

# Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders

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## Abstract

Whilst having long been the object of scholarly examination, the relationship between the European legal order and the international legal order has recently attracted renewed attention following the problems caused by the implementation by EU Member States of the measures adopted within the framework of the UN system of collective security. Within that context, two different discourses have permeated the case-law of the European Courts and the legal scholarship about the articulation of the international legal order and the European legal order. On the one hand, various scholars and judges have endorsed the idea that the European legal order is an autonomous constitutional order resembling a municipal legal order (European constitutionalism). On the other hand, it has been argued that the European legal order is a legal order of international law and is embedded into the international legal order whose fundamental values and principles it must promote and enforce (international constitutionalism). It is the aim of this paper to, firstly, decipher the diverging features underlying these different understandings of the relationship between the European legal order and the interna-

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tional legal order and, secondly, offer a critical appraisal of their limits in the light of the abiding separation between existing legal orders.

Whereas European legal scholars have long tried to disentangle the complexity of the relationship between European law and international law, international legal scholars have always stayed aloof from this debate for they deemed it too remote to directly concern the “global” legal order. However, following the convoluted decisions of the European Court of First Instance in the cases *Yusuf* and *Kadi*,<sup>1</sup> international legal scholars have suddenly enthused about this question as if it had now risen above the mere regional framework of European law and was radiating into the international legal order as a whole. This enthusiasm for an international constitutionalist articulation of the European and international legal orders has not been confined to these particular decisions and will undoubtedly outlive their recent repeal.<sup>2</sup> Indeed, one cannot fail to notice the extent to which the abundant scholarly literature dedicated to this articulation is deeply and durably overrun by a constitutionalist discourse. Many international legal scholars engaging in the discussion about the recent case-law of the European Courts have been inclined to hail what they saw as a long-awaited recognition of the hierarchical “superiority” of the collective security system and the international legal order in which the European order is embedded.

This is not to say that constitutionalism is a new strand of thought in the international legal discourse. Such an understanding of the international legal order has long been rife among experts of international law.<sup>3</sup> Originally concerned with the

<sup>1</sup> Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, 21 September 2005, [2005] ECR II-3533; Case T-315/01, *Kadi v Council and Commission*, 21 September 2005, [2005] ECR II-3649.

<sup>2</sup> Joint Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, 3 September 2008, available at <<http://curia.europa.eu>>. See also the earlier opinion of the Advocate General Poireres Maduro, 16 January 2008, Case C-402/05 P, *Yassin Abdullah Kadi v Council and Commission*, available at <<http://curia.europa.eu>>.

<sup>3</sup> For a few illustrations, see C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, General Course on Public International Law, 281 Collected Courses 10 (1999), see esp. 237, 306; E. de Wet, *The International Constitutional Order*, 55 *International and Comparative Law Quarterly* (2006), 51-76; E. de Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 *Leiden Journal of International Law* (2006), 611-632; H. Mosler, *The International Society as a Legal Community* (1980), 17-18. See also Der “Gemeinschaftliche Ordre Public” in Europäischen Staatengruppen, 21 *Revista de Derecho Internacional* (1968), 523, 532; J. Delbrück (ed.), *New Trends in International Lawmaking – International ‘Legislation’ in the Public Interest* (1997), esp. 18-19; B. Simma, *From Bilateralism to Community Interest*, 250 *Collected Courses* (1994-VI), 217-384, esp. at 233; A. Peters, *Compensatory Constitutionalism: The Function of Potential of Fundamental International Norms and Structures*, 19 *Leiden Journal of International Law* (2006), 579-610; P.-M. Dupuy, *Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi*, 16 *EJIL* (2005), 131-137; J. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 *ZaöRV* (2004), 547-562, esp. 556-557; C. Walter, *International Law in a Process of Constitutionalization*, in: J. Nijman/A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007), 191-215. It is interesting to note in this respect that in its conclusions, the ILC Study Group on the Fragmentation of International Law alluded to the “constitutional character of the UN Charter”, *Yearbook of the In-*

consistency of the configuration of the international legal order – especially with respect to the UN collective security system, the systemic impact of *jus cogens* norms and the alleged existence of a global Rule of Law principle<sup>4</sup> – constitutionalist legal scholars could not fail to seize the new underpinnings to their hierarchical and incrementally vertical vision of the international legal order that were offered by the case-law of the European Court of First Instance. This came as a fantastic outlet for their constitutionalist posture. It is therefore no surprise that many of these scholars were prompt to celebrate the constitutionalist position underwriting it.

It seems to the authors of this paper that the meaning of the constitutionalist understanding of the relationship between European law and international law which pervades the literature and the case-law of European Courts has yet to be correctly appraised. In particular, the supporters of international constitutionalism – whether judges or international legal scholars – have not realized the extent to which their constitutionalist positions collide with traditional constitutionalist conceptions advocated by European judges in earlier decisions as well as European legal scholars themselves. The relationship between European law and international law thus offers two different and diverging constitutionalist approaches. It is precisely the aim of this paper to shed light on the discrepancies between the European constitutionalist and the international constitutionalist discourses that shroud the question of the relationship between European law and international law.

After depicting the various substantive and systemic features of the European and international constitutionalist understandings of the relationship between European law and international law (I.), the paper will carry out an evaluation of the overall consistency and sustainability of international constitutionalism (II.). Indeed, applied to the interaction between European law and international law, constitutionalism may not necessarily generate the structuring and systematizing expected outcome as the one that it may yield in connection with the international legal order as a whole. The second part of this paper will thus engage in a discussion about the limits of international constitutionalism and its inherent internal contradictions with a view to offering an articulation of the European legal order<sup>5</sup>

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ternational Law Commission, vol. II, part two para. 35. On Constitutionalism in general see A. von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 *Harv. Int'l L.J.* (2006), 223.

<sup>4</sup> For some critical remarks about the constitutionalist understanding of international law, see J. d'Aspremont, *The Foundations of the International Legal Order*, 12 *Finnish Yearbook of International Law* (2007), (Forthcoming). See also J. d'Aspremont, *International Law in Asia: the Limits to the Constitutionalist and Liberal Doctrines*, 13 *Asian Yearbook of International Law* (2008), 89-111.

<sup>5</sup> For the sake of clarity and despite the simplification that this implies, the European Union and the European Community will be, as a rule, conflated in the terminology used in this paper. It will only be resorted to the expression "European Union" to designate the legal order(s) created at the European level within the framework of the European treaties. While reflecting the solution eventually enshrined in the Treaty of Lisbon (see the new article 1 (3) of the Treaty on European Union: "The

and the international legal order that takes into account the abiding horizontal and decentralized character of international law.

## I. European Constitutionalism and International Constitutionalism

The constitutionalist view that has prevailed among European scholars and that classically permeates the case-law of European courts is well-known: the European Union constitutes an autonomous legal order governed by a constitutional charter based on both substantive principles as well as institutional mechanisms directed at their implementation (A.).

This traditional approach has more recently been confronted with the idea that this European constitutional order is itself embedded in the international legal order whose hierarchically superior values and principles ought to be promoted and respected by and within the European Union (B.). The hierarchy and verticality which, according to this second approach, underlies the relationship between the European legal order and the international legal order is also the expression of a constitutionalist conception. However, contrary to the traditional European constitutionalist vision which is entirely based on the autonomy of the European legal order, the latter presupposes that the fundamental rules of the international legal order are the ultimate principles of reference to appraise the “validity” of European law. It thus ends up smothering the constitutional autonomy of the European legal order by subduing it to the fundamental constitutional structure of the international legal order. In that sense, this second form of constitutionalism, by opposition to the European constitutionalism, can be qualified as “international”.

Such an international constitutionalist approach has recently made significant inroads in the case-law of European Courts<sup>6</sup> which had traditionally be amenable to the European constitutionalist approach. It has also been broadly endorsed by international legal scholars. This section seeks to offer an edifying description of each of these two constitutionalist visions. Because any constitutional structure rests on both basic values and institutional mechanisms, a distinction is drawn for each of these two constitutionalist discourses between their substantive and systemic features.

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Union shall replace and succeed the European Community”, Official Journal, 17 December 2007, C-306/10), such a generalization will, above all, allow us to zero in on the fundamental tensions that strain the coexistence of global and regional legal orders. On the new Treaty of Lisbon, see generally G. de Burca, Reflections on the Path from the Constitutional Treaty to the Lisbon Treaty, Jean Monnet Working Paper 03/08 (<<http://www.JeanMonnetProgram.org>>).

<sup>6</sup> See *supra* note 1.

## A. European Constitutionalism

The constitutional character of the TEC treaty was expressly affirmed by the European Court of Justice in its famous EEA Opinion in 1991.<sup>7</sup> On this occasion, the European Court highlighted the specific and innovative character of the community created by the States. The Court deemed it to be more than the constitutive treaty of an intergovernmental international organization and affirmed its constitutional character. The idea that the European Union constitutes a genuine constitutional system which surpassed the classical model of an intergovernmental international organization has been widely shared by European legal scholars.<sup>8</sup> There is probably no need to revert extensively to the characteristics of the European Union that makes it a very unique international organization. They are hardly questionable and have already been examined at length in the literature. However, with a view to subsequently gauging the soundness and consistency of constitutional discourses on the relationship between the European law and international law, this paper briefly reverts to the constitutional values of the European Union (1.) and its systemic constitutional mechanisms (2.) in an attempt to disentangle the specificities of the European constitutionalist discourse.

### 1. European Substantive Constitutionalism

According to the European constitutionalist discourse, the European Union is first and foremost a constitutional order because it rests on constitutional “values” common to the Union and its member States. These values guide the action of both the institutions and member states. It is against the backdrop of these constitutional values that the validity of their acts and the legality of their behavior are evaluated within the European legal order.

While wisely abstaining from defining too strictly the precise goals of the Union, Member States, prodded by the action of the European Court, have determined the “values” on which the Union rests. According to the affirmation of the Treaty on European Union “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”.<sup>9</sup> These values ought to be respected by the Union as well as the Mem-

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<sup>7</sup> Opinion 1/91, *European Economic Area 1*, [1991] ECR I-6102 (para. 21); see generally B. Brandtner, *The Drama of the EEA – Comments on Opinions 1/91 and 1/92*, 3 EJIL(1992), 300.

<sup>8</sup> G. F. Mancini, *The Making of a Constitution for Europe*, CML Rev. (1989), at 595; J. Weiler, *The Transformation of Europe*, 100 Yale Law Journal (1991), at 2405; L. Hancker, *Constitutionalism, the Community Court and International Law*, Neth. Yearb. Int'l L. (1994), 259-291; G. de Burca, *The Institutional Development of the EU: A Constitutional Analysis*, in: P. Craig/G. de Burca (eds), *The Evolution of EU Law (1999)*, 55-82; W. van Gerven, *Towards a Coherent Constitutional System with the European Union*, EPL (1996), 81-101.

<sup>9</sup> See the new article 2 of the EU Treaty as amended by the Treaty of Lisbon, *supra* note 5.

ber States<sup>10</sup> whose rights could be suspended if they seriously infringe them.<sup>11</sup> Candidates to accession are also required to abide by these values<sup>12</sup> although the level of compliance herewith may vary between the actual members and the aspirants.<sup>13</sup>

Despite the different manners in which each of these values have manifested themselves, the case-law of the European Court has ensured that these principles were ingrained in the European legal order before their formal endorsement within European treaties. This is especially true with respect to fundamental rights around which most of the aforementioned values revolve and which were elevated to general principles of the European legal order.<sup>14</sup> Inconsistency of European secondary legislation with the values underlying these general principles leads to the invalidity of the legal act concerned<sup>15</sup> while Member States can incur responsibility under EU Law if their measures of implementation of European law conflict with these principles.<sup>16</sup>

The constitutional character of fundamental rights in the European legal order was further reinforced by the adoption of the Charter of Fundamental Rights<sup>17</sup> whose binding character would formally be assured by the Treaty of Lisbon if it enters into force.<sup>18</sup> Thus, being endowed with its own bill of rights, the values on which the Union rests and which are expressed in the Charter provide a substantive constitutional foundation for the European legal order.<sup>19</sup>

<sup>10</sup> This is clearly affirmed in the new article 2 of the EU Treaty as amended by the Lisbon Treaty, *supra* note 5.

<sup>11</sup> See article 7 of the EU Treaty and article 309 of the EC Treaty.

<sup>12</sup> See article 49 of the EU Treaty: "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."

<sup>13</sup> See generally C. Hillion, *Enlargement of the European Union – The Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities*, 27 *Fordham International Law Journal* (2003-2004), 715.

<sup>14</sup> *Stauder v City of Ulm*, Case 29/69, [1969] ECR 419. See gen. T. Ahmed/I. de Jesus Butler, *The European Union and Human Rights: An International Law Perspective*, 17 *EJIL* (2006), 771-801, esp. 775.

<sup>15</sup> Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1970] ECR 1125.

<sup>16</sup> Case 249/86, *Commission v Germany*, [1989] ECR I-1263; Case 63/83, *R. v Kent Kirk*, [1984] ECR 2689; Case 5/88, *Wachauf v Germany*, [1989] ECR 2609.

<sup>17</sup> Official Journal, 18 December 2000, C 364/1; Official Journal, 14 December 2007, C 303/1.

<sup>18</sup> See the new article 6 of the EU Treaty according to which the Union "recognizes the rights, freedoms and principles set out in the Charter of the Fundamental Rights of the European union (...) which shall have the same value as the Treaties".

<sup>19</sup> These developments have been the object of an abounding literature: see generally A. Cassese/A. Clapham/J. Weiler (eds), *European Union: The Human Rights Challenge*, vols I-III

It is remarkable that these fundamental rights have not been defined on the basis of international human rights law, even before the adoption of the Charter of Fundamental Rights. Indeed, the ECJ defended the autonomy of general principles of EC law from international human rights law,<sup>20</sup> refusing to consider human rights treaties to which member states are signatories a direct source of interpretation.<sup>21</sup> Even after references to the European Convention on Human Rights (hereafter ECHR) were included in the preamble to the European Single Act<sup>22</sup> or in the Treaty on European Union,<sup>23</sup> it remained clear that the fundamental rights of the Union were not directly derived from the ECHR and that they were autonomously interpreted, however inspirational international treaties on the protection of the rights of individuals may be.<sup>24</sup> It is precisely because of their autonomy – and the possible discrepancies between the rights enshrined in the ECHR and those embedded in the general principles of the European legal order<sup>25</sup> – that the question of the accession of the Community to the ECHR arose.<sup>26</sup>

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(1991); N. Neuwahl/A. Rosas (eds), *The European Union and Human Rights* (1995); L. Woods, *The European Union and Human Rights*, in: R. Hanski/M. Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (1997), 283-300. It is interesting to note that these developments have not been subject to significant criticism. On this point, see A. von Bogdandy, *The EU as a Human Rights Organisation? – Human Rights and the Core of the European Union*, 37 *Common Market Law Review* (2000), 1307.

<sup>20</sup> International human rights constitute only “guidelines” according to the Court. See Case 4/73, *Nold v Commission*, [1974] ECR 491.

<sup>21</sup> This was clearly emphasized in the analysis of the case-law offered by the Advocate General Trabucchi in *Watson and Belmann*, Case 118/75, [1976] ECR 1185, 1207.

<sup>22</sup> Official Journal, 29 June 1987, L 169.

<sup>23</sup> It is article F.2 of the Treaty on European Union introduced by the Maastricht Treaty which first expressly referred to the ECHR in an operational provision.

<sup>24</sup> G. Gaja, *Protection of Fundamental Rights under European Community Law: What Prospects?*, in: K. Koufa (ed.), *Human Rights and Democracy for the 21<sup>st</sup> Century: 1999 International Law Session* (2000), 583-603.

<sup>25</sup> Comp. for instance the famous decision in the Cases 46/87 and 227/88 *Hoechst AG v Commission*, [1989] ECR I-2859, and ECHR, *Niemitz v Germany*, Series A, No. 251.

<sup>26</sup> See the new article 6 (2) that would be introduced by the Treaty of Lisbon which commands that the Union accedes to the ECHR. See the article 59 of the ECHR as amended by the article 17 of the Protocol No. 14, Strasbourg, 13.5.2004, CETS No. 194; <<http://conventions.coe.int/treaty/en/Treaties/Html/194.htm>>, open to signature since 13 May 2004. On this reform see generally L.-A. Sicilianos, *La réforme de la réforme du système de protection de la CEDH*, 49 *Annuaire français de droit international* (2003), 611. It is important to note that the accession would not in itself directly make the ECHR an integral part of the European legal order and will thus leave unaffected the autonomous constitutional character of the values of the Union. It is true that the accession to the ECHR could ultimately erode – to the great dismay of European judges – the systemic autonomy of the fundamental rights control within the Union. It would however not frustrate the substantive autonomy of the values of the Union. See generally P. Drzemczewski, *The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights*, 22 *HRLJ* (2001), 14; see also H. Krüger/J. Polakiewicz, *Proposals for a Coherent Human Rights Protection System in Europe/The European Convention on Human Rights and the EU Charter of Fundamental Rights*, 22 *HRLJ* (2001), 1-12.

While fundamental rights quickly emerged as a constitutional principle of the European legal order, it was not until the famous decision of the Court in the case *Parti Ecologiste 'Les Verts'* that the Court bestowed a similar character on the principle of the Rule of Law.<sup>27</sup> Indeed, it affirmed on that occasion that the European legal order is based on the rule of law “inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”. Even though the Rule of law may be construed as a systemic mechanism rather than a value in itself – as the systemic role played by the European Court as a constitutional Court will demonstrate – the Rule of Law is nowadays considered belonging to these constitutional principles of the Union,<sup>28</sup> thereby expanding the constitutional values on which the Union rests.

Democracy did not emerge as a constitutional value as a result of the action of the Court. Indeed, it is the 1992 Maastricht treaty that introduced the “value” of democracy in the European legal order.<sup>29</sup> This value and its corresponding enforcement mechanisms were subject to modest additions and modifications in the ensuing reforms of the treaty, especially following the jolts provoked by the Austrian elections in 1999.<sup>30</sup> Although carefully averting any definition of democracy, the Treaty on European Union accordingly subjects the participation of actual members as well as the accession of new members to the respect for democracy.<sup>31</sup> Even though the Treaty also obliges the Union – the functioning of which shall be “founded” on democracy<sup>32</sup> – to live up to democracy, it must be acknowledged that the exaltation of democracy to the rank of value of the Union has not unsnarled its abiding democratic deficit.<sup>33</sup> Be that as it may, and however unclear its ultimate meaning may be, the constitutional character of democracy within the European legal order can nowadays hardly be put into question.<sup>34</sup>

Part of the success of this European constitutionalist features may be traced back to the fact that judges, scholars and European policy-makers have shied away from clearly defining the values of fundamental rights, Rule of Law and democracy. This nonetheless matters little here. However imprecise they may be, these

<sup>27</sup> Case 294/83, *Parti Ecologiste 'Les Verts'*, [1986] ECR 1339.

<sup>28</sup> K. Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, 44 CML Rev. (2007), 1625; A. Arnall, *The Rule of Law in the European Union*, in: A. Arnall/D. Wincott (eds), *Accountability and Legitimacy in the European Union* (2002), at 239-258.

<sup>29</sup> Official Journal, 29 July 1992, C 191.

<sup>30</sup> I. Seidl-Hohenveldern, *The Boycott of Austria within the European Union. Defence of European Values and Democracy*, in: vol. 2, *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (2003), at 1425-1442.

<sup>31</sup> See articles 6 and 49.

<sup>32</sup> New article 10 (1) of the EU Treaty as amended by the Treaty of Lisbon, *supra* note 5.

<sup>33</sup> J. Weiler/U. Haltern/F. Mayer, *European Democracy and Its Critique*, in: J. Hayward (ed.), *The Crisis of Representation in Europe* (1995), at 32-33; or J. Weiler, *European Models: Polity, People and System*, in: P. Craig/C. Harlow, *Lawmaking in the European Union* (1998), chapter I.

<sup>34</sup> See the new Part II of the Treaty on European Union introduced by the Treaty of Lisbon, *supra* note 5.

values endow the European constitutionalist discourse with sustained, sound and undisputed substantive foundations. This European substantive constitutionalist premise is reinforced by a fascinating constitutional machinery assembled and forged over the years about which we must now say a few words.

## 2. European Systemic Constitutionalism

While originating in certain common values, European constitutionalism also rests upon several sophisticated legal mechanisms and principles which are designed to ensure the effective and uniform application of the law manifesting these values as well as to enforce the corresponding hierarchy of norms within the European legal order. Taken together, these mechanisms and principles generate a coherent and structured “system”.<sup>35</sup>

The system so instituted is usually regarded as bearing more resemblance to national legal orders than to general international law.<sup>36</sup> In that sense, these systemic features underpin the constitutional nature of the EU. Much could be written – and has indeed been written – on the technicalities of each of the foresaid mechanisms and principles. Here, it is sufficient to single out the constitutionalist overtones of a few of them.

Direct effect and supremacy probably constitute the two most crucial constitutionalizing mechanisms articulated by the Court of Justice.<sup>37</sup> The direct effect of European norms leads to a partial continuity of the Member States’ legal orders and the European legal order in the EU architecture as it enables individuals to rely on these European norms in the absence of any national implementing measure. One cannot resist the impression that the direct relationship established between individuals and the European institutions reflects, to a large extent, the corresponding relationship between individuals and their national State; in this respect, it is telling that in *Van Gend & Loos* the Court, when identifying the “subjects” of the European legal order, referred not only to the Member States themselves but also to the Member States’ nationals. Against such a backdrop, it is no surprise that the Court has abundantly resorted to the notion of direct effect as a potent tool for integration. Needless to say that direct effect is of course not peculiar to European law. The mechanism is, quite to the contrary, deeply rooted in general

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<sup>35</sup> The term is used by the Court of Justice in Case 294/83, *Parti Ecologiste ‘Les Verts’ v European Parliament*, [1986] ECR 1339. The Court builds on that to hold that the EEC is “a community based on the rule of law” and that the Rome Treaty is its “constitutional charter” (at para. 23). On the notion of system, see J. Combacau, *Le droit international: bric-à-brac ou système?*, *Archives de philosophie du droit* (1986), 85.

<sup>36</sup> For a similar understanding of the EU legal order as a domestic legal order, see A. von Bogdandy, *Pluralism, Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law*, *International Journal of Constitutional Law* (2008), 1-17, esp. 3.

<sup>37</sup> See, respectively, Case 26-62, *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR 1, and Case 6-64, *Flaminio Costa v E.N.E.L.*, [1964] ECR 585.

international law.<sup>38</sup> When construing and applying the notion in the European framework, the ECJ has nevertheless steadily championed a somewhat objective approach (predicated on the analysis of the terms of the norm) rather than the traditional subjective criterion (the intention of the contracting parties), which is commonly used in general international law.<sup>39</sup> It can thus be argued that, while failing to be a specific pattern of EU law as a matter of principle, direct effect plays a structuring role in that particular context as it undoubtedly bridges European and domestic legal orders and contributes to the emergence of a truly European constitutional legal order.<sup>40</sup>

The principle of supremacy can be appraised in more or less the same fashion. From the standpoint of international law, it is commonly admitted that a State is not allowed to invoke the provisions of its domestic law as justification for its failure to perform the international obligations incumbent upon it.<sup>41</sup> Classically, it is up to each domestic legal system to determine whether or not international rules enjoy supremacy over domestic legislation, without international law as such implying any obligation in this regard.<sup>42</sup> In *Costa v ENEL*, the ECJ however went beyond the mere (uncontroversial) transposition of this principle to EU law: the judgment actually entails that national courts are required to recognize the precedence of EU law within their respective internal legal orders.<sup>43</sup> In doing so, the ECJ undeniably adopted a groundbreaking approach. The decision in *Costa* potentially involves a sweeping departure from the traditional solution for it commands a (major) alteration to the Member States' constitutional orders, requiring subservience to community rules. In that sense, supremacy no longer stems from the Member States' legal orders but is commanded by the European legal order itself.<sup>44</sup> Once more the ECJ utilizes an existing international law mechanism but ex-

<sup>38</sup> See generally J. Verhoeven, *La notion d'applicabilité directe du droit international*, *Belgian Review of International Law* (1980), 243; A. Nollkaemper, *The Direct Effect of Public International Law*, in: J.M. Prinsse/A. Schrauwen (eds), *Direct Effect, Rethinking a Classic EC Legal Doctrine* (2002), at 157. See however the challenging contribution of A. von Bogdandy who construes direct effect as a question of domestic law rather than a question of international law. See von Bogdandy, *supra* note 36, esp. 6-7.

<sup>39</sup> See PCIJ, *Advisory Opinion on the Jurisdiction of the Courts of Danzig*, 3 March 1928, Series B, No. 15, at 17-18.

<sup>40</sup> J. Weiler, *The Community System: the Dual Character of Supranationalism*, *Yearbook of European Law* (1981), at 275; see also D. Bethlehem, *International Law, European Community Law, National Law: Three Systems in Search of a Framework*, in: M. Koskenniemi (ed.), *International Law Aspects of the European Union* (1997), at 179.

<sup>41</sup> See article 27 of the Vienna Convention on the Law of Treaties.

<sup>42</sup> G. Betlem/A. Nollkaemper, *Giving Effect to Public International and European Law*, 14 *EJIL* (2003), 569, esp. at 572.

<sup>43</sup> See also Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR 629, para. 21.

<sup>44</sup> J. d'Aspremont/J. de Beys, *La primauté du droit européen dans le contentieux objectif de légalité*, *Journal des Tribunaux – Droit européen* (2004), 200-205.

tends it far beyond its classical ambit, with a view to forging a genuine constitutional system akin to that of a State.<sup>45</sup>

Mention must also be made of the comprehensive “system”<sup>46</sup> of remedies devised by the EU legal order. These procedures are probably one of its most salient features, insofar as they betray an inclination in favor of a paramount role of the judiciary which is usually confined to national societies and almost unknown in regional legal orders. The existence of this complete set of remedies has three main corollaries, each of them shoring up the systemic constitutional character of the EU.

Firstly, the ECJ and the CFI become entrusted with a truly constitutional role.<sup>47</sup> Through the control of the legality of the acts of European institutions<sup>48</sup> the European courts are empowered to ensure that the fundamental constitutional principles of the Union be consistently applied by the institutions.

Secondly, it is settled case-law that the Member States<sup>49</sup> are prevented from adopting countermeasures in the face of a breach of EU law by an institution<sup>50</sup> or by another Member State.<sup>51</sup> Such an exclusion results, in the Court’s view, from the very existence of the above remedies: there is allegedly no need for the Member States to resort to countermeasures inside the EU as they have special proceedings at their disposal, through which they can vindicate their rights as necessary. Arguably, the system is not completely self-contained, as some “fall-back” upon the sanctions of general international law seems inevitable if and to the extent that the conventional European procedures prove ineffective.<sup>52</sup> Leaving this aside, it remains noteworthy that the *justice privée* mechanism of counter-measures, which undoubtedly constitutes a prominent feature of the classical, decentralized international society, is (at least temporarily) circumscribed within the European legal order by the centralized, sophisticated abovementioned judicial techniques. No

<sup>45</sup> On supremacy, see also the Declaration No. 17 attached to the Treaty of Lisbon.

<sup>46</sup> See *supra* note 35.

<sup>47</sup> F. J a c o b s, Is the Court of Justice of the European Communities a Constitutional Court?, in: D. Curtin/D. O’Keefe (eds), *Constitutional Adjudication in European Community and National Law* (1992), at 25.

<sup>48</sup> Article 230 of the EC Treaty.

<sup>49</sup> Although the ECJ has thus far never been faced with the situation, it is posited that, for reasons similar to (and within the same limits as) those expounded in the text, the institutions themselves are forbidden to take countermeasures against a Member State for breach of EU law. For the same view, see notably P. M o r i, *Il nuovo articolo 171, par. 2, del trattato CE e le sanzioni per gli Stati membri inadempienti*, 58 *Rivista di diritto internazionale* (1994), at 63 and 67. On this question, see generally F. D o p a g n e, *Les contre-mesures des organisations internationales. Essai de transposition du régime des contre-mesures étatiques*, forthcoming (2009).

<sup>50</sup> Joint Cases 90-63 and 91-63, *Commission v Grand Duchy of Luxembourg and Kingdom of Belgium*, [1964] ECR 625.

<sup>51</sup> Case 232/78, *Commission v French Republic*, [1979] ECR 2729, para. 9; repeated on many occasions, recently in Case C-111/03, *Commission v Sweden*, [2005] ECR I-8789, para. 66.

<sup>52</sup> See e.g. B. S i m m a /D. P u l k o w s k i, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 *EJIL* (2006), 483, at 517; or G. C o n w a y, *Breaches of EC Law and the International Responsibility of Member States*, 13 *EJIL* (2002), 679, at 689.

doubt that these limitations imposed upon the ability of States to take unilateral sanctions against one another within the European legal order mirror similar restraints placed upon individuals in (most of) national constitutional systems and therefore constitute a significant constitutional feature of the European legal order.

Thirdly, Article 292 of the EC Treaty provides that "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein". This exclusive jurisdiction of the ECJ has notoriously been confirmed by the Court itself on the occasion of a case revolving around the *Mox Plant* litigation.<sup>53</sup> Like the banishment of countermeasures – though being distinct from this principle<sup>54</sup> –, the exclusion of the external means of dispute settlement reveals the intention to build a structured system, endowed with a high degree of autonomy.

All the abovementioned mechanisms provide the Union with a genuine constitutional framework. Taken in conjunction with the constitutional European values, this constitutional system buttresses the finding of the ECJ in its opinion 1/91 that the European Community cannot be equated with other international organizations as it constitutes a real constitutional order similar to the municipal constitutional systems<sup>55</sup> rather than to the legal orders of other international organizations. It is in these substantive and systemic constitutional features that the European constitutionalist discourse is so firmly rooted.

## B. International Constitutionalism

As is explained above, recent international legal scholarship and judicial developments seem to embrace another form of constitutionalist discourse, namely a discourse that construes the European legal order as embedded in the more general constitutional international legal order. In contrast to the European constitutionalist approach that bridges the domestic legal order with the European legal order, the international constitutionalist approach integrates the European legal order

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<sup>53</sup> Case C-459/03, *Commission v Ireland*, [2006] ECR I-4635. See J. F i n k e, Competing Jurisdiction of International Courts and Tribunals in Light of the MOX Plant Dispute, 49 *German Yearbook of International Law* (2006), 307-326; N. L a v r a n o s, The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?, 19 *Leiden Journal of International Law* (2006), 223-246.

<sup>54</sup> As such, Article 292 EC does not rule out countermeasures by Member States, for countermeasures do not boil down to a method of dispute settlement: this seems to be born out by the fact that the case-law prohibiting countermeasures (see *supra*, notes 50-51) does not rely on that provision at all.

<sup>55</sup> It is worth dwelling here on the fact that despite these similarities the EC has nevertheless not transformed into a State within the meaning of international law. This was underscored by the European Court of Justice itself, which held that "the rules governing the relationship between the Community and its Member States are not the same as those which link the Bund with the Länder" (Case C-359/92, *Federal Republic of Germany v Council*, [1994] ECR I-3681, at para. 38). On this point, see generally A. P e l l e t, *Les fondements juridiques internationaux du droit communautaire*, vol. V, *Collected Courses of the Academy of European Law* (1994-2), 222 ff.

into the global legal order. As such, this new form of constitutionalism does not overtly challenge the constitutional character of the European legal order. It however subdues it to the values and the principles of the international legal order which it deems hierarchically superior. It thus presupposes that the fundamental rules of the international legal order are the ultimate principles of reference to appraise the “validity” of European law.<sup>56</sup> It accordingly ends up undermining – however unconscious or unwitting that this may be – the constitutional autonomy of the European legal order. This is maybe what the European court itself quickly realized after its much celebrated 1963 decision in the case *Van Gend en Loos* when it hinted at the idea that the European legal order was “a new legal order of international law”<sup>57</sup>. Indeed, it is remarkable that the qualifier “of international law” was quickly abandoned by the Court which, as has been described above, embarked into a fully-fledged European constitutionalist approach.<sup>58</sup> It is similarly striking that the Advocate General Pöiares Maduro in its recent opinion on the appeal against the aforementioned decision of the CFI in *Kadi* also omitted that qualifier when referring to that famous precedent.<sup>59</sup> It is as if the Court and the most authoritative interpreters had promptly wished to quell this early incidental – if not accidental – allusion to the constitutional kinship between the European legal order and the international legal order because it runs against the substantive and systemic European constitutionalist features of the Union. It is the aim of this section to depict this international constitutionalist discourse that undermines the traditional European constitutionalist understanding of the articulation of European law and international law. Once again, because any constitutional order, whether national, European or international, rests on both basic substantive principles and institutional mechanisms, a distinction must be drawn between the substantive (1.) and the systemic (2.) international constitutionalist features.

### 1. International Substantive Constitutionalism

The international constitutionalist understanding of the relationship between European law and international law presupposes that the European values are the emanation of universal values and thus plays down the autonomous character of the European constitutional principles. It is based on the assumption that the constitutional values of the European Union trickle from the international legal order and that they mirror the values of the “international society”.

<sup>56</sup> See A. Peters, The Position of International Law Within the European Community Legal Order, 40 German Yearbook of International Law 9 (1997), at 38 at 76.

<sup>57</sup> *Supra* note 37 (emphasis added). See the remarks of J. Allain, The European Court of Justice as an International Court, 68 Nordic Journal of International Law (1999), at 255.

<sup>58</sup> See in particular Case 294/83, *Parti écologiste ‘Les Verts’ v European Parliament*, [1986] ECR 1339.

<sup>59</sup> *Supra* note 2, at para. 21.

It took more than forty years before a European Court turned back to international substantive constitutionalism. It was not until the famous decision *Yusuf* and *Kadi* that the idea that the European legal order and the international legal order rest on common constitutional principles was echoed in one of European court-rooms in Luxembourg. Indeed, the CFI, confronted with the allegation that the EC regulations imposing sanctions on certain persons suspected of supporting international terrorism as commanded by UN Security resolutions were infringing fundamental rights, regarded itself – although indirectly – empowered to review the legality of Security Council resolutions with respect to *jus cogens*, and understood the latter as “a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations and from which no derogation is possible”.<sup>60</sup> Leaving temporarily aside the dramatic impact of this approach in terms of international systemic constitutionalism,<sup>61</sup> it is particularly noteworthy that the CFI, while carrying out its indirect control of the Security Council resolutions with regard to *jus cogens*, interpreted it as encapsulating “the mandatory provisions concerning the universal protection of human rights”, including the right to make use of their property, the right to a fair hearing and the right to an effective judicial remedy. Although the CFI was subsequently rebuked on that point by the ECJ,<sup>62</sup> it must be pointed out that in so doing the CFI repudiated its role of European constitutional court by basing its review on constitutional norms of reference lying outside the European legal order and engaged in a review of the legality of a non-European legal act on the basis of the fundamental principles of the international legal order. Ceasing to be a European constitutional court applying European constitutional principles, the CFI adopted an international constitutionalist posture as it transformed the values of the international community into fundamental values of the European legal order which it incorporated into the standards of its control of legality. In this respect, it is remarkable that, by contrast, the ECJ, on appeal, did not rely on *jus cogens* when carrying out its review.

The CFI not only resorted to *jus cogens* as a norm of reference for its review. It also endorsed a very generous and far-flung understanding of *jus cogens*. While it is probably of no avail to dwell upon the overly progressive picture given by the CFI to peremptory norms of the international legal order,<sup>63</sup> it is nonetheless noteworthy that in doing so the CFI actually broadcasted, under the banner of the fundamental norms of the international legal order, a very European set of values. For, it is far from certain that the right to make use of property, the right to a fair hearing and the right to an effective judicial remedy actually constitute peremptory norms of the international legal order. It may thus seem that the CFI, under the guise of

<sup>60</sup> *Yusuf*, *supra* note 1, at para. 277.

<sup>61</sup> See *infra*, 2.

<sup>62</sup> *Kadi*, *supra* note 2, paras 281 and 316.

<sup>63</sup> See for instance, C. E c k e s, *Judicial Review of European Anti-Terrorism Measures*, 14 *European Law Journal* (2008), at 87-88.

an international constitutionalist discourse, simply promoted, at the universal level, the constitutional values of the European Union. Whatever the ultimate motives behind the reasoning of the CFI may be, it suffices to state for the time being, that the decision of the CFI had all the trappings of international constitutionalism with respect to the constitutional values on which it bases its control of legality.

While the aforementioned aspect of the CFI decisions in *Yusuf* and *Kadi* drew much attention before being set aside by the ECJ,<sup>64</sup> it would be erroneous to believe that these decisions constitute the only manifestation of a substantive international constitutionalism in the European Union. The Treaty on European Union itself equates some of the fundamental values of the EU with those of the international legal order. It entrusts the Union, in its international relations, with the mission to “contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”.<sup>65</sup> Likewise, the Treaty provides that the Union shall pursue common policies in its external action in order to “preserve peace, prevent conflicts and strengthen international security in accordance with the purposes and principles of the United Nations Charter”.<sup>66</sup> It is interesting to note that this leaning of the treaty – initiated in Maastricht – towards international constitutionalism has been perceived by scholars as a “rebellion” against the image of European constitutionalism described above and an attempt by Member States to emancipate themselves from the European constitutional structure and seek more elbow room in the international order.<sup>67</sup> Whatever the reasons for these conventional provisions may be, it seems clear that they provide significant support for the international constitutionalist stance.

Because the respect for the basic principles of the international legal order permeates the treaty on the European Union, it is not surprising that the external action of the Union – and that of the Community – has on various occasions been based on the defense of these “global values”. This has been particularly obvious in the establishment of bilateral or multilateral association agreements with third States conditioned upon the respect for democracy, fundamental rights and the rule of law. It is well-known that after a few tergiversations,<sup>68</sup> these “values” have been expressly considered as constituting an essential element of the consent ex-

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<sup>64</sup> *Kadi*, *supra* note 2, paras 281-285.

<sup>65</sup> New article 3 (5) as amended by the Lisbon Treaty, (*supra* note 5).

<sup>66</sup> New article 21 (2) (c) as amended by the Lisbon Treaty, (*supra* note 5).

<sup>67</sup> J. Weiler/J. P. Rachtman, Symposium – Institutions for International Economic Integration: European Constitutionalism and Its Discontents, 17 *Journal of International Law & Business* (1996-1997), at 371.

<sup>68</sup> See the agreement with the State parties to the General Agreement of Central America Economic Integration Official Journal, 30 June 1986, L 172. See also the Agreement of Lomé III of 8 December 1984, 24 *ILM* (1985), 571; see also the agreement with Hungary, Official Journal, 3 December 1993, L 347 or the agreement with Poland, Official Journal, 31 December 1993, L 348.

pressed by the parties to these conventions,<sup>69</sup> thereby triggering the possibility to resort to the *exceptio non adimpleti contractus* under general law of treaties<sup>70</sup> or special regime included into the treaty<sup>71</sup> if one of these values were to be derided by one of the parties.<sup>72</sup> Based on this mechanism, the Union has not balked at sanctioning a few countries for their contempt for these values deemed universal. More remarkable for the sake of this paper is the fact that, in this context, democracy, fundamental rights and the rule of law were considered as universal principles<sup>73</sup> and sanctioned as such<sup>74</sup> within that framework. The idea that the Union should in its external relations promote these universal “values” is not limited to its actions in the framework of its aforementioned association agreements with third States. It is also because the Union considers these values universal that it ventures to resort to

<sup>69</sup> One of the very first agreements where this was expressly stated in an operative provision is the agreement with Brazil, Official Journal, 17 June 1992, L 163.

<sup>70</sup> See article 60 of the 1986 Vienna Convention on the Law of Treaties.

<sup>71</sup> See the various special consequences devised in the agreements with the Baltic countries (the so-called “Baltic clause”) as the agreement with Estonia, Latvia, Lithuania of 21 December 1992, Official Journal, 31 December 1992, L 403. See also the more flexible mechanism included in the agreement with Bulgaria (the so-called “Bulgarian clause”) of 8 March 1993, Official Journal, 31 December 1994, L 358. A similar mechanism to the Bulgarian Clause was introduced in article 366 *bis* of the Agreement of Lomé IV and in articles 11 (b), 96 and 97 of the Cotonou Agreement of 23 June 2000, Official Journal, 15 December 2000, L 317, as amended by the Agreement of 25 June 2005.

<sup>72</sup> On this mechanism, see generally, J. d'Aspremont, *L'Etat non démocratique en droit international* (2008), 309-316. See also J. Verhoeven, *La Communauté européenne et la sanction internationale de la démocratie et des droits de l'homme*, Liber amicorum M. Bedjaoui (1999), at 787; B. Brandtner/A. Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, 9 EJIL (1998), at 474.

<sup>73</sup> See for instance article 9 (2) of the Cotonou Agreement: “The Parties refer to their international obligations and commitments concerning respect for human rights. They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. Human rights are universal, indivisible and inter-related. The Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural. In this context, the Parties reaffirm the equality of men and women. The Parties reaffirm that democratisation, development and the protection of fundamental freedoms and human rights are inter-related and mutually reinforcing. Democratic principles are universally recognised principles underpinning the organisation of the State to ensure the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system, and the existence of participatory mechanisms. On the basis of universally recognised principles, each country develops its democratic culture. The structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law. Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement”.

<sup>74</sup> See Annex to the Council Decision (2003/631/EC) of 25 August 2003 adopting measures concerning Liberia under Article 96 of the ACP-EC Partnership Agreement in a case of special urgency, Official Journal, 3 September 2003, L 220/3; Annex to the Council Decision (2002/148/EC) of 18 February 2002 concluding consultations with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement, Official Journal, 21 February 2002, L 50/64.

special sanctions against third States whose behavior is seen as contemptuous of democracy and fundamental rights.<sup>75</sup>

In the light of the foregoing, it is therefore rather common that some of the fundamental principles of the international legal order orientate the action of the Union which thus sees itself in charge of the promotion and the enforcement not only of its own fundamental values,<sup>76</sup> but also of those of this “international society”. It shows that the Union regards itself a member as well as an agent of this universal community.

The picture of a European Union both agent and member of the international community whose values it shares gives some credence to the international constitutionalist discourse. This should however not be exaggerated. It must be acknowledged that the support provided by the existence of constitutional values common to the international and European legal orders to the international constitutionalist argument remain modest. The place awarded to the principles of the international legal order in the external action of the EU should only be construed as a mild form of substantive international constitutionalism. First, because in promoting and enforcing these global “values”, the action of the Union (or that of the Community when the measure concerned is adopted by the community) also serves its own interest.<sup>77</sup> In that sense, it does not promote and enforce the constitutional principles of the international legal order solely because of its own presupposed integration into a wider and global order.<sup>78</sup> Secondly, the role of champion of certain universal values bestowed upon the Union does not bear upon the true nature of the constitutional values of the European legal order. It is only if one

<sup>75</sup> This is true whether or not the action of the Union (and the corresponding measure of the Community) was adopted following a UN Security Council Resolution. In the absence of any Security Council measure, see Council Common Position 2004/661/CFSP of 24 September 2004 concerning restrictive measures against certain officials of Belarus, Official Journal, 28 September 2004 L 301/67. For measures ensuing a Security Council measure, see Council Common Position 2004/852/CFSP of 13 December 2004 concerning restrictive measures against Côte d’Ivoire, Official Journal, 15 December 2004, L 368/50; Council Regulation (EC) No 174/2005 of 31 January 2005 imposing restrictions on the supply of assistance related to military activities to Côte d’Ivoire, Official Journal, 2 February 2005, L 29/5; Council Common Position 2005/411/CFSP of 30 May 2005 concerning restrictive measures against Sudan and repealing Common Position 2004/31/CFSP, Official Journal, 2 June 2005 L 139/25; Council Regulation (EC) No 1184/2005 of 18 July 2005 imposing certain specific restrictive measures directed against certain persons impeding the peace process and breaking international law in the conflict in the Darfur region in Sudan, Official Journal, 23 July 2005, L 193/9. On this point, see generally D o p a g n e, *supra* note 49.

<sup>76</sup> See article 11 of the Treaty on European Union which recalls that one of the objectives of the CFSP is to safeguard the common values of the Union; see article 3 (5) of the Treaty on European Union as amended by the Treaty of Lisbon, *supra* note 5.

<sup>77</sup> On the comparison between “global values” and “common interest”, see d’A s p r e m o n t, *The Foundations*, *supra* note 4.

<sup>78</sup> On the overlap between the interest of the European Community and the general interest of the international community, see the judgment of the ECJ in *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, Case C-84/95, [1996] ECR I-3953, paras 21 and 26. See also the judgment of the ECJ in *Ebony Maritime SA and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi and others*, Case C-177/95, [1997] ECR I-1111, para. 38.

considers that the fundamental values of the international legal order are automatically constitutional principles of the Union itself that one embraces a genuine substantive international constitutional approach. The treaty does not go as far. This step, as has been explained above, was taken by the CFI in the abovementioned *Yusuf* and *Kadi* case whereby this judicial organ of the Union construed its role as encompassing a control of legality on the basis of the fundamental constitutional norm of the international legal order. The *Yusuf* and *Kadi* decision, more than any other developments, constitutes the embodiment of a substantive international constitutionalist approach.

This international constitutionalist understanding of the relationship between European law and international law is thus probably limited to one particular episode as far as its substantive aspects are concerned. But it proves much more tangible when one turns to its systemic manifestations.

## 2. International Systemic Constitutionalism

Provisions and judicial developments that lend support to the idea that the EU is itself embedded in the international legal order are manifold. Under their respective form, they all presuppose that the European Union has to abide by the fundamental structural principles of the international legal order, especially those governing the UN system. These provisions denote a vertical and hierarchical conception of international law.

The classical judicial manifestations to which legal scholars are tempted to refer to illustrate the systemic vertical relationship that allegedly exists between the international legal order and the European legal order are probably the decisions of the ECJ and CFI in the cases *Haegeman*,<sup>79</sup> *Van Duyn*,<sup>80</sup> *Poulsen and Diva Corp.*,<sup>81</sup> *Opel Austria*<sup>82</sup> and *Racke*.<sup>83</sup> Because the European courts expressed some sort of deference for international law in these cases,<sup>84</sup> one may easily be lured into considering this traditional case law as an expression of international systemic constitutionalism. It is nonetheless argued here that the respect paid by the Court to international law on these occasions is anything but different from the positions adopted by national domestic courts and in that sense does not express any constitutionalist approach towards international law. Indeed, the consideration defended in *Haegeman* that international agreements concluded by the Community are integral part of the European legal order – allowing the Court to give a preliminary

<sup>79</sup> Case 181/73, *Haegeman v Belgium*, [1974] ECR 449.

<sup>80</sup> Case 41/74, *Van Duyn v Home Office*, [1974] ECR 1337.

<sup>81</sup> Case C-268/90, *Poulsen and Diva Corp.*, [1992] ECR I-6019.

<sup>82</sup> Case T-115/94, *Opel Austria v Council*, [1997] ECR II-39.

<sup>83</sup> Case C-162/96, *Racke v Hauptzollamt Mainz*, [1998] ECR I-3655.

<sup>84</sup> See generally R. Higgins, *The ICJ, the ECJ and the Integrity of International Law*, 52 ICLQ (2003), 1.

ruling concerning their interpretation – is not revolutionary.<sup>85</sup> That the Community determines itself that the agreements that it enters are part of its legal order does not reflect any extraordinary deference to international law. It simply reveals a very liberal approach towards the requirements of introduction of a treaty into the European legal order. More particularly, this position mirrors the similar attitude adopted by most States of “civilist” legal tradition as regards the incorporation into their legal order of the international treaties to which they are a party.<sup>86</sup> In that sense, the European legal order has proven very amenable towards international conventional law.

Likewise, the inclination to interpret European law in accordance with the rules of general international law in *Van Duyn*<sup>87</sup> and *Poulsen*<sup>88</sup> reflects a principle of consistent interpretation also adopted by most domestic courts.<sup>89</sup> By the same token, the idea defended in *Opel Austria*<sup>90</sup> – although in ambiguous terms because of the resort to the EU law principle of legitimate expectations – or in *Racke*<sup>91</sup> according to which the Community is bound by customary international law is not extraordinary either. It is true that, while customary international law binds personified international organizations to the same extent as States,<sup>92</sup> it is up to each legal person to decide which measures should be taken to incorporate the customary rule concerned in its own legal order. Such an introduction into the legal order of the legal persons bound by the rule is not commanded by international law. Each State or personified international organization decides whether and, if so, how it incorporates the customary rule into its legal order. The same conclusion applies to the European Community (and today to the Union). It is well known that most domestic legal systems, even the so-called dualist countries<sup>93</sup> have made the incorporation of customary international law exempted from any specific measure. In *Opel Austria*, and, above all, in *Racke*, the Community has not taken any different position as it has simply decided that customary international law was automatically incorporated into the European legal order. The exemption of any measure of incorporation awarded to customary international law was the result of the Com-

<sup>85</sup> Case 181/73 *Haegeman v Belgium*, *supra* note 79, at paras 2-6.

<sup>86</sup> On the debate about the extent of the monist approach of the Court, see *Peters*, *supra* note 56, esp. 21-34.

<sup>87</sup> *Supra* note 80, at para. 22.

<sup>88</sup> *Supra* note 81, at para. 9.

<sup>89</sup> The most famous example is probably the early decision of the U.S. Supreme Court, *Murray v The Charming Betsey*, 6 U.S. 2 Cranch 64-64 (1804); see generally C.H. Schreuer, ‘The Interpretation of Treaties by Domestic Courts’, 45 *British Yearbook of International Law* (1971), 255-301, or *Betlem/Nollkaemper*, *supra* note 42.

<sup>90</sup> *Supra* note 82, at paras 90-95.

<sup>91</sup> *Supra* note 83, at paras 44-46.

<sup>92</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980 ICJ Reports 73.

<sup>93</sup> In dualist countries, see the assertion that customary international law is law of the land. On this question see, J. d’Aspremont, ‘Du dualisme au monisme. La révolution silencieuse de la Cour suprême du Canada’, 4 *Revue belge de droit constitutionnel* (2003), 399-409.

munity legal order, not that of international law.<sup>94</sup> For this reason, it would be misleading to consider the aforementioned decisions as illustrative of international systemic constitutionalism.<sup>95</sup> It however shows that a European constitutionalist stance is not incompatible with a great deference towards customary international law.

While not to be found in the much applauded *Van Duyn*, *Poulsen*, *Opel Austria* or *Racke* decisions, traces of an international systemic constitutionalist understanding of the relationship between European law and international law can first and foremost – and more simply – be gleaned from the Treaty on European Union itself. Indeed, when stating the objectives of the Common Foreign and Security Policy, the Treaty on European Union makes an express reference to “the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders”, and to the “promot[ion of] international cooperation”.<sup>96</sup> The modification on the Treaty on the European Union brought about by the treaty of Lisbon makes it even clearer: the Union “shall contribute (...) to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”.<sup>97</sup> Likewise, the EU shall “promote multilateral solutions to common problems, in particular in the framework of the United Nations”,<sup>98</sup> and “promote an international system based on stronger multilateral cooperation and good global governance”.<sup>99</sup>

It is particularly important to stress that the international constitutionalist overtones of the Treaty on the European Union – insufficient in themselves to durably justify a discourse of that kind – have been magnified by the famous CFI decisions in *Yusuf* and *Kadi* and the similar cases *Hassan*, *Ayadi*, and *Minin*.<sup>100</sup> While also offering strong support for a substantive international constitutional discourse, they undoubtedly constitute the most striking and far-reaching expression of a systemic international constitutionalist approach. And their significance has not faded following the subsequent annulment of some of them by the ECJ<sup>101</sup> for they still re-

<sup>94</sup> See generally, J. Wouters/D. van Eeckhout, Giving Effect to Customary International Law through European Community Law, in: J.M. Prinszen/A. Schrauwen (eds), *Direct Effect – Rethinking a Classic EC Legal Doctrine* (2002), 183-234, esp. 210. See also d'Aspremont/de Beys, *supra* note 44.

<sup>95</sup> See also A. Ott, Thirty Years of Case-law by the European Court of Justice on International Law: A Pragmatic Approach Towards Its Integration, in: V. Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony* (2001), at 136.

<sup>96</sup> Article 11 (1).

<sup>97</sup> New article 3 (5), as amended by the Lisbon Treaty, *supra* note 5.

<sup>98</sup> New article 21 (1) (2), as amended by the Lisbon Treaty, *supra* note 5.

<sup>99</sup> New article 21 (2) (h), as amended by the Lisbon Treaty, *supra* note 5.

<sup>100</sup> Case T-306/01, *Yusuf*, *supra* note 1; Case T-315/01, *Kadi*, *supra* note 1; Case T-253/02, *Ayadi v Council*, [2006] ECR II-2139 (under appeal: C-403/06 P); Case T-49/04, *Hassan v Council and Commission*, [2006] ECR II-52 (under appeal: C-399/06 P); Case T-362/04, *Minin v Commission*, [2007] ECR II-2003.

<sup>101</sup> See *supra* note 2.

main the embodiment of an international constitutionalist discourse that will continue to permeate the international legal scholarship. For the sake of the argument made here it suffices to focus on the decision of the CFI in *Yusuf*, the other decisions being very similar as far as the systemic elements of international constitutionalism are concerned.

It is worth recalling here that in *Yusuf*, the action for annulment brought before the CFI concerned an EC regulation by which the applicant had been included in a list of persons whose financial resources were to be frozen as persons suspected of supporting terrorism. The regulation had been adopted in order to implement Security Council resolutions adopted under Chapter VII of the UN Charter. The applicant contended, *inter alia*, that the regulation infringed certain of his fundamental rights protected by the general principles of Community law. The CFI eventually dismissed the action. Basically, its reasoning is premised upon the alleged existence of structural limits on the judicial review powers that the Court is entitled to wield with respect to the contested regulation, due to the UN origin of this regulation.<sup>102</sup> More precisely, the Court started by pointing out that while the European Community as such – unlike the Member States – is not bound by the UN Charter and is therefore not required to carry out the Security Council resolutions as a matter of general public international law, it nevertheless “must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it”.<sup>103</sup> In itself, and aside from the numerous technical difficulties that it generates,<sup>104</sup> this finding is already remarkable from the perspective of international constitutionalism: significantly, the CFI inferred the obligation of the EC to implement the Security Council resolutions from the European legal order, thereby assuming that the Community spontaneously subordinates itself to a legal order which is deemed superior and must not go unheeded.<sup>105</sup> For an international legal person, which is not itself bound by the UN Charter, this position mirrors the existence of some kind of international unilateral commitment<sup>106</sup> to respect

<sup>102</sup> *Yusuf*, *supra* note 1, at para. 263.

<sup>103</sup> *Yusuf*, *supra* note 1, at paras 242-243. The CFI relies in this regard on an analogy with the case *International Fruit Company* (paras 245-246, 250 and 253). On this analogy, see the skepticism by R. Schütze, On “Middle Ground”. The European Community and Public International Law, EUI Working Papers – Law 2007/13, at 21.

<sup>104</sup> See generally A. Vandepoorter, L’application communautaire des décisions du Conseil de sécurité, 52 *Annuaire français de droit international* 102 (2006), at 106-123. See on the contrary the approval by C. Tomuschat, Case Note, 43 *Common Market Law Review* (2006), 537, at 543.

<sup>105</sup> It is interesting to notice that in his Opinion Advocate General Poiares Maduro implicitly considered that the EC is effectively bound by international obligations: “(...) the effect of international obligations within the Community legal order (...)” (para. 23), “(...) once the Community is bound by a rule of international law (...)” (para. 24). However, he seemed to contend that this submission of the EC to international law does not result from the EC Treaty, but rather from international law itself, as he referred to “the obligations that are incumbent on the Community *by virtue of international law*” (para. 24, emphasis added).

<sup>106</sup> See J. Rideau, Les Accords Internationaux dans la Jurisprudence de la Cour des Communautés Européennes, 94 *Revue générale de droit international public* (1990), 289, at 411. On binding unila-

the law generated by a treaty to which it is only a third party. This is not in itself odd as any legal person can commit itself to respect a given set of international norms.<sup>107</sup>

More interesting from the vantage point of international constitutionalism are the ensuing parts of the reasoning of the CFI. The Court went on to hold that any review of the lawfulness of the contested regulation would amount to considering “indirectly” the legality of the Security Council resolutions since the European institutions “acted under circumscribed powers” when implementing those resolutions.<sup>108</sup> Drawing upon the assumption that it is itself bound by the aforementioned obligation to carry out Security Council resolutions, or at least the obligation not to impede the performance of the obligations imposed on Member States under the UN Charter,<sup>109</sup> the Court concluded that it has no authority to review the lawfulness of the Security Council resolutions in the light of fundamental rights as enshrined in Community law.<sup>110</sup> It is thus here that the CFI touched upon the “structural limits” referred to above: in the opinion of the Court, the UN resolutions fall outside the scope of the judicial review that it has to carry out. It is interesting to note that the Court, not being itself an organ of a party to the UN system, was under no obligation to respect the internal distribution of powers within the UN system, and, in particular, the prevailing powers of the Security Council under chapter VII of the Charter.<sup>111</sup> Indeed the binding character of the UN Charter – and hence of the Security Council resolutions – on the European institutions does not prevent the EU Courts from reviewing UN acts.<sup>112</sup> The CFI however chose to yield to powers of the Security Council.

This remarkable deference to the UN collective security principles may be explained in two ways. One could argue that this judicial self-restraint boils down to some application of the political question doctrine<sup>113</sup> – it being understood that here the act with respect to which the judges decline jurisdiction is at-

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teral acts in international law, see E. S u y, *Unilateral Acts of States as a Source of International Law: Some New Thoughts and Frustrations*, in: O. Corten (ed.), *Droit du pouvoir, pouvoir du droit : mélanges offerts à Jean Salmon* (2007), 631-642; See also J. d' A s p r e m o n t, *Les travaux de la Commission du droit international relatifs aux actes unilatéraux des Etats*, *Revue générale de droit international public* (2005), 163-189.

<sup>107</sup> See the judgment of the International Court of Justice in the *Nuclear Tests* case, 20 December 1974, ICJ Reports, 253.

<sup>108</sup> *Yusuf*, *supra* note 1, at paras 265-266.

<sup>109</sup> See *Yusuf*, *supra* note 1, paras 254 and 269.

<sup>110</sup> *Yusuf*, *supra* note 1, esp. paras 272 and 276.

<sup>111</sup> Confusingly, the Court held that “determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts” (*Yusuf*, *supra* note 1, at para. 270, emphasis added).

<sup>112</sup> See P. E e c k h o u t, *Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit*, 3 *European Constitutional Law Review* (2007), 183, at 191-192.

<sup>113</sup> See U.S. Supreme Court, *Luther v Borden*, 48 U.S. 1 [1849], *per* Chief Justice T a n e y .

tributable to a body alien to the “system” to which the judges belong.<sup>114</sup> However, this seems improbable. In the light of the self-subordination to the UN system reflected in the CFI’s decision, it is not certain at all that the Court eschewed a review of the Security Council resolutions because it thought that this was a “political question”. Instead, this respect for the UN collective security system comes arguably from the assumption of the CFI that the EU – like UN member States – acts as agent of the Security Council perceived as a sort of world executive. If this is true, the CFI’s decision in *Yusuf* manifests a determined and assertive international constitutionalist attitude.

The CFI’s tendency towards international constitutionalism is further buttressed by its findings pertaining to the status of *jus cogens*, i.e. peremptory norms of general international law. The CFI held that it is “empowered to check, indirectly, the lawfulness of the resolutions of the Security Council (...) with regard to *jus cogens*”.<sup>115</sup> Technically speaking, it might be asked why such an exception to the inexistence of judicial review is inserted:<sup>116</sup> as has been pointed out by the International Court of Justice,<sup>117</sup> the peremptory nature of norms does not in itself confer on tribunals powers with which they otherwise are not entrusted.<sup>118</sup> What is important to notice here is nevertheless that according to the CFI the UN Security Council is subjected to *jus cogens*.<sup>119</sup> This argumentation, again, demonstrates the strains of a constitutionally systemic and hierarchical conception of the international legal order. In so doing, the CFI institutes itself as a court of international law<sup>120</sup> in sharp contrast with the European constitutional status that it enjoys under the European constitutionalist schema described above. It thus becomes a constitutional court of a global hierarchical and vertical three-tiered legal system encapsulating respectively the *jus cogens* norms, the Security Council resolutions adopted under Chapter VII of the UN Charter, and the implementing acts by States or regional organizations such as the EU.

<sup>114</sup> A reference to the notion of political questions was put forward by the European Commission at the hearing related to the appeal before the ECJ in the *Kadi* case (ref. *supra*, note 2): see the opinion of Advocate General Poireres Maduro delivered on 16 January 2008, paras 33 ff.

<sup>115</sup> *Yusuf*, *supra* note 1, at para. 277. Assuming (para. 279) that *jus cogens* encompasses (at least certain) fundamental rights (see the remarks *supra*, I. B. 1.), the Court then engages in a review of the conformity of UN resolutions with the peremptory norms which it deems relevant, and decides that no violation has occurred (paras 284-347).

<sup>116</sup> See E. de Wet, Holding the United Nations Security Council Accountable for Human Rights Violations Through Domestic and Regional Courts: A Case of Be Careful What You Wish For?, forthcoming, at 15.

<sup>117</sup> Case concerning *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v Rwanda)*, judgment of 3 February 2006, ICJ Reports, at para. 64. On this decision, see F. Dopagne, Les exceptions préliminaires dans l’affaire des Activités armées sur le territoire du Congo (nouvelle requête: 2002), *Annuaire français de droit international* (2007), 328-346.

<sup>118</sup> See Article 53 of the Vienna Convention on the Law of Treaties.

<sup>119</sup> *Yusuf*, *supra* note 1, explicitly at para. 280.

<sup>120</sup> See on this question Allain, *supra* note 57, 249.

It is worth mentioning that the resolved international constitutionalist stance taken by the CFI has been echoed in the Declaration No. 13 of the intergovernmental Conference that adopted the Lisbon Treaty – even though the latter may eventually not enter into force.<sup>121</sup> In this Declaration the Conference “stresses that the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security”. Although declarations usually have no legal force under EU law, it is noteworthy that the European Union itself is explicitly regarded bound by the UN Charter, on seemingly the same footing as its Member States. The Conference even goes as far as asserting that this situation is prior to the enactment of the Declaration (“will remain”). One may wonder whether the participants to the intergovernmental Conference had the CFI case-law in mind and took it wittingly into account. Be that as it may, the Declaration No. 13 of the Lisbon Intergovernmental conference provides further underpinning for the international constitutionalist conception of the relationship between European law and international law.

## II. International Constitutionalism under Scrutiny

As has been explained in the first part of this paper, two types of constitutionalist discourse pervade the positions taken by judges, policy-makers and legal scholars with respect to the relationship between international law and European law. Some argue that the European Union is an autonomous constitutional legal order estranged from the global legal order and which rests on European constitutional principles systematically enforced by a set of institutional mechanisms (European constitutionalism). Others contend that the European legal order is embedded in the international legal order whose hierarchically superior values and fundamental enforcement mechanisms must be applied by European judges (international constitutionalism).

The former is well known to European legal scholars and has already been the object of numerous studies. The latter, probably because its success is more recent and novel, has been hardly tested and accordingly deserves more attention. It is the object of the second part of the paper to shed some light on this international form of constitutionalism. Because advocates of the international constitutionalist approach have not always figured out the extent to which their discourse was at loggerheads with European constitutionalism, the first section starts by highlighting the contradictions existing between these two types of constitutionalism (A.). It then attempts to pinpoint the inherent limits of the international constitutionalist approach (B.).

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<sup>121</sup> Official Journal, 17 December 2007, C 306/255.

## A. International Constitutionalism and European Constitutionalism in Conflict

The discrepancy that international constitutionalism – especially the international systemic constitutionalism as it is embodied in the reasoning in the CFI decisions in *Yusuf* and *Kadi* – is likely to bring about within the European legal order is twofold. Indeed, the constitutionalist understanding of how international law and European law interplay puts both the basic values (1.) and the institutional mechanisms (2.) underlying the EU at risk. These substantive and systemic tensions help explain why international constitutionalism has been perceived as a purposive attempt to counterbalance the constitutionalist features of the European legal order.<sup>122</sup>

### 1. The Tensions with European Substantive Constitutionalism

As has already been outlined, the CFI in *Yusuf* and *Kadi* carried out its judicial review on the basis of the fundamental rights allegedly belonging to *jus cogens*, and held that no breach had occurred with regard to these fundamental rights. As is demonstrated by the decision of the ECJ on appeal,<sup>123</sup> another conclusion would have been reached if the CFI had accepted to review the lawfulness of the contested measures in the light of the whole range of fundamental rights as they are enshrined in general principles of EC law.<sup>124</sup> This conclusion was already buttressed by the CFI judgment in *Organisation des Modjahedines du peuple d'Iran v Council* (“*OMPI*”).<sup>125</sup> Indeed, in this case, which concerned similar measures of freezing of assets in the framework of the fight against terrorism – although the Security Council resolution concerned did not specify individually the persons whose funds were to be frozen – and which accordingly raised comparable problems of legality, the CFI engaged in a thorough examination of these measures on the basis of fundamental rights as part of Community law, in accordance with its classical understanding of the fundamental rights judicial review process within the EU. The CFI eventually found that some of these rights had been infringed.

The accordingly lower standard of protection used in *Yusuf* and *Kadi* cuts against one of the most sacred principles of European substantive constitutionalism, that is protection of fundamental rights. By emphasizing the superiority of UN mechanisms for the maintenance of peace and security, the CFI turned out to tolerate that the basic values on which its own legal order is founded be en-

<sup>122</sup> See *supra* note 67.

<sup>123</sup> *Supra* note 2, paras 331-372.

<sup>124</sup> Eeckhout, *supra* note 112, at 190 (“if *Yusuf* and *Kadi* had been decided on the basis of the judicial reasoning in *OMPI*, annulment [of the regulation] would equally have ensued”).

<sup>125</sup> Case T-228/02, *OMPI*, [2006] ECR II-4665. See also Case T-47/03, *Sison v Council*, available at <<http://curia.europa.eu>>, and Case T-327/03, *Al-Aqsa v Council*, available at <<http://curia.europa.eu>>.

croached on.<sup>126</sup> Furthermore, the distinction between the situations where the Security Council itself has determined the targeted individuals and the situations where such a determination is made by the European Union is not without consequence. It brings about a discrimination between the “UN-targeted” individuals and the “EU-targeted” ones. No doubt that this discrimination is at loggerheads with the fundamental substantive principles of the European legal order. The position of the CFI thus sheds light on the major inconsistencies between international constitutionalism and European constitutionalism.

In this point, it is interesting to pay attention to the utterly different approach adopted by the ECJ when setting aside the aforementioned *Kadi* decision and, before it, by the Advocate General Poiares Maduro in the framework of the appeal against that decision. By and large, they uphold a restoration of European (substantive) constitutionalism. From the very outset when addressing the interaction between international law and European law, they emphasize the “autonomy” of the EU legal order.<sup>127</sup> Building on that premise, they assert that the international obligations incumbent on the EU can permeate the latter’s legal order only under the conditions set by its “constitutional principles”, the role of the ECJ being, first and foremost, to review the lawfulness of Community acts on the basis of these Community constitutional principles.<sup>128</sup> Moreover, neither the Advocate General nor the Court accept the idea that a “supra-constitutional status” ought to be awarded to measures designed to give effect to Security Council resolutions, and that such measures are immune from judicial review, notably in the light of fundamental rights as enshrined in EU law.<sup>129</sup> As the Court points out, “it is not a consequence of the principle governing the international legal order under the United Nations that any judicial review of the lawfulness of the contested regulation in the light of fundamental freedom is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations”.<sup>130</sup> The European legal order being autonomous, such “immunity from jurisdiction” could only stem from the EC treaty. Neither the Court nor the Advocate General can find in the

<sup>126</sup> See E. Cannizzaro, *A Machiavellian Moment? The UN Security Council and the Rule of Law*, 3 *Int. Org. L. Rev.* (2006), 189, at 203.

<sup>127</sup> Opinion of Advocate General Poiares Maduro, *supra* note 2, para. 24; ECJ, *supra* note 2, paras 281-285 and 316.

<sup>128</sup> Opinion of Advocate General Poiares Maduro, *supra* note 2, para. 24; ECJ, *supra* note 2, para. 285 and paras 316-317.

<sup>129</sup> In that sense, the position of the Advocate General and that of the ECJ departs from the solution endorsed by the ECHR in its decision of 2 May 2007 in *Behrami v France and Saramati v France, Germany and Norway*, Applications Nos. 71412/01 and 78166/01 (not yet published) as it decided not to apply its equivalent protection test to behaviors of States party to the ECHR acting under a UN mandate. See also the considerations of the ECJ on the *Behrami* and *Saramati* decisions of the ECHR in its *Kadi* decision, *supra* note 2, paras 310-314.

<sup>130</sup> ECJ, *supra* note 2, para. 299.

treaty a provision that bestows such special status upon Community measures implementing Security Council resolutions adopted under Chapter VII.<sup>131</sup>

The ECJ and Advocate General Póiares Maduro thus prove less “impressed” than the CFI by the UN origin of the contested regulation and back away from the idea that the UN origin yields a restriction of the EU Courts’ jurisdiction to the sole norms of *jus cogens*. On the contrary, within the EU, respect for (the whole range of EU-standard) fundamental rights must anytime be assessed, irrespective of the origin of the action and the (international) interests at stake.<sup>132</sup> This perspective is, to all appearances, that of European constitutionalism not that of international constitutionalism, the two being very difficult to reconcile with one another in terms of substantive principles.

## 2. The Tensions with European Systemic Constitutionalism

The international constitutionalist conception as is articulated in the CFI decisions in *Yusuf* and *Kadi* does not only conflict with European substantive imperatives. As some commentators have pointed out,<sup>133</sup> it also runs against certain systemic principles that are in the very heart of European constitutionalism, in particular the principle of supremacy of EU law over the domestic legal orders. More precisely, the very fact that, as a result of these entrenched international constitutionalist positions, fundamental rights fail to be properly safeguarded by the EU institutions threatens the bedrock of the principle of supremacy. Indeed it is well-known that several Member States’ Supreme Courts have backed away from their original opposition to the supremacy of EU law upon the condition that an appropriate level of fundamental rights protection be ensured within the EU legal order.<sup>134</sup> If that condition proves not fulfilled (anymore), the risk is that national courts embark on reviewing EU acts on the basis of internal constitutional rules, and refuse to apply those acts if they are deemed to contravene domestic fundamental rights standards.<sup>135</sup> Although the risk of a new averseness of constitutional

<sup>131</sup> ECJ, *supra* note 2, paras. 300 ff.; opinion of Advocate General Póiares Maduro, *supra* note 2, paras 25-39.

<sup>132</sup> Apart from the discussion about the scope of the judicial review, see also Advocate General’s arguments on the applicable review criteria in a context of suppression of the international terrorism (paras 42 ff.).

<sup>133</sup> Eeckhout, *supra* note 112, at 202; Schütze, *supra* note 103, at 24-25.

<sup>134</sup> See in particular the “*Solange*” decision of the Bundesverfassungsgericht (BVerfG), [1974] 2 CMLR 540, esp. 549-550. See also the “*Solange II*” decision, BVerfG, *Re Wunsche Handelsgesellschaft*, [1987] 3 CMLR 225, 265. See the remarks of J.A. Frowein, *Solange II*, 25 CMLR 201 (1988); see also the decision of the Italian Constitutional Court, *Frontini c. Ministero delle Finanze*, [1974] 2 CMLR 372. See generally R. Petriccione, Italy: Supremacy of Community Law Over National Law, 11 ELRev (1986), 320; or G. Gaja, New Developments in a Continuing Story: The Relationship between EEC Law and Italian Law, 27 CML Rev. (1990), 83.

<sup>135</sup> As such, this would however not be out of keeping with the *Foto-Frost* principle (Case 314/85, [1987] ECR 4199), which only prohibits national Courts from themselves declaring the invalidity of Community acts because of their incompatibility with EC primary law. In the hypothesis re-

judges towards European law may seem rather negligible from a “political” standpoint, EU Law could then gradually fail to meet the “*Solange*” condition upon which its supremacy had eventually been accepted by all.<sup>136</sup> No doubt that this would seriously impinge on the uniform application of the EU legal order and conflict with the European constitutionalist approach which is, to a large extent, based upon the precedence of EU law. Additionally, it could also put into question the presumption of equivalent protection granted by the European Court of Human Rights<sup>137</sup> – although the latter seems to have recently turned its back on that test for actions of States within the framework of a UN Security Council mandate<sup>138</sup> – and cripple even more the confidence into the substantive constitutional protection of individuals within the European legal order.<sup>139</sup>

It will not be surprising that, by contrast to the CFI, the ECJ and the Advocate General Póitares Maduro sought to preserve the systemic European constitutionalist patterns of the EU legal order. According to them, when confronted with European measures implementing Security Council resolutions, the EU Courts should not balk at reviewing these measures, like all acts adopted by the institutions and intended to produce legal effects, with regard to (all) fundamental rights as protected by EU law.<sup>140</sup> This approach appears to be more consistent with the previous relevant case-law of the European Court of Justice. Indeed, in *Bosphorus* – where the mere fact that it was an interpretation preliminary ruling case does not suffice to explain the different solution adopted<sup>141</sup> – the ECJ did not refrain from examining the regulation’s conformity with fundamental rights as the UN origin of the regulation was not construed as exempting the latter from regular judicial review.<sup>142</sup> The European constitutionalist solutions defended by the ECJ in *Kadi* and *Bosphorus* as well as by Advocate General Póitares Maduro are clearly at odds with the international constitutionalist positions espoused by the CFI in *Yusuf* and *Kadi* with no room to reconcile them.

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ferred to in the text, namely national non-application of EU acts on the basis of domestic constitutional rules, only the *Costa* principle is at stake.

<sup>136</sup> S. Prechal, Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union, in: C. Barnard (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (2007), 35-69.

<sup>137</sup> ECtHR, *Bosphorus v Ireland*, Application No. 45036/98, Judgement of 30 June 2005. See generally C. Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries In Europe*, 6 *Human Rights Law Review* (2006), 87-130.

<sup>138</sup> See *supra* note 129.

<sup>139</sup> Eeckhout, *supra* note 112, at 204.

<sup>140</sup> ECJ, *supra* note 2, paras 299-300, 305 and 326; opinion of Advocate General Póitares Maduro, *supra* note 2, para. 40.

<sup>141</sup> See however the position of the United Kingdom, echoed in para. 277 of the ECJ judgment.

<sup>142</sup> Case C-84/95, *Bosphorus Hava Yolları Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, [1996] ECR I-3953.

## B. The Inherent Limits of International Constitutionalism

The support offered to the international constitutionalist approach by the CFI will probably wane after the latter's judgment having been quashed by the ECJ. However, the enthusiasm that it has brought about shows that this discourse will undoubtedly outlive this judicial episode in both its substantive and systemic forms. Indeed, many scholars, particularly those that were already well known for their constitutional inclination, have hailed the "respect" for the international legal order on which international constitutionalism rests and welcomed the fact the European order could no longer be deemed hermetical to the values and the mechanisms of the international legal order.<sup>143</sup> It is true, as was observed by the Court in *Van Gend en Loos*, that the European legal order is an order of "international law"<sup>144</sup> in that the European legal order is created by an instrument of international law which is itself governed by international law.<sup>145</sup> This, however, only means that the European treaties are subject to the fundamental rules of the law of treaties. That does not involve that the European legal order as a whole is subject to the basic principles and mechanisms of international law.<sup>146</sup> As is explained in the two following sections, this international legal origin of European law does not suffice to quell the substantive (1.) and systematic (2.) autonomy of the European legal order which remains a legal order sealed off and distinct from the international legal order.

### 1. Substantive Limits of International Constitutionalism

According to the substantive international constitutionalist stance depicted above, the European legal order allegedly shares the values of the international legal order, especially those manifested in the imperative norms of the latter. Such an understanding considerably pervades the decision of the CFI in *Yusuf and Kadi*.<sup>147</sup> It must be acknowledged that there is intrinsically no reason why the basic values upon which the European legal order rests could not be similar to those of the international legal order. Actually, it would be surprising that there is no overlap between the fundamental principles of the international legal order and those of the European legal order. This being said, the interpretation of these values common to the European and international legal orders given by international constitutionalism may sometimes ignite the feeling that the similarities between European and international basic principles boil down to a self-serving quest for the promotion of European values at the international level.<sup>148</sup> More precisely, it can be argued

<sup>143</sup> Tomuschat, *supra* note 104, esp. 546.

<sup>144</sup> See *supra*, I. B.

<sup>145</sup> Bethlehem, *supra* note 40, at 173.

<sup>146</sup> See *contra* the authors cited by Peters, *supra* note 3, at 10, note 8.

<sup>147</sup> See *supra* note 1.

<sup>148</sup> See for instance Allain, *supra* note 57, at 273.

that the international constitutionalist inclination for the conflation of the values of the European legal order and those of the international legal order very often stems from a – conscious or unconscious – bent for the advancement of European values on the international plane. In other words, under the guise of an international constitutionalist discourse, international constitutionalists – especially those of a European origin – engage in a projection of European values in the international legal order.<sup>149</sup>

This is particularly true in the abovementioned *Yusuf* and *Kadi* decision of the CFI as the Court construed *jus cogens* along the lines of the European fundamental rights standards. Indeed, the CFI, confronted with the allegation that the EC regulations imposing sanctions on certain persons suspected of supporting international terrorism as commanded by UN Security Resolutions were infringing basic fundamental rights, interpreted *jus cogens* as embodying the right of individual to make use of their property, the right to a fair hearing and the right to an effective judicial remedy. As explained above,<sup>150</sup> the CFI endorsed a very far-reaching conception of *jus cogens* molded after a very European pattern.<sup>151</sup>

The foregoing demonstrates that international constitutionalism commonly suffers from a major substantive flaw, that is the tendency to see the world through Western (and mostly European) lenses.<sup>152</sup> It is accordingly not surprising that international constitutionalism mostly permeates Western legal scholarship, leaving non-Western legal scholarship – especially Asian<sup>153</sup> or Eastern-European legal scholars<sup>154</sup> – perplexed if not skeptical. These underlying hegemonic leanings of international constitutionalism may eventually have somewhat reverse effects as it can eventually undermine the general influence of the European Union in the international arena. More dangerously, this international substantive constitutionalist attitude also conveys a risk of fragmenting<sup>155</sup> *jus cogens*, thereby undercutting the consistency (and *a fortiori* the acceptance) of the minimal existing hierarchy of the

<sup>149</sup> On the use of an international legal discourse to promote a given set of values, see generally M. Koskenniemi, *From Apology to Utopia* (reissue with new epilogue, 2005) and the commentary of J. d'Aspremont, *Uniting Pragmatism and Theory in International Legal Scholarship: Koskenniemi's From Apology to Utopia Revisited*, 19 *Revue québécoise de droit international* (2006), 353-360, also available at <<http://www.nyulawglobal.org/>>.

<sup>150</sup> See *supra*, I. B. 1.

<sup>151</sup> For a similar criticism, see Eckout, *supra* note 112, at 195; Eckes, *supra* note 63, at 88.

<sup>152</sup> For a general criticism of constitutionalism, see d'Aspremont, *The Foundations*, *supra* note 4.

<sup>153</sup> D'Aspremont, *International Law*, *supra* note 4.

<sup>154</sup> J. d'Aspremont, *The Transfer of Values Through International Law: The Hobbesian Lessons from Eastern European Scholars*, *European Society of International Law*, available at <[http://www.esil-sedi.eu/publi\\_paper\\_list.php?panel\\_id=41](http://www.esil-sedi.eu/publi_paper_list.php?panel_id=41)>.

<sup>155</sup> On this topic, see the recent contribution of E. Benvenisti/G. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 *Stanford Law Review* (2007), 595. See generally M. Koskenniemi/P. Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *Leiden Journal of International Law* (2002), 553.

international legal order. In that sense, the approach of international constitutionalists frustrates the very hierarchy that they commonly seek to promote.

## 2. Systemic Limits of International Constitutionalism

While being a matter of concern, the aforementioned substantive weaknesses of the international constitutionalist understanding of the relationship between European law and international law are dwarfed by the sweeping systemic flaws that also cripple this sort of discourse. Indeed, the international constitutionalist approach that has been described above, rests entirely on the idea of a *continuum* between the international legal order and the European legal order and minimizes the estrangement between the two. As is explained in the following paragraphs, this systemic bias probably constitutes the Achilles' heel of any international constitutionalist conception of the relationship between European law and international law.

As soon as the constitutive treaty of an international organization is in force, it creates a new legal order which is autonomous from the international legal order in which it was born. This autonomous legal order is regulated by the basic (constitutional) principles enshrined in its constitutive treaty and not by any other, even if the treaty is a legal instrument of an international origin. In other words, the legal order created by the constitutive treaty of an international organization is not regulated by the principles of the international legal order but only by those of that autonomous legal order. The fact that the constitutive treaty of the organization is governed by the rules of the international law of treaties does not alter that conclusion.

The foregoing means that when acting within the framework of the organization, member States and the organs of that organization are subject to the rules of the constitutive treaty by which they must abide. If they do not, their behaviors and their acts can be deemed, within the framework of the constitutive treaty, respectively wrongful or invalid. The consequences that these actions may have – for instance in terms of responsibility if one of them constitutes an internationally wrongful act – are to be determined by the international legal order and do not at all put the autonomy of the legal order created by the constitutive treaty of the organizations in question.<sup>156</sup> It is important to understand that what is legal within the legal order of the organization may well be wrongful or invalid in the international legal order. Conversely, what is invalid or wrongful within that legal order is not necessarily invalid or wrongful in the international legal order.

It goes without saying that this elementary divide between the international legal order and the legal order of the organization does not involve that the organization concerned cannot be bound by international law. If the organization is endowed with international legal personality, it will be bound by customary interna-

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<sup>156</sup> In this sense, see the opinion of Advocate General P o i a r e s M a d u r o, *supra* note 2, para. 39.

tional law.<sup>157</sup> It will also be bound by the international treaties to which it is a party or the international unilateral acts that it formulates. Nonetheless, the mere fact that the organization, as an international legal person, is bound by a certain number of international rules does not mean that these rules are automatically part of the legal order of the international organization. Exactly as international law is not automatically an integral part of the municipal legal order of States, international rules binding upon an organization must still be incorporated in the legal order of the organization to be integral part of it. The incorporation of international law in a domestic or regional legal order is not a question of international law but is determined by the legal order concerned. In that sense, each legal order decides for itself whether or not it incorporates rules made in another legal order and, if so, how such an incorporation must be carried out. The relation between European law and international law is governed by European law to the same extent as the relationship between international law and municipal law is governed by municipal law.<sup>158</sup> This was expressly recalled by the Advocate General Poiares Maduro in his aforementioned opinion<sup>159</sup> and followed by the ECJ in *Kadi*.<sup>160</sup>

It is true that the monist countries have significantly eased the formalities of incorporation of international conventional law. It remains that such a “fast” incorporation is not imposed by international law and still hinges on the legal order concerned.<sup>161</sup> In that sense, monism is simply a “modality of dualism”<sup>162</sup> – dualism being in this sense understood as pluralism.<sup>163</sup> It thus behooves the European legal

<sup>157</sup> See the advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports, 1980, at 73; on this point, see generally C. Gray, *The International Court's Advisory Opinion on the Who-Egypt Agreement of 1951*, 32 *International and Comparative Law Quarterly* (1983), 534-541.

<sup>158</sup> For a similar understanding of the EU legal order as a domestic legal order, see von Bogdandy, *supra* note 36, esp. 3. See also G. Arangio-Ruiz who, more generally, advocates that the relationship between the legal order created by the constitutive treaty of international organizations and international law should be patterned after the relationship between domestic legal orders and international law. G. Arangio-Ruiz, *International Law and Interindividual Law*, in: Nijman/Nollkaemper, *supra* note 3, at 39-43, esp. at 42.

<sup>159</sup> Opinion of Advocate General Poiares Maduro, *supra* note 2, at para. 24: “Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.”

<sup>160</sup> ECJ, *supra* note 2, paras 305 and 316.

<sup>161</sup> Arangio-Ruiz, *supra* note 158, at 19-20.

<sup>162</sup> J. Combacau/S. Sur, *Droit International Public* (6<sup>th</sup> ed. 2004), 181 (our translation).

<sup>163</sup> See A. von Bogdandy who argues that Monism and Dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law and calls for reconstructing dualism on the basis of a theory of legal pluralism. Von Bogdandy, *supra* note 36, at 4. See also Arangio-Ruiz, *supra* note 158, at 17. See also G. Gaja, *Dualism: a Review*, in: Nijman/Nollkaemper, *supra* note 3, at 53. It does not seem to the authors of the present

order to determine whether or not to incorporate international legal order and upon which conditions such an incorporation should be realized. This is precisely what the European Court did. It is noteworthy that it followed a solution found in most domestic legal orders and adopted a very liberal position towards customary international law making it almost automatically an integral part of European law.<sup>164</sup> Regarding treaties concluded by the Community, the Court also deemed that they were incorporated into Community law without any formality whatsoever.<sup>165</sup>

If international rules binding upon an international organization are not automatically part of the legal order of that organization, it will be no surprise that the rules which are not binding upon the organization also fail to be part of the legal order of the organization. This applies to UN law – and in particular Security Council Resolutions – to which the European Union (and the Community) is not a party. It follows that the rules of the UN system are not automatically part of the legal order of another international organization. The mechanism of Article 103 of the UN Charter designed to solve the conflicts of norms arising between UN obligations and other international obligations does not impinge on that conclusion as it simply addresses such a conflict from the vantage point of the UN Charter. This mechanism does not sort out conflicts of norms which may arise within the legal order of member States or within the legal order of international organizations.

The fact that all the members of the European Union are also a party to the UN Charter does not accordingly make the European Union automatically bound by UN Law, and the UN Charter an integral part of the European law, whatever the competence of the Union may be. In that respect, the “succession theory” whereby the Union (or the Community) had succeeded the member States in its obligation towards the United Nations in the area of competence of the Union is hardly convincing.<sup>166</sup> Despite its endorsement by the ECJ in *International Fruit Company* with respect to the GATT,<sup>167</sup> the membership of all the member States to the UN does not in itself transfer the obligation to the European Union nor does it integrate UN Law into the European legal order. It may only be argued that member States of the European Union may be, by virtue of the UN Charter, obliged in the international legal order to ensure that the Union (or the Commu-

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contribution that legal pluralism departs from the understanding of dualism upon which this paper rests for the interaction among different legal orders is not ruled out.

<sup>164</sup> See the abovementioned decisions in the cases *Opel Austria* or *Racke*, *supra* notes 82-83.

<sup>165</sup> Case 181/73, *Haegeman v. Belgium*, *supra* note 79, paras 2-6. On this debate, see Peters, *supra* note 56, 21-34.

<sup>166</sup> This argument is commonly used by some scholars, see Tomuschat, *supra* note 104, 543; see Ahmed/de Jesus Butler, *supra* note 14, 777 and 788; see also H. Schermers/N. Blokker, *International Institutional Law* (2003), para. 1574, at. 995. See the remarks of Rideau, *supra* note 106, at 317.

<sup>167</sup> Cases 21-24/72, *International Fruit Company*, [1972] ECR 1219.

nity) itself exercises its powers in accordance with the UN Charter.<sup>168</sup> This was rightly acknowledged by the CFI itself in *Yusuf* and *Kadi*.<sup>169</sup> This does not mean however that UN law is part of the European legal order.

Even if UN law is not automatically part of other organizations' internal legal order, it may well be that the organization decides to unilaterally abide by these rules and integrate them into its legal order. But such an incorporation remains dependant upon the organization's sole decision. In this respect, it is particularly interesting to note that the CFI in its decision in *Yusuf* and *Kadi* is amenable to this abiding duality of legal orders as it claims that UN law binds the European Community only by virtue of the EC Treaty.<sup>170</sup> One may however wonder whether the Treaty actually implies such a unilateral subjection to the UN Charter.<sup>171</sup> This is especially true since the "succession theory", as is explained above, does not seem to suffice to ascertain the obligatory nature of the UN Charter upon the EU. This being said, the gist of the reasoning of the CFI on this occasion remains consistent with the natural estrangement between the UN legal order and the European legal order.

But even if one considers that the Union has voluntarily subjected itself to UN Law and leaves the strong flaws of the "succession theory" aside, the ensuing international constitutionalist approach adopted by the CFI remains gravely problematic. Indeed, the fact that the EU is bound by UN Law does not make UN law an integral part of the European legal order and there is therefore absolutely no reason why the CFI needed to take into account the limits that apply to the action of the Security Council as it did in applying the peremptory norms of international law. This means that nothing justifies that the CFI elevates itself into a guardian of legality of the UN Security Council resolutions within the European legal order.

On this very point, the positions adopted by the ECJ and Advocate General Poiares Maduro are much more consistent with the elementary estrangement of the European and international legal orders. The only norms of reference upon which the judicial review of Community acts carried out by European courts is based are those provided by European law itself, i.e. the general principles of Community law which embody fundamental rights.<sup>172</sup> While one may eventually disagree with the conclusion that the impugned regulation actually breached these fundamental rights,<sup>173</sup> the ECJ and Advocate General's positions can hardly be

<sup>168</sup> On this point, see the few remarks by J. d'Aspremont, Abuse of the Legal Personality of International Organizations and the Responsibility of Member States, 4 Int. Org. L. Rev. (2007), 91-119, esp. 115-116.

<sup>169</sup> See *Yusuf*, *supra* note 1, at para. 248.

<sup>170</sup> See for instance *Yusuf*, *supra* note 1, at paras 243 and 254.

<sup>171</sup> See for instance *Rideau*, *supra* note 106, at 296 and 411.

<sup>172</sup> ECJ, *supra* note 2, paras 281-285 and 316; opinion of Advocate General Poiares Maduro, *supra* note 2, at paras 39-40.

<sup>173</sup> On the question of the violation of human rights by individual sanctions adopted by the Security Council, see I. Couzigo, La lutte du Conseil de Sécurité contre le terrorisme international et les droits de l'homme, 112 Revue générale de droit international public (2008), 49.

contested on this point. Being an organ of the European legal order and being only entrusted with the powers determined by this legal order, the CFI could only review the legality of the impugned regulation in the light of the general principles of Community law and not on the basis of international legal principles of another legal order. Such an approach also corresponds to that of the ECJ in its previous sound case-law in *Bosphorus*<sup>174</sup> according to which when EU Member States resort to European legal instruments to fulfill their obligations arising under the UN Charter, they must only abide by the European constitutional principles.<sup>175</sup>

It must be acknowledged that by annulling the impugned regulation for inconsistency with European fundamental rights, the ECJ may not have completely shrugged off the impact of its decision on the UN collective security system. Indeed, it may well be that, by finding that the re-examination procedure before the UN Sanctions Committee “does not offer the guarantees of judicial protection”,<sup>176</sup> the Court impliedly tries to entice UN member States – and particularly the veto-wielding powers of the Security Council – to revamp that procedure, and somehow does – although in a more subtle and veiled manner – what the German and Italian Supreme Courts did more than 30 years ago in the context of the relationship between EC Law and domestic law.<sup>177</sup> Whatever the consequences of this decision may eventually be for the UN collective security system, the ECJ position boils down to a useful reminder of the elementary divide between the international and European legal orders.

One cannot fail to finally notice that, besides its inherent conceptual flaws, the international constitutionalist discourse is also completely at loggerheads with the current external action of the European Union and that of its member States, at least with respect to their reactions against internationally wrongful acts or to attitudes in treaty-making. For instance, the Community and – to some extent – the Union, have not balked at resorting to unilateral countermeasures in reaction against a violation of an *erga omnes* obligation, thereby confirming the persistent decentralized character of enforcement mechanisms in the international legal order.<sup>178</sup> Likewise, contemporary treaty-making practice by European States has

<sup>174</sup> *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and Others*, Case C-84/95, [1996] ECR I-3953, paras 19 ff. In that sense, see Eeckhout, *supra* note 112, 201-204, and Eckes, *supra* note 63, at 86.

<sup>175</sup> See in this sense, Schütze, *supra* note 103, at 16-17; Eeckhout, *supra* note 112, esp. 199.

<sup>176</sup> See paras 321-325 of the ECJ judgment, *supra* note 2.

<sup>177</sup> See the aforementioned “*Solange*” decision of the Bundesverfassungsgericht (BVerfG), [1974] 2 CMLR 540, esp. 549-550 and “*Solange II*” decision, BVerfG, *Re Wunsche Handelsgesellschaft*, [1987] 3 CMLR 225, 265. See also the decision of the Italian Constitutional Court, *Frontini c Ministero delle Finanze* [1974] 2 CMLR 372.

<sup>178</sup> See Common Position 1998/326/CFSP, Official Journal, 27 March 1998, L 95, and Council Regulation (EC) No 1295/1998, Official Journal, 14 May 1998, L 143; see also Common Position 1999/624/CFSP, Official Journal L 245/53. See generally Dopagne, *supra* note 49; P.-J. Kuyper, Community Sanctions Against Argentina: Lawfulness under Community and International Law, in: D. O’Keeffe/H. Schermers (eds), *Essays in European Law and Integration* (1982), at 141; see also E. Paasivirta/A. Rosas, *Sanctions, Countermeasures and Related Actions In the External Relations*

shown a tendency to exclude between the Union's member States the legal effects of (certain provisions of) mixed agreements concluded by the Union and its member States with third States (i.e. so-called disconnection clauses).<sup>179</sup> This is well illustrated by the inclusion of such clauses in the recent conventions prepared under the auspices of the Council of Europe and at the request of the member States of the Union which constitute a majority therein.<sup>180</sup> The practice of the disconnection clauses not only buttresses the idea of a discontinuity between the European legal order and the international legal order. It also reinforces the strictly European constitutionalist tenet which lies at the heart of the European legal order.

Despite the abecedarian character of the above conclusions and the glaring character of the systemic limits of international constitutionalism as well as its discrepancies with the external action of the Union and its member States, many legal scholars have hailed and supported the position endorsed by the CFI in the *Yusuf* and *Kadi* cases. In doing so they have contributed to the dissemination of a fundamentally misleading international constitutionalist discourse. Because the success of that approach among legal scholars will no doubt outlive the recent annulment judgment of the ECJ, the authors of this paper cannot help broaching, as a matter of conclusion, the motives that actually prod all the supporters of international constitutionalism into disregarding the elementary separation of the European and international legal orders.

### III. Concluding Remarks: the Constitutionalist Obsession of Consistency in the International Legal Order

This paper has described the two mainstream approaches which pervade the understanding of the relationship between European law and international law. It has recalled the traditional constitutional approach based on the substantive and sys-

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of the EU: A Search for Legal Frameworks, in: E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002); P. Palchetti, *Reactions by the European Union to Breaches of Erga Omnes Obligations*, in: Cannizzaro, *ibid.*

<sup>179</sup> On this question, see generally C. P. Economides/A. Kolliopoulos, *La Clause de Deconnexion en faveur du Droit Communautaire: une Pratique Criticable*, 111 *Revue générale de droit international public* (2006), 273-300. See also M. Lickova, *European Exceptionalism in International Law*, 19 *EJIL* (2008), 463, esp. 484-489.

<sup>180</sup> See for instance article 27 European Convention on Transfrontier Television of 5 May 1989 (STE 132); article 25.2 Lugano Convention on Civil Liability for Damage Resulting from Damage Dangerous to the Environment, 21 June 1993 (STE 150); article 9.1 of the European Convention Relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite of 11 May 1994 (STE 153); article 21 of the European Convention for the Protection of the Audiovisual Heritage of 8 November 2001 (STE 183); article 26.3 of Council of Europe Convention on the Prevention of Terrorism (STE 196); article 40.3 of the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005 (STE 197); article 52.4 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005 (STE 198).

temic autonomy of the European legal order and its estrangements from the international legal order (European constitutionalism). This European constitutionalist position has been confronted with the emergence of a new discourse which advocates a form of substantive and systemic *continuum* between the European and the international legal orders (international constitutionalism). After depicting each of these approaches (I.), this paper has demonstrated that they were not reconcilable with one another and pinpointed the ineluctable flaws of the international constitutionalist conception of the relationship between European law and international law. It has particularly expounded on the extent to which international constitutionalism fails to correctly take into account the elementary estrangements of legal orders and, more generally, the horizontality and the decentralized character of the international legal order (II.).

The authors of this paper believe that the unabated success of international constitutionalism despite its fundamental flaws is not to be traced back to some self-serving motives.<sup>181</sup> It can rather be explained by the sincere faith of its advocates – whether judges, legal scholars or policy makers – in their own capacity to structure the international legal order. In particular, it is contended here that the international constitutionalist discourse is driven by an obsession of giving some consistency and hierarchy to the international legal order.<sup>182</sup> In the more precise context of the relationship between European law and international law, this means that international constitutionalists cannot stand the idea that a resolution of the Security Council remains unimplemented in Europe because the member States would no longer be competent and the European Union would fail to act.<sup>183</sup> They cannot come to terms with the fact that European member States could be held responsible in the international legal order for failing to abide by their obligations under the UN Charter regarding a subject-matter for which they are no longer competent under the EU framework. While this fear may largely be exaggerated,<sup>184</sup> it helps explain much of the need felt by the supporters of international constitutionalism to structure a hierarchical relationship between European law and international law.

It may well be that this quest for a more structured international legal order does not constitute the sole motive behind the international constitutionalist approach. Many international constitutionalists may actually be motivated, not only

<sup>181</sup> For a criticism of the self-serving leanings of the contemporary legal scholarship, see J. d'Aspremont, *Softness in International Law: a Self-Serving Quest for International Legal Materials*, 19 EJIL (2008), 1075-1093.

<sup>182</sup> See for instance de Wet, *supra* note 116.

<sup>183</sup> See e.g. P. Stangos/G. Gryllou, *Le droit communautaire à l'épreuve des réalités du droit international: leçons tirées de la jurisprudence communautaire récente relevant de la lutte contre le terrorisme international*, Cahiers de droit européen (2006), at 466.

<sup>184</sup> See article 297 and 60 (2) of the EC Treaty; on this point, Case C-70/94, *Werner*, [1995] ECR I-3189; Case C-83/94, *Leifer and Others*, [1995] ECR I-3231; see also the opinion of Advocate General Jacobs in Case C-120/94, *Commission v Greece*, [1996] ECR I-1513, or the opinion of the Advocate General Poiras Maduro, *supra* note 2, at para. 30.

by an endeavor to rationalize the international legal order, but also by the ambition to make it more human through the reinforcement of the protection of human rights, a goal already shared by the early supporters of monism.<sup>185</sup> In that sense, international constitutionalists, by subjecting the UN to some sort of judicial review at the regional level on the basis of the substantive and systemic principles of the international legal order and by elevating regional courts into agents of the international legality of UN Security Council action, are simply aiming at forcing the UN to abide by fundamental human rights. It is acknowledged here that, as such, expressing the wish that the UN Security Council (or its sanctions committees) lives up to stricter standards of human rights is commendable. It is not sure however that this may easily be materialized in practice without hindering the tasks of the Security Council. This being said, one may bemoan the naivety that riddles the constitutionalist discourse as well as its ignorance of the inescapable decentralized and horizontal character of the international legal order. While the international legal order envisaged by international constitutionalists may thus reflect some noble aspirations, it turns a blind eye to the contemporary reality of the international legal society and the autonomous character of the legal orders created by the constitutive treaties of international organizations. If one ultimate lesson should be drawn from the scholarly debate examined here, it is not that the European Union has reinforced its entrenchment into the international legal order but rather that it has now all the trappings of a municipal legal system. This does not mean that (thus far) the EU can qualify as a State within the classical meaning of international law.<sup>186</sup> It only means that, far from being a legal order "of international law", the European legal order has grown into a constitutional order bearing much resemblance with a municipal legal order and has turned as much estranged from international law as the municipal legal orders are. The obsession of international constitutionalists to structure the international legal order cannot circumvent this elementary finding.

The inextricable separation of legal orders that underlies the European constitutionalist discourse should not be seen as an attempt to preserve the autonomy of the European decision-making process and keep it free of any outside interference. Claiming that the European Union is autonomous as far as its legal order is concerned does not make it less receptive to the outside world. More precisely, the autonomy of the European legal order should not be construed as expressing an aversion for international law. Indeed, advocating that a legal order is autonomous does not prejudice its potential amenability to international law. In that respect, one cannot fail to recognize that the European legal order has proven very monist

<sup>185</sup> See J. Nijman/A. Nollkaemper, Introduction, in: Nijman/Nollkaemper, *supra* note 3, 6-10.

<sup>186</sup> The European Court of Justice itself held that "the rules governing the relationship between the Community and its Member States are not the same as those which link the Bund with the Länder" (Case C-359/92, *Federal Republic of Germany v Council*, [1994] ECR I-3681 at para. 38). On this point, see generally Pellet, *supra* note 55, 222 ff.

in that it has not subjected the incorporation of treaty law<sup>187</sup> and customary international law<sup>188</sup> to any formal act of incorporation. On the contrary, international constitutionalists do not realize that their argument could actually yield the opposite effect of subjecting the European legal order to values to which it may some day be loath,<sup>189</sup> thereby prompting an end to the current receptiveness of EU law towards international law and bringing about a more radical isolationist reaction.

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<sup>187</sup> See Case 181/73, *Haegeman v Belgium*, *supra* note 79.

<sup>188</sup> Case T-115/94, *Opel Austria v Council*, *supra* note 82; Case C-162/96, *Racke v Hauptzollamt Mainz*, *supra* note 83.

<sup>189</sup> On the current impact on the overall legitimacy of the EU external action that the lowering of the standard of protection of fundamental rights in the field of foreign policy can have, see I. C a n o r, "Can Two Walk Together, Except They Be Agreed?" The Relationship Between International Law and European Law: the Incorporation of United Nations Sanctions Against Yugoslavia Into European Community Law Through the Perspective of the European Court of Justice, 35 CML Rev. (1998), 137, at 169.

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