses this transformation.<sup>34</sup> Instead of being the supreme power of a state, existing apart from and prior to international law, or as indicative of the self-referential autonomy and supremacy of the domestic constitutional legal order, “sovereignty” is now seen as a set of rights and a legal status ascribed conditionally by positive public international law to states. As Bardo Fassbender puts it, “Sovereignty is a collective or umbrella term denoting the rights which at a given time a state is accorded by international law and the duties imposed upon it by that same law. These specific rights and duties constitute ‘sovereignty’; they do not flow from it.”<sup>35</sup>

The second shared assumption is that an *international community* of states and individuals now exists, although the global constitutionalists differ as to its institutional structure. According to the version centering the global constitution in the UN Charter system, the new principle of sovereign equality, articulated in Article 2(1) of the Charter, along with the principle of equal rights and self-determination of peoples (Article 1(2)), respect for human rights (the preamble and Article 1(3)), together with the aim that the United Nations be a center for harmonizing the actions of nations to attain these common ends, all entail and help constitute “community-oriented” content rather than national (state) self-interest: hence the shift from the concept of “international society” to “international community.”<sup>36</sup> The international (global) legal and political community is committed to “humankind” as a whole with its own (common) purposes enforceable against recalcitrant states.<sup>37</sup> It is equipped with its own organs: it can articulate and enforce community law through “supranational” majoritarian voting rules that applies even to nonmembers.<sup>38</sup> The Charter also provides the global community’s supreme enforcement organ: the Security Council. According to one analyst, there is thus now a hierarchy of rules and sources of global international law: those with constitutional quality enjoy the highest rank.<sup>39</sup> In this reading, the Charter is not only supreme over international treaty law and domestic constitutional law, as per Article 103; it also “incorporates” prior customary international law and “world order treaties” like the two human rights covenants and the genocide convention, deemed “constitutional by-laws” of the international community.<sup>40</sup> In short, the centered constitutional reading “dissolves the dualism of ‘general international law’ and the law of the Charter.”<sup>41</sup> The UN Charter system and the associated *jus cogens* rules are construed as the pinnacle—the highest layer in a hierarchy of legal norms, of a global monist constitutional legal order of constitutional quality.<sup>42</sup>

Normative hierarchy also obtains within the global political subsystem in relation

to states, as do the unity, universality, and supremacy of the global constitutional legal order and the existence of global remedies (with both supranational and domestic courts acting to enforce global law).<sup>43</sup> Indeed, the third common assumption of the global constitutionalists is *monism*. For a legal order to be autonomous and of constitutional quality, in this view, it is not enough that it be supreme. The subordinate legal orders must belong to the same legal system: supremacy and hierarchy require unity. Thus states (their courts, executives, and even legislatures) are construed as organs of the politically constituted world society and its constitutionalized legal system. This legal order grants them a wide range of autonomy, although the intrusions on domestic jurisdiction are not trivial. The point is that in this reading their legal domestic systems ultimately have their condition of validity not in themselves but in the higher, supreme, autonomous international legal order.

This approach seems to satisfy all of the meanings of constitution and constitutionalism described above.<sup>44</sup> Strictly speaking, the rules of the international community bind states as members of a legal order whose validity inheres in the Charter itself. The supreme international constitutional order decides the competence and jurisdiction of domestic legal orders. Unlike the earlier League of Nations, there is no provision for exit from the United Nations and every state (member or not) is subject especially to the binding resolutions of the Security Council as “higher law” trumping other treaty obligations and domestic law.<sup>45</sup>

Despite the fact that the UN Charter was established as an international treaty by the diplomatic representatives of the governments of the relevant states—the only legal method available under the conditions in 1945—the reference in the preamble to “we the peoples of the United Nations,” together with the supermajoritarian amendment rule (as distinct from unanimity typical of a treaty) is taken to indicate that it was established on behalf of and by the peoples of the United Nations through their representatives.<sup>46</sup> In other words, the Charter as a constitution (process) has to be understood in the foundational legislative sense and ascribed to the peoples (*demos*) of the member states of the United Nations as their respective constituent power(s).<sup>47</sup> As a material constitution, the Charter clearly involves a set of substantive norms, purposes, and procedures that establish organs and articulate their powers, including primary and secondary rules. As a formal constitution, the Charter is a written document that may be changed only through the stipulated amendment procedure requiring a two-thirds majority of the members of the General Assembly including all of the five permanent members of the Security Council (ratified in accordance the respective domestic constitutional processes of the member states).<sup>48</sup> The supermajority requirement for amendment establishes its formal character, its relative rigidity, and its superior rank with respect to the rules its organs make. By implication the constituent units—states—are legally subordinated to their new creation: its rules apply to them irrespective of their continuing individual consent.

### **The Risks of Symbolic Constitutionalism: Legitimation Problems**

Especially in this Charter-centered version, however, global constitutionalism is subject to serious objections. Not only does it fly in the face of the self-understanding of the states (as sovereign); it also misreads the structure of the UN Charter (a consti-



tutional treaty), the hybrid nature UN Charter system, and the complex geology of the international-global legal and political system. Challenging this reading would be a merely academic exercise, were it not for a spate of relatively recent resolutions of Security Council that is both newly active and active in new ways. These recent resolutions make reflection on the nature and status of the legal order articulated in the UN Charter system of particular importance today. I have in mind the resolutions passed in the context of the war on terror creating what amounts to a new global security regime.<sup>49</sup> These resolutions entail the direct impact of harsh rights-violating sanctions on individuals and legislative commands distinct from crisis management “measures” addressed to states: two important innovations that raise serious legitimacy questions.

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

But the greatest impediment to the constitutionalist reading is its deficiencies with respect to even the most minimal normative dimension. Constitutionalism means at the very least that the powers and governing organs established in a constitutionalized legal order are regulated and limited by it. *There can be no space for holders of authoritative public power constituted by a constitutionalist order to somehow still stand outside it.* It is in this regard that the constitutionalist nature of the Charter falls short, for the permanent members of the Security Council are absolute in the old-fashioned sense thanks to the peculiar hybrid structure of the UN established by virtue of the veto in the Council and in respect of amendment.

The veto means that the Security Council cannot act against the five permanent members. The new forms of Council activism have made evident since 1989, however, that the veto in the amendment rule places the permanent members in a structurally different relationship to the United Nations than the all of the other members.<sup>50</sup> While the veto in the first instance serves as a negative check—to block alterations to the Charter or Council decisions undesired by the permanent members—it also has an enabling function: it allows the Council to informally amend the Charter (provided the requisite votes) and to block any constitutionalist response within the system. It is not just that the veto blocks needed reforms unwanted by any of the permanent members. Whatever decisions, new rules, expansive interpretation of Council powers the permanent members manage to push through the Council cannot be undone through amendment, because any permanent member can veto the corrective. Nor is

there a court empowered to decide the competence of UN organs, or to police the distinction between the two tracks established by the formal constitution: between ordinary rule and decision making and constitutional change. This means that for the permanent members, the Charter remains a treaty, and the United Nations an ordinary treaty organization: these five states remain the principals not subject to their agent's control without their consent. For all other states, the United Nations functions like a binding constitutionalized supranational global governance institution (somewhat akin to an asymmetrical federation) whose legal order and majoritarian decision-making procedures and amendment rules bind them.

One can hardly call such a structure constitutionalist in the democratic foundationalist sense because despite the rhetoric of the preamble, the peoples regulated by the UN Charter had no say in its construction and have no role in the lawmaking its organs engage in. I discuss below the loss of output legitimacy in terror listing practices, along with constitutionalist counterreactions on the part of the European Union (EU) and other actors. But this loss is the tip of the iceberg of the legitimacy problematic, for the deeper issue is the absence of input or process (democratic) legitimacy, once the organs of this organization engage in global governance, undertake legislative initiatives, and pass resolutions directly and adversely impacting individuals and their rights. In short, their new forms global governance and constitutionalist discourse both invite the charge of liberal and democratic legitimacy deficits. Security Council Resolutions 1267 (1999), 1373 (2001), and 1540 (2004), among others, involved the erection of an innovative "smart" sanction regime directly targeting alleged individual terrorists, the creation of monitoring committees to ensure state compliance, and the imposition of far-reaching general obligations for states to prevent and combat terrorism and to change their domestic laws to criminalize it with harsh penalties attached.<sup>51</sup> The first resolution established the now infamous 1267 Committee, a subsidiary organ of the Council, to monitor state compliance with Council-imposed sanctions and to maintain a list of individuals and entities deemed to be involved in terrorism. Those placed on the list by state executives are to have their assets frozen and their movement restricted regardless of the fact that they have been convicted of no crime, regardless of the lack of an accepted definition of terrorism, and regardless of the absence of due process mechanisms for those listed. The latter have no right to a fair hearing; there is no procedure for a formal appeal or review mechanism, no means for a court to evaluate the evidentiary basis on which a person or entity has been placed on the list. The executive of any state can place a person or organization on the list with no evidentiary guidelines and very few requirements for the submitting state—and delisting is a very onerous process. This is the underside of the "individualization" of international law celebrated by human rights activists and cosmopolitans. For here, the direct link between public international (or global) law and the individual undermines instead of securing their basic constitutional and/or human rights.

In these cases, the overriding legal obligations of the international system are invoked to strengthen, not to limit, executive discretion, in ways that eviscerate domestic democratic and constitutionalist controls.<sup>52</sup> Indeed, executives of national governments work through the Counter-Terrorism Committee established by Resolution 1373 to limit judicial review by national courts and to deprive individuals of

national judicial protection, exposing them, unprotected by a legal persona, to the full force of the global security system.<sup>53</sup> This shift of political authority or “governance” to international institutions has the effect of undermining executive accountability on the domestic and international levels, with serious detrimental effects on constitutionalism and democracy everywhere. The second and third resolutions are innovative in another respect: they entail a shift in Security Council action from enforcement measures in specific crises to universal legislation insofar as the requirements they impose on states to make laws or alter their existing laws are open-ended and meant to be permanent. These requirements are unrelated to any specific crisis or dispute. Instead of having the status of specific commands or “measures,” they establish binding general rules of international law. If we define legislation as the enactment of abstract norms directly binding on all member states, norms that regulate their rights and obligations on general issues with long-term effects, it is clear that the Council has started legislating.<sup>54</sup>

Nevertheless, it is open to question whether the Council’s authority to make binding decisions and order measures necessary for resolving a crisis amounts to a constitutional right to legislate for the world: the Council is not a representative body and was not designed for that purpose. This self-arrogation of legislative competence seems like a “usurpation” of the constituent power of the member states insofar as the formal amendment rule invoked to legitimate the substantial expansion of Council competence.<sup>55</sup> As the recent groundbreaking *Kadi* ruling by the European Court of Justice (ECJ) indicates, there are serious legitimacy problems raised by the new global governance functions adopted by the Council.<sup>56</sup>

### **The *Kadi* Case and the Conundrum of Global Governance**

The case addressed the listing of Yassin Kadi, a Saudi national, as a terrorist by the special sanctions committee established by the Security Council in Resolution 1267 adopted under Chapter VII of the UN Charter. At issue was the EU’s compliance with the resolution by freezing his assets within the European Community (EC). (The case took place before the further consolidation of older EC structures within the EU, hence the references to the Community below.) Since the EU acts for member states in the area of foreign policy, even though neither it nor the EC is a party to the Charter, it passed the relevant implementing regulations.<sup>57</sup> The EU Council and Commission argued they had no choice but to implement binding Chapter VII resolutions without alteration and without review. Kadi sued, maintaining he was wrongly identified and—absent any way to legally challenge the listing under international law—that his rights to a fair hearing, to judicial remedy, and to property, all enshrined in the European Community’s legal order, were violated by the Community’s implementing regulation.

The case thus involved a confrontation between the legal orders of the EU, its member states, and international law. The efficacy of highest norms in the international legal system was at issue: Article 103 of the UN Charter that asserts its supremacy over all other treaties or obligations of states, and the binding status of Chapter VII resolutions.<sup>58</sup> The conundrum is the following: states presume they are legally compelled to implement Chapter VII resolutions without alteration or review.

They can thus disclaim responsibility for and deny the reviewability of their own implementing measures. But the measures at issue directly affect individuals and impinge on their basic rights. They thus have no redress against arbitrary, biased, or politically motivated listing by states' executives via the Council and then domestically. Listed individuals are potentially placed into a legal black hole.

In response, two EU courts took up the challenge, but they reached opposite conclusions. What is of interest is the conceptual basis for their reasoning, as it latches onto *the very dichotomy* with which I opened this article: monist constitutionalism versus legal pluralism (construed as a contemporary version of dualism). In my view, commentators have (mis-)read and either defended or criticized these decisions on similar grounds. I'll summarize, offer a different kind of reasoning, and point to a way to resolve to the legitimacy problems highlighted by the case, from the perspective of constitutional pluralism.

*The Cosmopolitan Constitutionalist Analysis of the Court of the First Instance (The Primacy of Globalizing Public International Law)*: The first court to hear Kadi's case was the Court of the First Instance (CFI).<sup>59</sup> Citing Article 103, it argued that the obligations of member states under the UN Charter prevail over other obligations of domestic or international law, including those under the EC treaties and the European Convention on Human Rights and Fundamental Freedoms.<sup>60</sup> It found that it had no authority to review the contested Security Council regulation or to indirectly review its resolutions to assess their conformity with fundamental rights as protected by the Community legal order.<sup>61</sup> Yet the Court then went on to assert its jurisdiction to assess the lawfulness of Security Council resolutions with regard to *jus cogens*—a body of higher rules of public international law binding, so it claimed, on all subjects including the bodies of the United Nations.<sup>62</sup> Reminiscent of *Marbury v. Madison* in the American constitutional tradition, the court asserted its jurisdiction to conduct such review (indirectly reviewing the Security Council itself), even if it went on to determine that no *jus cogens* rights were violated in this particular case.<sup>63</sup>

According to one commentator, the judgment represents a picture of a regional organization at once faithful and subordinate to—yet simultaneously constituting itself as an independent check upon—the powers exercised in the name of the international community under the UN Charter.<sup>64</sup> Accordingly, the assertion of *jus cogens* was intended to demonstrate deference to the international legal order and subordination of EU treaty law to the higher law of that order to which it belongs. In short, the court positioned itself as an organ of the international legal system under a single global hierarchy of public international law.

This so-called *dédoublement fonctionnelle* of the Court—as an organ both of the European legal order and of the globalized international legal order—was a striking move.<sup>65</sup> It treated the legal order coupled to the global political system as if it already constituted a unified, monist, and hierarchical system with higher norms of constitutional quality, binding all other domestic legal orders or treaty organizations, deemed to be integrated parts of that order.<sup>66</sup> In this respect it indirectly confronts the Security Council's step into a legislative role and the concomitant direct impact of its legislative resolutions on individuals and states; it placed itself on the same constitutional plane. I see the “Marbury” move as a classic exercise in “political justice”—an attempt

through adjudication to foster the further integration/constitutionalization of the international legal order, and to assert the Court's own power within such a system.<sup>67</sup> At the same time, the Court appeared to be a good citizen of the international legal system.

One problem with this move, apart from the fact that it gave no relief to Kadi, is that if other courts followed this reasoning they would reduce the constitutional standards for global governance institutions to a minimum, for very few international norms have or are likely to attain a *jus cogens* status. The Court designated the right to a fair hearing, to judicial process, and to property as *jus cogens* norms but denied that they had been arbitrarily violated in this case, given the humanitarian exceptions the 1267 invocation allows, and given the security considerations at issue.<sup>68</sup> The generous reading of *jus cogens* rights was complemented by a stingy application. Given debates over which norms have the status of *jus cogens*, and given the fact that no court can simply decide this on its own, this was a startling and much criticized move.<sup>69</sup>

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

To act as if the EU and by implication domestic courts of other countries are already organs of a cosmopolitan legal order and global legal-political community whose core values and institutional structure are already constitutionalized and thus directly binding on all actors is a paradigmatic example of “symbolic constitutionalism”—the invocation of the normative plus that constitutionalist discourse carries in an inappropriate context, thereby cloaking power relations in universalistic garb. This approach undermines the link between the courts of a particular political community and both domestic political processes and internal constitutionalist structures—along with the legitimacy those courts enjoy flowing from them—in the name of a higher legitimacy that in my view is lacking. This is especially disturbing in the case of polities enjoying democratic legitimacy. Such an approach prevents autonomous courts from undoing the constitutionalism- and democracy-eviscerating effects of global governance described above. In short, the structure of the global legal-political system at present does not warrant such deference when it comes to Security Council legislative resolutions that directly impact individuals and violate their most basic due process rights. Contrary to the CFI's approach, it is not up to a domestic or regional court to produce the missing legitimacy.

On the other hand, the autonomous, constitutional status of the EU legal order within the European Union has been insisted upon by the ECJ for years and has been accepted by member states.<sup>70</sup> The complex dynamic that simultaneously distinguishes and integrates the legal order of the EU with those of member states internally has been analyzed by many from the internal perspective. Surely the fact that it is an

integrated legal order in which the validity of EU law also means immediate validity within member states' national legal orders makes this a distinctive political formation. However, as others have noted, the constitutional integrity of the Union also has performed an external dimension that entails its autonomy and self-determination internationally.<sup>71</sup>

*The "Sovereignist" Analysis of the ECJ: The Primacy of Domestic Constitutionalism and the Revival of Dualism?:* The ECJ took the opposite approach from the CFI and proceeded with its review in light of the fundamental rights guarantees found among the general principles of EC law, and determined that Kadi's rights to be heard, and to effective due process, were violated. The Court annulled the relevant regulations.<sup>72</sup>

The arguments the Grand Chamber of the ECJ deployed in favor of review were based on a constitutionalist understanding of the nature of the EC and its relation to international law. Instead of treating it as just another international treaty organization—porous and subordinate to the binding dictates of the Security Council—the Court construed the EC's legal order as an autonomous one of constitutionalist quality.<sup>73</sup> Accordingly, the EC is based on the rule of law, equipped with a complete system of legal remedies and procedures such that neither member states nor its own organs can avoid review of the conformity of their acts with its "constitutional charter."<sup>74</sup> The Court rejected the idea that an international treaty—the UN Charter—could affect the internal constitutional allocation of powers, the autonomy of the EC legal system, or its core constitutional principles (which include fundamental rights) in any way.<sup>75</sup> It thus rested its case squarely on the internal requirements of the integrity of the EC's legal order construed as distinct and independent from public international law—and asserted the primacy and autonomy of its core constitutional principles.<sup>76</sup> The Court held national and EC executives responsible for the implementing legislation and itself capable of reviewing that legislation when basic rights and the fundamental principles of EC constitutionalism are at issue.

The Court insisted that "obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty."<sup>77</sup> From this internal perspective, the ECJ reinvents itself as a domestic constitutional court, taking yet another step in fostering the evolution of the supremacy and direct effect of the constitutionalist European legal order with respect to its member states.

On the external axis, the Court solidified the autonomous status of the European legal order by treating it as one of constitutional(-ist) quality whose completeness and integrity preclude unreviewable intrusion by the international legal order or by any international agreement of member states that affects the fundamental principles of that order. Indeed it went so far as to argue that, even if the obligations imposed by the UN Charter were to be seen as part of a hierarchy of norms within the EC legal order, they would be secondary in rank to the EC's constitutional principles.<sup>78</sup> Clearly, the Court assumed an asymmetry in the nature of the distinct legal (and political) orders involved.

Unlike the approach of the CFI, the Grand Chamber did not reason as if there already exists a monist global public international legal order of constitutional quality whose highest norms and institutions can claim unconditional supremacy with respect to its member states or regional orders. It seemed to opt instead for a classical dualist

stance, insofar as it rested its case squarely on the internal requirements of integrity of the European constitutional legal order—and asserted the primacy and autonomy of European constitutional law over public international law.

This decision has been hailed by some as a victory for human rights against executive predation in the name global security and the war on terror.<sup>79</sup> But others have criticized it for its alleged revival of classical dualist (today, legal pluralist) arguments regarding the relation among legal orders.<sup>80</sup> The Court's reasoning appears sovereigntist in the old-fashioned sense.<sup>81</sup> Its allegedly inward-looking stance and “dualist” logic is seen as bad international citizenship coming at a high price: it impugns the EU's image as a law-abiding international actor, and it dims the prospects that this regional order and its courts might play a role in building a global constitutionalism of shared values and principles via inter-institutional dialogue.<sup>82</sup> By eschewing direct engagement with the international legal order, the decision allegedly fails to come to grips with the innovations in global governance in a constructive way and instead takes a parochial stance sealing off the European order from the rest of the international system.<sup>83</sup> It thus allegedly exacerbates the legitimacy problematic at the heart of that system in which the EU is, despite its dualist pretensions, nonetheless situated.<sup>84</sup> Others defending the dualist strand of the decision argue that it is not the responsibility of a constitutionally based jurisdiction to instruct the institutions of other entities whether or not they adhere to their own legal standards.<sup>85</sup>

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

*The Case for Constitutional Pluralism:* There is and it was articulated by Advocate General Miguel Poiares Maduro in his opinion delivered to the ECJ upon Kadi's appeal of the CFI's judgment.<sup>86</sup> It was Maduro's argument, adopted by the Grand Chamber, that the appropriate way to address the relation between the international system and the EC is to proceed from the assumption that the latter is an autonomous legal order “beholden to” but “distinct from” public international law.<sup>87</sup> He thus insisted that the primary obligation of the ECJ, the constitutional court of the EC, is to enforce its constitutional law.

But fully aware of the interdependence and increased communication among the plurality of globalizing legal orders in the international system, and of the potential external impact of an ECJ decision, Maduro's opinion was not purely inward-looking. It articulated a strategic, communicative stance with respect to the outside while denying that noncompliance would amount to judicial review of Security Council resolutions or entail extrasystemic jurisdiction on the part of the EU.<sup>88</sup> Maduro noted the presumption that the EC wants to honor its international commitments and insisted that his analysis does not mean that the EC's “municipal” legal order and the international legal order pass by each other “like ships in the night.”<sup>89</sup> It explicitly addressed the deficiencies of the Security Council processes in its legislative initiatives and resolutions involving targeted sanctions, noting that annulment of the imple-

menting legislation in the EU could have a positive political consequence of prodding the United Nations, in the face of likely other legal challenges and threats of noncompliance, to respect the basic human rights principles of due process.<sup>90</sup> But the legal effects of an ECJ ruling would remain confined to the EC.<sup>91</sup>

While Maduro's reasoning obviously influenced the ECJ, I argue that it was informed by the premises of a constitutional pluralist analysis, rather than a cosmopolitan monist or a sovereigntist dualist one. Though his opinion ultimately reached a conclusion similar to that of the Grand Chamber, due to its distinctive underlying conceptual framework, it was more open to dialogue with the international legal system and to spurring its further constitutionalization—without, however, sacrificing the rights of the plaintiff. However, it is also clear that Maduro understood that the necessary institutional preconditions for a viable constitutional pluralist relationship among the EU's legal order, the globalizing international legal order in general, and that of the UN Charter system in particular are lacking at present.<sup>92</sup> Hence the hopes that institutional reform on the international level might follow from a challenge by the ECJ to the validity of the measures implementing the rights-violating resolutions of the Security Council.

Throughout his opinion Maduro refers to the treaties constituting the EC as its basic “constitutional charter”—one that constituted an autonomous legal and political community, an approach followed by the ECJ. The Community's constitutional treaties, unlike the intergovernmental European human rights convention, have founded a *legal and political order* in which states and individuals have immediate rights and obligations. The direct effect of EC legislation also distinguishes it from the legal and political order established by the convention. The complex polity that is the EU is thus deemed by Maduro to be different in kind from the organization constituted by the convention. The latter is an international law treaty “designed to operate primarily as an interstate agreement that creates obligations between the contracting Parties at the international level.” It is not a “constitutional charter” that constitutes and articulates the law of a polity.<sup>93</sup> In Maduro's words, this means that the ECJ is designed to be and has a duty to act as the constitutional court of the “municipal” legal order or a *polity* of transnational dimensions—that is, the EC as regards its jurisdiction *ratione personae* and as regards the relationship of the autonomous legal system of the Community to public international law.<sup>94</sup> It was Maduro's argument, also adopted by the Court, that the “constitutional charter” of the EC established a complete system of legal remedies and procedures designed to enable ECJ to review the legality of acts of the institutions of the Community and that its constitutional treaty and its law thus enjoy the same autonomy as any municipal legal order.<sup>95</sup>

This sounds like a classical dualist interpretation of the relation between the autonomous “municipal” legal order of the EC and international law, indistinguishable from the one ultimately put forth by the ECJ. However, Maduro's argument is more nuanced than this and rests on a different conceptual framework. Unlike the latter, Maduro articulated a conditional, alternative conceivable relationship between the EC legal order and that of the United Nations. He argued that neither Article 103 nor Chapter VII Security Council resolutions preclude EC courts from reviewing domestic



implementing measures to assess their conformity with fundamental rights, *so long as* the United Nations does not provide a mechanism of independent judicial review that guarantees compliance with fundamental rights.<sup>96</sup>

Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, this might have released the EC from the obligation to provide for judicial control of implementing measures that apply within the EC legal order.<sup>97</sup> However, as the system governing the functioning of the United Nations *now* stands, the only option available to individuals who seek access to an independent tribunal so as to gain adequate protection of their fundamental rights is to challenge domestic implementing measures before a domestic court.<sup>98</sup> Under these circumstances, the relationship between international law and the EC legal order must be governed by the EC legal order itself, “and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.”<sup>99</sup> This stance is itself premised on the assumption that the human rights at issue—due process rights, rights to a fair hearing, property rights—are not idiosyncratic features of a single jurisdiction. They are universal, as the relevant international human rights documents and the UN Charter indicate: thus it is incumbent on all legal orders to institutionalize and protect them in the appropriate manner.<sup>100</sup> At the present time, however, given the fact that neither the global political system generally nor the UN Charter system in particular is sufficiently integrated or adequately constitutionalized, given the lack of direct effect and the absence of legal remedies on these levels, unquestioning deference to the international legal order(s) is unwarranted.

The advocate general clearly meant to evoke the well-known “Solange” jurisprudence of the German Federal Constitutional Court (GFCC) that conditions the supremacy of EU law on the degree to which it secures an equivalent respect for fundamental constitutional rights to that which exists in the domestic constitutions of member states.<sup>101</sup> The point is to foster the highest level of individual rights and constitutionalist, rule of law protections within all the relevant legal orders. While some fear that the “constitutional pluralist” approach this jurisprudence initiated is dangerously centrifugal and dissociative, others have pointed to the dialogic dimension it opens up among the relevant legal actors and its integrative potential.<sup>102</sup> At issue is the threat to the uniformity of law and implementation of EU or UN resolutions posed by insistence on domestic constitutional supremacy, on the one hand, and the threat to fundamental constitutionalist principles if unconditional hierarchy were accepted, on the other. But if reference is to the highest level of protection of human rights that are acknowledged in the relevant legal orders, then the judicial suspension of an external legal obligation is not solipsistic but rather meant to trigger a equivalent level of protection among the relevant interconnected but not hierarchically related legal orders and to initiate dialogue among the respective judicial organs.<sup>103</sup>

The theory of constitutional pluralism was developed to account for this dialogic mutually accommodating practice of constitutional tolerance and cooperation among autonomous legal orders and organs (courts) within an overarching shared legal order of the EU.<sup>104</sup> The “Solange” approach is theorized as a dynamic process that involves conflict and contestation (the pluralist dimension) but also initiates dialogue and

cooperation among actors and legal organs with a view toward fostering reciprocity and legal resolution on the basis of shared constitutionalist (basic rights) standards that are or should be common to all jurisdictions (the constitutionalist dimension).

This is not the approach of a dualist or of a traditional sovereigntist. However, any attempt to analogize the ECJ's Kadi decision with the "Solange" jurisprudence of the GFCC, is, nonetheless, premature.<sup>105</sup> For what Maduro's argumentation and the decision of the ECJ (which did not use the Solange language) indicate is that in the absence of an appropriate interlocutor—an international court with jurisdiction to review Security Council legislation and enforce human rights—a conflict between the two legal orders could hardly be avoided or resolved through constitutional toleration or judicial comity.<sup>106</sup> Human rights exist in the Charter system and in international legal order generally. What is missing is an appropriate independent body (court) which could serve as an interlocutor for domestic or EU courts! The absence of a suitable dialogue partner on the international level is one reason why the Solange logic cannot simply be ratcheted up to the next level.

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

Indeed, the ECJ's decision did address the Security Council insofar as it indicated what would be necessary in order for a court of a constitutionalist, rights-respecting rule of law system to accept the supremacy and direct impact on individuals of the Security Council's acts. Both the ECJ and the advocate general noted the presumption that the EU wants to honor its international commitments.<sup>107</sup> But given that the CTC created by the Security Council is a body coordinating security-oriented executives, designed precisely to bypass domestic constitutional due process provisions and limit

judicial review, this “dialogue” is different in kind from what occurs between constitutional courts situated within an encompassing legal order of constitutional quality.<sup>108</sup>

### Internal and External Pluralism

The distinction between the “internal constitutional” and “external legal pluralism” made by Maduro in a different context is helpful for reflection on the legitimacy basis for the juridical and political practice of constitutional pluralism.<sup>109</sup> Internal constitutional pluralism refers to a plurality of constitutional orders and sources internal to an overarching legal order without a hierarchical relationship among them. It involves the coexistence of several political communities *within* a particular overarching political community of communities each of which has its own legal order of constitutional quality. The EU is the prime example of internal constitutional pluralism.<sup>110</sup> Its multiple autonomous constitutional orders, sites of norm creation, and power coexist within an overarching order of orders, which are mutually recognized and yet are organized in a “heterarchical” and horizontal, rather than in a hierarchical and vertical, manner. The internal legal pluralism of the EU thus involves a plurality of constitutional sources whose interrelation cannot be analyzed in monist or dualist terms. EU law has direct effect, thus isn’t dualist; it is supreme but conditionally so, and courts in each autonomous legal order cite and dialogue with one another: this is not hierarchical monism. The coordination among the distinct legal orders proceeds through dialogue and mutual accommodation: EU law has a “negotiated” yet binding normative authority, sometimes contested, however supreme.

To be sure, it is part of the dynamics of internal constitutional pluralism that each constitutional legal order sees itself as autonomous and supreme. From the internal legal/normative perspective of the constitutional order of each member state, the reason why the rules of the EU are directly effective, enforced, and supreme is ultimately that the member state’s constitutional order has accepted its rule-making capacity and supremacy given the appropriate provisos. From the perspective of the autonomous constitutional legal order of the EU, however, its own rules are supreme in its relevant domain and that is why they are directly binding on and effective in national courts. The internal perspective of each is perforce “monist.” But from the external sociological or theoretical perspective, these are interrelated if distinct constitutional orders in a dynamic nonhierarchical relationship with one another. *Reflexivity* on the part of participants allows for a dynamic, nonhierarchical, yet not disorderly, relationship among the legal orders informed by an ethic of political responsibility and constitutional tolerance.<sup>111</sup>

In such a context—where constitutional pluralism is internal to a legal order supported by its own political community—the competing courts inside that community see themselves as bound *both* by their particular legal order and by the broader legal order in which they are also situated.<sup>112</sup> The duty of a domestic court within a transnational *polity* such as the EU is to frame arguments that challenge an EU law or decision in general terms, invoking substantive norms that are held also to be applicable on the general level even while referring to the autonomy of its own legal order.<sup>113</sup> The legal relationships are based on an underlying political legitimacy, not only on interjudicial cooperation and coordination.

Clearly this approach—and the very idea of constitutional tolerance or internal constitutional pluralism—is predicated on a background culture of mutual accommodation and compromise. But it is important to see that this political achievement is itself predicated on a political reality: membership within and commitment to a discrete, overarching political community or polity. The distinctive political form of the EC is not named by Maduro in his advisory opinion. But his deployment of the international law concept of a “municipal order” of transnational dimensions is certainly more evocative of the concept of federation of states than it is of an international treaty organization.<sup>114</sup> Of course, as others have pointed out, the European Union is a complex hybrid—a union of states composed of institutional arrangements partly typical of international organizations and partly typical of federal states, of constitutional arrangements typical of federations of states and/or of confederations (depending on one’s taxonomy), and of a level of material integration, along with aspects of its material constitution, evocative of a federal state.<sup>115</sup>

For these purposes, two points are, however, worth emphasizing here: first, what makes the stance and practice of internal constitutional pluralism possible is that the non-statist, quasi-federal character of the EU (however complex and hybrid its actual institutional and behavioral aspects are) *renders the external internal*: relations among member states of the EU with respect to EU law, institutions, and public policies are understandable not as international but as internal relations. The treaties constituting the EU do have constitutional quality and constitute today an autonomous legal and political order integrated with domestic legal orders and bound up with a political project of forming an ever closer union among the peoples of Europe. But this does not mean that the quasi-federation which is the EU is a federal *state* or that the political community subtending the legal community of the EU is a supranational *demos* composed directly or exclusively of individuals. Rather, it means that the political community is composed of multiple political communities, or multiple *demoi*.<sup>116</sup> Understanding themselves as members of an overarching legal and political union of states and as involved in a common project toward an ever closer union, in addition to the requirement that all member states be constitutional democracies, constitutes the self-determining political context in which internal constitutional pluralism in Maduro’s sense is possible and productive instead of disintegrative.<sup>117</sup> Analyzing the EU from the lens of federal theory breaks with the dichotomous political and legal framework that the international law term “municipal” carries with it: the political formation to which constitutional pluralism is the appropriate legal analogue is neither a state (not even a federal state) nor an international treaty organization but a union of states combining international and domestic legal features in a complex structure that is found to greater or lesser degrees in all federal unions.<sup>118</sup> The binary choice between monism and dualism and between domestic and international is transcended in such a structure.

But the same stance is inappropriate in a context of the external pluralism characteristic of the global political system. There is increased juridification of the international political system and the emergence of a new layer of a new form of law: so-called humanity law that brings together humanitarian, law of war, and human rights focused on persons and peoples rather than sovereignty and states.<sup>119</sup> Nevertheless,

and despite increased communication and coordination among the proliferating judicial actors and legal orders on the world scene, there is no order of orders supported by commitment to a new political community, there is little democratic legitimacy underlying the international legal system, and there is surely no democratic conditionality for membership. International human rights law lacks the efficacy and does not serve the same function as fundamental rights protection within the EU. In such a context, constitutional courts are bound by the particular legal order of the political community which has directly delegated competence for constitutional review and from which they derive their legitimacy. Of course, in an increasingly interdependent world, different legal orders will have to endeavor to accommodate each other's jurisdictional claims and judicial coordination among existing supranational courts and tribunals can be rights- and democracy-reinforcing—as witnessed by the cascading impact of the Kadi case.

Accordingly, “unilateral” nonimplementation of Security Council “law” by a constitutional court is justifiable as a right of resistance when the former imposes decisions that are manifestly inimical to the principles of domestic or regional constitutionalist systems as well as the substantive values (human rights) articulated by the UN Charter itself and international law generally (in human rights treaties or customary international law).<sup>120</sup> By explicitly referring to the deficiencies in the international legal system from a constitutionalist perspective, the Kadi judgment clearly hoped to prod the relevant actors to create due process remedies when targeting sanctions directly on individuals. The aim is obviously not to undermine the international legal system but to foster its further constitutionalization in light of its own universalistic principles. The strategic point of the judgment is that a mutually beneficial cooperative, dialogic, positive-sum game among domestic, regional, and international orders could (only) become possible with the further constitutionalization of the international legal system—but this would have to mean the creation of the appropriate new institutions and the redesign of existing ones within the UN Charter system.

This is a political project: it is not a task for technocrats or legal experts or courts on their own. A modest beginning is the creation by the Security Council in Resolution 1904 (2009) of an ombudsperson to examine requests from individuals and entities to be taken off the sanctions list: clearly a response to the increasing reluctance of states to put new names on the list and to the proliferating court challenges to listings. But the power of the ombudsperson falls short of an independent review mechanism and there is still no body that can order people or entities to be removed from the terrorist list.

## **Conclusion**

From the perspective of constitutionalism, the UN Charter system is obviously deficient in the power-limiting sense and in need of some type of a two-pronged (re)foundational reform: no residues of public power behind the law should remain untouched (requiring transformation of the quasi-absolutist powers of the Security Council permanent members) and the organs established by the Charter should be adequately regulated by it. Clearly, this would have to entail elimination of the hybrid structure of the UN by abolishing at least the veto of the permanent five in the amendment

rule, thereby extending the two-thirds supermajority threshold to all the members of the General Assembly.<sup>121</sup> This would be a “democratizing” move insofar as it would vindicate the principle of sovereign equality enunciated in the Charter within the UN itself, thus eliminating the worst aspects of legalized hierarchy in the system. The dramatic new legislative role of the Council should be scaled back, as this is not an appropriate organ for global lawmaking. In addition, the constitutionalization of the global political subsystem would have to involve creation of a global court(s) with jurisdiction to review rights-violating resolutions that are legislative in character and directly affect individuals—possibly through some sort of preliminary reference procedure, by the organs of (or created by) global governance institutions like the Security Council. Some body or mechanism to police the (ideally reformed) dualist constitutional structure established within the UN Charter system is also crucial, especially as it assumes more governance functions.

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

It is debatable whether it makes sense to use the terminology of federation for a such a project regarding a global functional organization: a form of political organization in which the members are states rather than individuals but which binds actors on the basis of supermajoritarian rather than unanimity rules of decision making and amendment, and also clearly depends on the cooperation of autonomous polities that are its members. It is also debatable how much integration of the global political system is desirable—surely it is not a feasible project for it to approximate the degree of integration warranted by a polity in formation like the EU. What matters is that all actors would be under law, and unlike in the current UN Charter system, that a legal response would be possible to any informal amendment, or violation of the rules, principles, and purposes of the Charter that the powerful might attempt to make. Only this would warrant deference of the so-called Solange II type toward global law. Given the degree of heterogeneity in the world, the “legislative” role of such a body would have to be minimal. Freedom for individuals in such a constitutional legal order would be secured not through expansion of the list of human rights that become hard cosmopolitan law but by blocking the constitution-eviscerating effects of an overly intrusive and legislative central instance, while the transformations of global

political culture in a more public-regarding and rights-respecting direction have time to occur.

In order to conceive of this project as a third path, one would have to abandon the legal monism of the Kelsenian school and embrace the concept of constitutional pluralism. In other words, the relations between the constitutionalized global political system and the constitutions of member states and regional polities would have to be seen as “heterarchical,” not hierarchical: they would all be autonomous legal orders interrelating in specified ways and supremacy would be conditional on constitutionalist principles. To the degree to which the relevant actors acquire the consciousness that their polities are part of a regional and global political system in whose just basic structure they wish to participate, and which they hope to preserve and improve, they can gain the requisite reflexivity to develop what theorists of constitutional pluralism have called “constitutional tolerance.”<sup>122</sup> Constitutional pluralism in this sense would provide a safeguard against hegemonic lawmaking from the center. Again, this is a long-term project.

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

The basic idea, then, is to acknowledge that autonomous legal orders of constitutional quality can exist in the global political system—of sovereign states and of the global political system and global governance institutions within it—and that the latter’s claims to autonomy, supremacy, and constitutional quality can coexist alongside the continuing claims of states. Mutual cooperation and dialogue across legal orders, adequate receptors for influence within them to human rights and other concerns, and a legal-political ethic of responsibility should inform the efforts to handle competing claims and to cooperatively further develop the constitutionalist character of all the legal orders involved. Collisions and conflict, as the legal pluralists rightly note, can lead to reflexivity and cooperation; tension need not end in the fragmentation of either legal system, for none of them is self-referentially closed—they are open systems. The integrity of a legal system requires that each new legal decision

is coherent with previous ones; so long as the participants share a commitment to the project of maintaining and improving a global legal-political order of constitutional quality, integrity not impossible even given heterogeneity and diversity. Indeed the stance of constitutional pluralism would create the condition of possibility for constitutionalist-minded courts and domestic legislatures to cooperate in salutary ways for all of us.

## NOTES

1. On the distinction between segmental and functional differentiation, see Niklas Luhmann, *The Differentiation of Society* (New York: Columbia University Press, 1982). For the systems-theoretical concept of “world society,” see Luhmann, “The World Society as a Social System,” *International Journal of General Systems* 8, no. 3 (1982): 131–38, and Gunther Teubner, “Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?,” in *Transnational Governance and Constitutionalism*, ed. Christian Joerges et al. (Oxford: Hart Publishers, 2004), 3–28.

2. “Global governance institution” (GGI) is a vague but useful term to indicate a new form of global regulation and rule making that raises distinctive legitimacy problems. See Allan Buchanan and Robert Keohane, “The Legitimacy of Global Governance Institutions,” *Ethics and International Affairs* 20, no. 4 (Winter 2006): 405–37.

3. The basic hierarchy of authority between (globalizing) international and domestic law remains unresolved. See UN International Law Commission, “Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,” A/CN.4/L.682 (April 13, 2006), and Martti Koskenniemi, “The Fate of Public International Law: Between Technique and Politics,” *Modern Law Review* 70, no. 1 (January 2007): 1–30.

4. For an optimistic view, see Robert O. Keohane, Stephen Macedo, and Andrew Moravacsik, “Democracy-Reinforcing Multilateralism,” *International Organization* 63, no. 1 (January 2009): 1–31. For a critical view see Kim Lane Scheppele, “The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency,” in *The Migration of Constitutional Ideas*, ed. Sujit Choudhry (Cambridge: Cambridge University Press, 2008), 347–373.

5. See Grainne de Burca, “The EU, the European Court of Justice, and the International Legal Order after Kadi,” *Harvard International Law Journal* 51, no. 1 (Winter 2010): 1–81.

6. The literature on global constitutionalism is vast. See Erika de Wet, “The International Constitutional Order,” *International and Comparative Law Quarterly* 55, no. 1 (January 2006): 51–76; Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna: Julius Springer, 1926); Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century* (The Hague: Hague Academy of International Law, 1999); and Bruno Simma, *From Bilateralism to Community Interest in International Law* (The Hague: Hague Academy of International Law, 1994), 217–384, for a sampling of those who argue for an international community based in shared and now constitutionalized values.

7. The earlier literature on legal pluralism was more anthropological and sociological than jurisprudential and much of it challenged the state’s claim of legal sovereignty as the monopoly of law making capacity within imperial contexts and/or with respect to premodern societies. For an overview, see Brian Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global,” *Sydney Law Review* 30, no. 3 (September 2008): 375–411.



8. See Ann Stoler, "On Degrees of Imperial Sovereignty," *Public Culture* 18, no. 1 (2006): 125–46, and James Tully, *Public Philosophy in a New Key*, vol. 2, *Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008).
9. Koskeniemi, "The Fate of Public International Law," 23.
10. This is the claim of radical legal pluralists like Nico Krisch, "The Pluralism of Global Administrative Law," *European Journal of International Law* 17, no. 1 (2006): 247–48.
11. J. H. H. Weiler, "The Geology of International Law—Governance, Democracy and Legitimacy," *Völkerrecht/Heidelberg Journal of International Law* 64 (2004): 547–62.
12. Jean L. Cohen, "Whose Sovereignty? Empire versus International Law," *Ethics and International Affairs* 18, no. 3 (December 2004): 1–24. See also Weiler, "The Geology of International Law," 556–58.
13. On the distinction between competences of sovereignty and the autonomy and supremacy of a legal order and political community, see Georg Jellinek, *Allgemeine Staatslehre* (Bad Homburg: Hermann Gentner Verlag, 1960), 435–504, and Hans Kelsen, *General Theory of Law and the State* (Cambridge, Mass.: Harvard University Press, 1945), 328–90. I analyze the complexities of sovereignty as ascribed by the international legal order and as a political phenomenon elsewhere. See my "Whose Sovereignty" and "Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective," in *The Philosophy of Public International Law*, ed., Samantha Besson and John Tasioulis (Oxford: Oxford University Press, 2010).
14. Monistic cosmopolitans like Thomas Pogge and Bardo Fassbender assume we are in or en route to a multilayered cosmopolitan constitutional global order oriented to the common good, shared values, and human rights and which entails the dispersal of sovereignty into vertically nested regimes subordinated to an overarching and supreme legal framework informed by cosmopolitan principles. See Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002), 174–201; Bardo Fassbender, "Sovereignty and Constitutionalism," in *Sovereignty in Transition*, ed. Neil Walker (Oxford: Hart Publishing, 2003). For sovereigntist discourse, especially in the United States, see Jeremy Rabkin, *Why Sovereignty Matters* (Washington, D.C.: AEI Press, 1999); John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005); and Eric Posner and Jack Goldsmith, *The Limits of International Law* (Oxford: Oxford University Press, 2005). See also Peter J. Spiro, "The New Sovereigntists: American Exceptionalism and its False Prophets," *Foreign Affairs* 79, no. 9 (November/December 2000): 9–15.
15. The concept of constitutional pluralism emerged in reference to the EU context. See Neil Walker, "The Idea of Constitutional Pluralism," *Modern Law Review* 65, no. 3 (May 2002): 317–59; Miguel Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action," in Walker, *Sovereignty in Transition*; Walker, "Late Sovereignty in the European Union," in Walker, *Sovereignty in Transition*; and Weiler, "On the Power of the Word: Europe's Constitutional Iconography," *International Journal of Constitutional Law* 3, nos. 2–3 (2005): 173–90. For an overview and critique of the constitutional pluralist approach, see Julio Baquero Cruz, "The Legacy of the Maastricht-Urteil and the Pluralist Movement" (EUI Working Paper 2007/13, Robert Schuman Center for Advanced Studies, European University Institute, Fiesole, 2007), 18–26.
16. For critiques of this legalistic approach to constitutionalization as fostering administrative rationality, see Koskeniemi, "The Fate of Public International Law," and Alexander Somek, "Constitutionalization and the Common Good" (University of Iowa Legal Studies Research Paper 10–23, College of Law, University of Iowa, Iowa City, 2010).

17. There is already a burgeoning literature on this issue. For an argument against the concept of supra- or transnational constitutionalism based the claim that a *demos* is necessary for the legitimacy of a constitution, see Dieter Grimm, "Integration by Constitutions," *International Journal of Constitutional Law* 3, nos. 2–3 (May 2005): 193–208, and Grimm, "Does Europe Need a Constitution?," *European Law Journal* 1, no. 3 (1995): 282–302. For a discussion of the complexities of the issue, see Walker, "Taking Constitutionalism beyond the State," *Political Studies* 56, no. 3 (October 2008): 519–43.

18. Kelsen, *General Theory*, 124–25.

19. *Ibid.*

20. Kelsen assumes that a legal *system* must be characterized by strict unity and hierarchy in the structure of validity claims—all norms whose validity may be traced back to one and the same basic norm form a legal system (the *Grundnorm*, understood as a transcendental postulate).

21. Alec Stone Sweet, "Constitutionalism, Legal Pluralism and International Relations," *Indiana Journal of Global Legal Studies* 16, no. 2 (Summer 2009): 626–67.

22. Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), 381–422; Teubner, "Societal Constitutionalism"; and Gunther Teubner, "Global Bukowina: Legal Pluralism in the World Society" in *Global Law without a State*, ed. Teubner (Aldershot: Dartmouth Publishing Group, 1997).

23. Christoph Möllers, "The Politics of Law and the Law of Politics: Two Constitutional Traditions in Europe," in *Developing a Constitution for Europe*, ed. Erik O. Eriksen, John Erik Fossum, and Augustin J. Menendez (London: Routledge, 2004), 131–42, 139.

24. *Ibid.* Modern republican and democratic constitutionalism invoke popular sovereignty and impute the constitution to the people or *demos* construed as the source of the higher law qualities and of constitutional dualism.

25. Jürgen Habermas, *The Divided West*, trans. Ciara Cronin (Cambridge: Polity Press, 2006), 131.

26. This need not entail a Schmittian conception of constituent power. For an analysis of democratic constitution making that avoids mythologizing the sovereign people as a macro subject, see Andrew Arato, "Post-Sovereign Constitution Making and Its Pathology in Iraq," *New York Law School Law Review* 51 (2006–2007): 535–55.

27. Anne-Marie Slaughter and William Burke-White, "An International Constitutional Moment," *Harvard International Law Journal* 43, no. 1 (Winter 2002): 1–22. For a critique, see Andreas Fischer-Lescano, "Redefining Sovereignty via International Constitutional Moments?," in *Redefining Sovereignty: The Use of Force after the End of the Cold War: New Options, Lawful and Legitimate*, ed. Michael Bothe, Mary Ellen O'Connell, and Natalino Ronzitti (Ardsey: Transnational Publishers, 2005).

28. Fassbender, "The United Nations Charter as Constitution of the International Community," *Columbia Journal of Transnational Law* 36, no. 3 (1998): 529–620, and Fassbender, *The United Nations Charter as the Constitution of the International Community* (Boston: Martinus Nijhoff, 2009).

29. Vienna Convention on the Law of Treaties, March 23, 1969, U.N.T.S. 1155; Dinah Shelton, "Normative Hierarchy in International Law," *American Journal of International Law* 100, no. 2 (April 2006): 291–323.

30. International Development Research Center, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: IDRC, 2001); UN

Secretary General, *Report of the Secretary General's High Level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility* (New York: United Nations, 2004).

31. Slaughter and Burke-White, "An International Constitutional Moment."

32. Gregory Fox, *Humanitarian Occupation* (Cambridge: Cambridge University Press, 2008). See also Stefan Talmon, "The Security Council as World Legislature," *American Journal of International Law* 99, no. 1 (January 2005): 175–93, and Paul Szasz, "The Security Council Starts Legislating," *American Journal of International Law* 96, no. 4 (October 2002): 901–5; both writers are enthusiasts of this development.

33. Fassbender, "Sovereignty and Constitutionalism," 115–45.

34. *Ibid.*, 134–41.

35. *Ibid.*, 212. See also Patrick Macklem, "Humanitarian Intervention and the Distribution of Sovereignty in International Law," *Ethics and International Affairs* 22, no. 4 (December 2008): 369–93.

36. Fassbender, "Sovereignty and Constitutionalism," 116–40.

37. *Ibid.*, 130; Weiler, "The Geology of International Law," 556–57, on "common assets" as the hallmark of the conception of international community, including material assets such as the deep bed of the high seas, functional assets as per collective security, and spiritual assets as per internationally defined human rights or ecological norms. The point is that states may not assert their exclusive sovereignty over any of the above. Nor can of these common assets be accounted for in contractarian terms: they require stipulation of a community whose purposes and values may be distinct from those of any one of its members.

38. Michael W. Doyle, "The UN Charter—a Global Constitution?," in *Ruling the World, Constitutionalism, International Law and Global Governance*, ed. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge: Cambridge University Press: 2009), 113–15.

39. Fassbender, "The United Nations Charter as Constitution," 103.

40. UN Charter, Article 103, states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

41. Fassbender, "Sovereignty and Constitutionalism," 135.

42. Fassbender, "The United Nations Charter as Constitution," 585.

43. Andreas Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte* (Weilerswist: Velbrück Wissenschaft, 2005).

44. There is also a "decentered" version of global constitutionalism that, unlike the Charter-centered approach, dispenses with legislation and the foundationalist element for the concept of constitution. See Luhmann, *Law as a Social System*.

45. UN Charter, Article 2(6). See Jean L. Cohen, "A Global State of Emergency," *Constellations* 15, no. 4 (December 2008): 456–85, for an analysis.

46. Fassbender, "We the Peoples of the United Nations: Constituent Power and Constitutional Form in International Law," in *The Paradox of Constitutionalism*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press: 2007), 269–91.

47. *Ibid.*

48. UN Charter, Chapter XVIII, Article 108.

49. United Nations Security Council (UNSC), Resolution 1267, "On the Situation in Afghanistan," October 15, 1999; UNSC Res. 1333, "On the Situation in Afghanistan," December 19, 2000; UNSC Res. 1373, "Threats to International Peace and Security Caused by Terrorist

Acts,” September 28, 2001; UNSC Res. 1540, “Non-Proliferation of Weapons of Mass Destruction,” April 28, 2004. Follow-up resolutions include UNSC Res. 1390, “The Situation in Afghanistan,” January 16, 2002, UNSC Res. 1483, “The Situation between Iraq and Kuwait,” May 22, 2003, and UNSC Res. 1452, “Threats to International Peace and Security Caused by Terrorist Acts,” December 20, 2002.

50. Cohen, “Global State of Emergency,” 464–68.

51. UNSC Res. 1373 and 1540 also called for criminalizing the acquisition or transfer of WMDs to nonstate actors and for sanction of organizations providing funding to terrorists.

52. Kim Lane Scheppele, “The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency,” in *The Migration of Constitutional Ideas*, ed. Sujit Choudhry (Cambridge: Cambridge University Press, 2006), 347–73.

53. Eyal Benvenisti and George W. Downs, “National Courts, Domestic Democracy and the Evolution of International Law,” *European Journal of International Law* 20, no. 1 (January 2009): 59–72, 70.

54. Szaz, “The Security Council Starts Legislating”; Talmon, “The Security Council as World Legislature”; Axel Marschik, “Legislative Powers of the Security Council,” in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, ed. Ronald St. John Macdonald and Douglas Johnston (Leiden: Brill Publishers, 2005) 431–92.

55. Perhaps one can make the case that according to the Vienna Convention on the Law of Treaties the Council does technically have the competence to interpret its own competence regarding the necessary measures to accomplish its purpose (international peace and security) under the constitutional *treaty* (the Charter) that established it. Perhaps legislation is such a “measure.” In that case, at the very least one must conclude that the design of the Charter as a *constitutional* treaty is deeply flawed, and utterly deficient from a constitutionalist perspective. But I am unconvinced that one can blur the meaning of “measure” and “law making” — the classic executive versus legislative functions— and the Charter provides only for measures under Chapter VII. Jean Cohen, “A Global State of Emergency,” 464–66.

56. *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, ECR I-6351 (European Court of Justice, September 3, 2008).

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

58. See the discussion in de Burca, “The EU, the European Court of Justice and the International Legal Order after Kadi.”

59. *Kadi v. Council and Commission*, Case T-315/01, ECR II-3649 (Court of First Instance of the European Union, September 21, 2005); and *Case Yusuf and Al Barakaat International Foundation v. Council and Commission*, T-306/01, ECR II-3533 (Court of First Instance of the European Union, Sept. 21 2005).

60. *Kadi* (CFI), para. 159.

61. *Kadi* (CFI), paras. 218–25.
62. *Kadi* (CFI), para. 226.
63. *Marbury v. Madison*, 5 U.S. 137 (U.S. Supreme Court 1803), in which the U.S. Supreme Court ascribed to itself the competence of judicial review while not overturning the contested regulation at issue.
64. De Burca, “The EU, the European Court of Justice, and the International Legal Order after *Kadi*.”
65. Georges Scelle, “Le phénomène juridique du dédoublement fonctionnel,” *Rechtsfragen der internationalen organisation—Festschrift für Hans Wehberg zu seinem 70. Geburtstag*, ed. Walter Schätzel, and Hans-Jürgen Schlochauer (Frankfurt, 1956). See also Scelle, “Le Droit constitutionnel international,” in *Melanges R. Carré de Malberg* (Paris: Sirey, 1933).
66. The Court of First Instance noted that member states cannot circumvent their international legal obligations by creating another treaty organization such as the EC to do what they are not permitted to do and that this is expressly recognized in the treaty itself. *Kadi*, paras. 195–96.
67. Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961).
68. *Kadi* (CFI), paras. 242–52.
69. See, for example, Daniel Halberstam and Eric Stein, “The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order,” *Common Market Law Review* 46, no. 1 (2009): 13–72.
70. Since the 1960s the ECJ has insisted that the legal order of the EU is autonomous. See *Costa v. ENEL*, ECR 585 (European Court of Justice 1964), and *Van Gend en Loos*, ECR 1 (European Court of Justice 1963). This means its other legal system inheres in its constitutional treaties and not in a higher legal order domestic or international.
71. Halberstam and Stein, “The United Nations, the European Union and the King of Sweden,” 26.
72. EC Reg. 881/02 let the EU Council maintain the effects (listing and freezing of assets) for three months to allow a possibility to remedy the infringements found. *Kadi*’s name was subsequently put back on the blacklist only a few months after it was removed by the ECJ.
73. *Kadi* (ECJ), para. 281. Since the 1960s the ECJ has insisted that the legal order of the EU is autonomous. See *Costa v. ENEL*, Case 6–64 ECR 585 and *Van Gend en Loos*, Case 26–62, ECR 1.
74. *Kadi* (ECJ), para. 281.
75. *Kadi* (ECJ), paras. 281 and 316–17.
76. *Kadi* (ECJ), paras. 285 and 304. The Court also disclaimed any jurisdiction to review, even indirectly, the actions of the Security Council and did not rule on the legality of the Security Council resolutions themselves.
77. *Kadi* (ECJ), para. 285.
78. *Kadi* (ECJ), paras. 288, 309.
79. Stefan Griller, “International Law Human Rights and the Community’s Autonomous Legal Order,” *European Constitutional Law Review* 4, no. 3 (October 2008): 528–53.
80. De Burca, “The EU, the European Court of Justice, and the International Legal Order after *Kadi*.”
81. De Burca, *ibid.*, compared its reasoning to the arrogant stance of the United States in *Medellin*. I think this is an unconvincing comparison and an ungenerous reading of the decision.

In the absence of a credible dialogue partner in the form of a court on the international level with the appropriate compulsory jurisdiction, the ECJ's reasoning makes sense.

82. *Ibid.*, and Halberstam and Stein, "The United Nations, the European Union and the King of Sweden."

83. Halberstam and Stein, "The United Nations, the European Union and the King of Sweden," 31–32.

84. De Burca, "The EU, European Court of Justice, and the International Legal Order after Kadi," and Halberstam and Stein, "The United Nations, the European Union and the King of Sweden," 64.

85. Mattias Kumm, remarks, panel discussion on the Kadi judgment, New York University School of Law, New York, September 17, 2008.

86. For the original and so far as I know first argument to the effect that Maduro's opinion must be understood within the framework of constitutional pluralism rather than according to the dualism/monist divide, see Cohen, "Global State of Emergency," 476–78.

87. Opinion of Advocate General Poiares Maduro, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P delivered January 16, 2008, para. 37.

88. *Ibid.*, para. 39. See also Cohen, "Global State of Emergency," 477.

89. *Ibid.*, para. 22.

90. *Ibid.*, para. 38.

91. *Ibid.*, para. 39.

92. At issue is shifting between external theoretical and internal participant perspectives. See Cohen, "Global State of Emergency," 473.

93. Opinion of Maduro, para. 37.

94. The word, "municipal" is somewhat misleading. I would prefer "federal" or "quasi-federal." This point is even more convincing given that the EC now has international legal personality as per the Lisbon Treaty.

95. Opinion of Maduro, paras. 22, 23–25.

96. *Ibid.*, paras. 51–54.

97. *Ibid.*, para. 54.

98. *Ibid.*, para. 38.

99. *Ibid.*, para. 38.

100. It is true that Maduro does not explicitly invoke customary international human rights or the UN Charter; but constitutional pluralism can involve this idea. Jochen A. Frowein, "Fundamental Human Rights as a Vehicle of Legal Integration in Europe," in *Integration through Law: Europe and the American Federal Experience*, ed. Mauro Cappelletti, Monica Seccombe, and Joseph Weiler (Brussels: Walter de Gruyter, 1986), 302.

101. Opinion of Maduro, para. 19. In the case that became known as *Solange I*, *Internationale Handelsgesellschaft MbH v. Einfur- und Vorratstelle für Getreide und Futtermittel*, 37 BVerfGE 271 CMLR 540 (German Federal Constitutional Court, May 29, 1974), the German Federal Constitutional Court famously reserved for German courts the right to review EC acts for their conformity with the German Basic Law (*Grundgesetz*) so long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights.

102. Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European*

*Commonwealth* (Oxford: Oxford University Press, 1999). Walker, “Constitutional Pluralism,” and Maduro, “Contrapunctual Law,” are among the latter group.

103. W. T. Eijsbouts and Leonard Besselink, “The Law of Laws—Overcoming Pluralism,” *European Constitutional Law Review* 4 (2008): 395.

104. Frowein, “Fundamental Human Rights.” See also Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Oxford: Oxford University Press, 1999).

105. See Halberstam and Stein, “The United Nations, the European Union and the King of Sweden,” 68. While one could analogize the attempt to trigger the creation of a dialogue partner and equivalent rights protections on the international level to Solange I, the “Solange II” approach (which entails the willingness of a constitutional court to refrain from review on the assumption that there is a comparable level of rights protection and constitutionalism on the level of the relevant overarching political community) is clearly inapposite. The conditions required for this kind of internal constitutional pluralism do not yet exist in the international community.

106. Opinion of Maduro, para. 54

107. The ECJ stressed the Community’s obligations under international law. *Kadi* (ECJ), paras. 290–297.

108. Benvenisti, “Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts,” *American Journal of International Law* 102, no. 2 (April 2008): 241–74.

109. Maduro, “Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism,” in *Ruling the World?*, ed. Dunoff and Trachtman.

110. *Ibid.*, 356–58.

111. On the ethic of political responsibility, grounded in commitment to the constitutional “acquis,” and to the ongoing political project of European Union, see Walker, “The Idea of Constitutional Pluralism,” 337–48; and Weiler, “On the Power of the Word,” advocating constitutional tolerance.

112. Maduro, “Courts and Pluralism,” 374–79.

113. *Ibid.*, and Eijsbouts and Besselink, “The Law of Laws—Overcoming Pluralism,” 397.

114. Maduro sees the treaties establishing the Community as an agreement not merely between states but between the peoples of Europe and refers to it as a “basic constitutional charter.” All of these terms are more evocative of a federation than of an international organization. Opinion of Maduro, paras. 21, 37.

115. According to the ECJ, the EU is a *sui generis* organization: Opinion 1/91, Draft Treaty on the Establishment of a European Economic Area (EEA), ECR I-6079 (European Court of Justice, 1991), para. 21. It is a new legal order (of international law) because it is autonomous and integrated into national legal orders. The EU legal order determines its own validity and sources autonomously.

116. On the concept of “demoicracy,” see Kalypso Nicolaidis, “The Federal Vision beyond the Federal State: Conclusion,” in *The Federal Vision*, ed. Nicolaidis and Robert Howse (Oxford: Oxford University Press, 2001).

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

118. See Murray Forsyth, *Unions of States* (New York: Holmes and Meier, 1981), Christoph Schonberger, “Die Europäische Union als Bund,” *Archiv des öffentlichen Rechts* 129 (2004): 81–120, and Olivier Beaud, *Théorie de la fédération* (Paris: PUF, 2007).

119. Ruti G. Teitel, "Humanity's Law: Rule of Law for the New Global Politics," *Cornell International Law Journal* 35, no. 2 (Fall 2002) 355–87.
120. Cohen, "A Global State of Emergency."
121. Perhaps with some form of double voting system. See Kemal Dervis, *A Better Globalization* (Washington, D.C.: Brookings Institution Press, 2005).
122. Weiler, "On the Power of the Word," 173–92.