

## Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?

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### 1. New Approaches to the Divide between Legal Orders

The relationship between international and *national* law enjoys renewed attention in the study of legal theory and doctrine. Over the past decade international legal scholars seem to have become aware of the influence of ‘globalization’ and ‘internationalization’ on the way they traditionally perceived the delimitation of their field of study from domestic law (as national lawyers increasingly noticed the difficulty to hold on to a pure domestic approach<sup>1</sup>). In a recent volume on the topic, Nijman and Nollkaemper pointed to three developments which may have triggered the placing on the agenda of the topic: 1. The emergence of a set of international values (related to the rule of law and human rights) that underlies policies of states, international organizations, and non-governmental organizations, and that straddles the boundaries of the national and the international domain; 2. The dispersion of sources of authority away from the state in both vertical (sharing of sovereign functions) and horizontal directions (involvement of private actors); and 3. A process of deformalization in which the relative role of international law as formal institution compared to other forms of normativity relevant to governance of international affairs seems to decline.<sup>2</sup> However, this does not explain why these developments (as true as they may be) emerged; in other words: what triggered the emergence of a set of international values, a dispersion of sources of authority and a process of deformalization? It seems that legal scholars have been influenced by research by their colleagues in public administration, political science and sociology, who earlier noticed a shift from ‘government’ to ‘governance’ and who pointed to phenomena such as ‘multi-actor governance’ and ‘multilevel governance’.<sup>3</sup> In a similar vein legal research attempt to cope with the increasingly unclear borders between legal global, regional and domestic legal orders by introducing concepts such as ‘multilevel constitutionalism’ or ‘multilevel regulation’.<sup>4</sup>

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<sup>1</sup> Either out of conceptual necessity or due to pressure by their universities to produce ‘international’ publications.

<sup>2</sup> J. Nijman and A. Nollkaemper, ‘Beyond the Divide’, in J. Nijman and A. Nollkaemper (Eds.), *New Perspectives on the Divide Between National and International Law*, Oxford University Press, 2007, pp. 341-360.

<sup>3</sup> A classic is L. Hooghe and G. Marks, *Multi-level Governance and European Integration*, Lanham, MD: Rowan & Little Field Publishers, 2001. In legal academic circles the notion has been picked up and applied, inter alia, by N. Bernard, *Multilevel Governance in the European Union*, The Hague: Kluwer Law International, 2002.

<sup>4</sup> I. Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?’, *Common Market Law Review*, 1999, pp. 703-750; ‘Multilevel Constitutionalism in the European Union’ *European Law Review*, 2002, pp. 511-529. And more recently: N. Walker, ‘Multilevel

The debate on the relationship between international and national law resulted in a reassessment of the doctrines *par excellence* to approach this relationship: monism and dualism. While there seems to be a longstanding consensus that monism and dualism as such have never been able to fully explain the complex relationship between the national and international legal orders, these days their existence is sometimes even felt to be hindering both a conceptual and a pragmatic understanding of the interaction between national and international law. Nijman and Nollkaemper phrase this as follows:

“The political and social context that inspired the original theories of dualism and monism is a very different one from that of today. The emergence of new non-legal developments, different from those that inspired traditional monism and dualism, call for alternative theoretical approaches that allow us to systematize, explain, and understand changes in the relationship between international and national law and, at the same time, to give direction to the future development of international and national law. [...] Increasing cross-border flow of services, goods and capital, mobility, and communication have undermined any stable notion of what is national and what is international.”<sup>5</sup>

Von Bogdandy even went as far as to argue that

“Monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law. Perhaps they can continue to be useful in depicting a more open or more hesitant political disposition toward international law. But from a scholarly perspective, they are intellectual zombies of another time and should be laid to rest, or deconstructed.”<sup>6</sup>

Together with an increasing number of academics,<sup>7</sup> Von Bogdandy claims that using the notion of ‘pluralism’ leads to more attention for the interaction between national and international legal orders. In his view, this approach has implications for the understanding and application of constitutional law: “any given constitution does not set up a normative universum anymore, but is, rather, an element in a normative pluriversum.”<sup>8</sup> Part of the argument pursued in the present paper is that this, in turn, may lead to a plea to refrain from looking at the relationship between legal orders in purely formal hierarchical terms, but to also take the content of norms into account.<sup>9</sup>

Recently, the reflex by academia to try and use constitutional notions to deal with the blurred distinction between domestic and international law<sup>10</sup> was also countered by Nico

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Constitutionalism: Looking beyond the German Debate’, *LEQS Paper* No. 8, June 1, 2009 (available at SSRN). Introducing the notion of ‘multilevel regulation’: A. Follesdal, R.A. Wessel and J. Wouters (Eds.), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes*, Leiden, Boston: Martinus Nijhoff Publishers, 2008.

<sup>5</sup> J. Nijman and A. Nollkaemper, in the introduction to their edited volume *New Perspectives on the Divide between National & International Law*, Oxford University Press, 2007, p. 10.

<sup>6</sup> A. von Bogdandy, ‘Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law’, *International Journal of Constitutional Law* (I.CON), nrs. 3&4, 2008, pp. 397-413, p. 400.

<sup>7</sup> For references see *infra*, section 4.

<sup>8</sup> *Ibid.*, p. 401.

<sup>9</sup> A similar (but different) approach may be found in P. De Sena and M.C. Vitucci, ‘The European Courts and the Security Council: Between *Déboulement* Fonctionnel and Balancing of Values’, *European Journal of International Law*, 2009, pp. 193-228.

<sup>10</sup> See for instance E. De Wet, ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’, *Leiden Journal of International Law*, 2006, pp. 611-632; ‘The International Constitutional Order’, *International & Comparative Law Quarterly*, 2006, pp. 51-76. A. Peters, ‘Compensatory Constitutionalism: The Function and Potential of of Fundamental International Norms and Structures’, *Leiden Journal of International Law*, 2006; A.

Krisch. Krisch explores an alternative, pluralist vision of postnational law and claims that proposals for postnational constitutionalism not only fail to provide a plausible account of the changing shape of postnational law but also fall short as a normative vision. Pluralism does not rely on an overarching legal framework but is characterised by the heterarchical interaction of various suborders of different levels.<sup>11</sup>

So far, the academic debate on the changing relationship between legal orders largely focused on the distinction between international and national law. The purpose of the present chapter is to extend this debate to the relationship between international and European law. This relationship is usually viewed as being ‘monistic’ in nature, but here also ‘monism’ has not been able to explain much of the case law of the European Court of Justice as well as some of the choices in the EU constitutive treaties.<sup>12</sup> The 2008 *Kadi* case – in which the European Court of Justice seems to have challenged the monistic starting points – certainly formed a reason for the renewed attention for the subject, but it is argued here that the judgment may be seen as a reflection of a larger theoretical and normative trend in academic thinking, rather than as the source of the debate.<sup>13</sup> In this academic discourse, the monism/dualism discussion seems to have been replaced by a constitutionalism/pluralism debate.

Section 2 will first of all highlight some of the problems related to traditional thinking on the status of international law in the European Union’s legal order. This will be followed by a reassessment of the basic notions in which this relationship presents itself: validity, direct effect and supremacy (section 3). Section 4 subsequently analyses to which extent ‘pluralism’ can be seen as a useful alternative to make sense of the relationship between international and European law. And, finally, some tentative conclusions will be drawn in section 5.

## 2. The Status of International Law in the EU Legal Order

Despite the absence of a clear provision in the Treaties, and despite the focus on the ‘autonomy’ of a ‘new legal order’ in early case law,<sup>14</sup> the legal order of the Union is widely identified as ‘monist’ in its relation to public international law.<sup>15</sup> Indeed, the EU does not seem to have a problem with allowing binding international norms to become part of its legal order. One observer even noted the Union’s ‘good international citizenship’.<sup>16</sup> Arguments are

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Von Bogdandy, ‘Constitutionalism in International Law: Comments on a proposal from Germany’, *Harvard International Law Journal*, 2006; B. Fassbender, ‘The United Nations Charter as Constitution of the International Community’, *Columbia Journal of Transnational Law*, 1998, p. 529.

<sup>11</sup> N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford: Oxford University Press, 2010. See earlier his ‘The Pluralism of Global Administrative Law’, *European Journal of International Law*, 2006, p. 247.

<sup>12</sup> See for instance A. Ott, ‘Multilevel Regulations Reviewed by Multilevel Jurisdictions: The ECJ, the National Courts and the ECHR’, in A. Follesdal, R.A. Wessel and J. Wouters, *op.cit.*, pp. 345-366.

<sup>13</sup> Cf. also N. Lavranos, ‘Protecting European Law from International Law’, *European Foreign Affairs Review*, 2010, pp. 265-282, who points to a new line of jurisprudence to protect the autonomy of European law from international law interferences by excluding as much as possible any conflicts between European and international law.

<sup>14</sup> In particular of course in Case C-26/62 *Van Gend & Loos*. Cf. also R. Barents, *The Autonomy of Community Law*: The Hague: Kluwer Law International, 2004.

<sup>15</sup> See for example: P. Pescatore, ‘Die Rechtsprechung des Europäischen Gerichtshofs zur gemeinschaftlichen Wirkung völkerrechtlicher Abkommen’, p. 661, in: Festschrift für H. Mosler, *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit Menschenrechte*, Berlin, 1983, p. 680; H. Schermers, ‘Community law and International Law’, *Common Market Law Review*, 1975, p. 83.

<sup>16</sup> T. Dunne, ‘Good Citizen Europe’, *International Affairs*, 2008, p. 13.

usually drawn from Article 216 (2) TFEU – which provides that international agreements concluded by the Union are binding upon the institutions of the Union and on its Member States – as well as from case law.<sup>17</sup> Indeed, after an initial period in which the Courts’ emphasis was laid on a strengthening of the autonomous nature of the Community, from the early 1970s on international treaties were considered to form “an integral part of Community law”,<sup>18</sup> and it was argued that international law ranks between primary and secondary law.<sup>19</sup> This status of international law is not restricted to international agreements (including mixed agreements<sup>20</sup>), but also holds true for customary law,<sup>21</sup> and secondary international law deriving from international agreements such as Association Council decisions.<sup>22</sup> Furthermore, it is clear that separating international law from the Union’s legal order would neglect its role as “a ‘tool’ or ‘asset’ for the European Union and its member states, when developing the agenda of European integration”.<sup>23</sup> And, finally, the interplay between international and European law may be important to understand a reverse effect: the influence of EU law on the international legal order.<sup>24</sup>

Although labelling the relationship between international and European law in terms of ‘monism’ may be helpful to indicate that international law forms part of the EU legal order from the moment an international norm is (lawfully) concluded, it has been pointed out that it may raise questions as well. A number of issues may be addressed in this respect. First of all, the complexity of the Union legal order is related to the role of the Member States in this order. When the fact that international agreements are an ‘integral part’ of Community law is linked to the notion of primacy, the effects of international agreements reach the internal law of (both monist and dualist) Member States and would lead to a supremacy over this law. This has led one observer to point to European law as a ‘door opener’ for international law: “In that event, the traditional approaches of the Member States for explaining the relationship between municipal law and public international law do not matter anymore.”<sup>25</sup> At the same time the status as ‘integral part’ of Union law does not settle the hierarchical position of international law in relation to other sources of Union law. For this reason it has been argued that the ‘communitarisation’ of international law is far too complex to be described in terms of

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<sup>17</sup> See further the contributions by Christina Eckes and Jan Willem van Rossem elsewhere in this volume as well as F.G. Jacobs, ‘Direct Effect and Interpretation of International Agreements in the Recent Case Law of the European Court of Justice’, in A. Dashwood and M. Maresceau (Eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, pp. 13-33.

<sup>18</sup> ECJ, Case 181/73 *Haegeman v. Belgium* [1974] ECR 449.

<sup>19</sup> See for instance: ECJ, Case C-179/97 *Kingdom of Spain v. Commission* [1999] ECR I-1251; ECJ, Case C-162/96 *Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I-3655, para.45.

<sup>20</sup> See on this issue the contribution by Jan Willem van Rossem elsewhere in this volume.

<sup>21</sup> Case C-162/96 *Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I-3655, para.45; CFI, Case T-115/94 *Opel Austria GmbH v. Council* [1997] ECR II-39; as well as ECJ, Case C-84/95 *Bosphorus*, 1996 ECR I-3953. See P.J. Kuijper, ‘Customary International Law, Decisions of International Organisations and other Techniques for Ensuring Respect for International Legal Rules in European Community Law’, in: Wouters, Nollkaemper, De Wet (Eds.), *The Europeanisation of International Law: the Status of International Law in the EU and its Member States*, The Hague: T.M.C. Asser Pres, 2008, pp. 87-106; as well as J. Wouters and D. Van Eeckhoute, ‘Giving Effect to Customary International Law through European Community law’, in: J.N. Prinszen and A. Schrauwen, (Eds.), *Direct Effect*, Groningen: European Law Publishing, 2004, pp. 183-234.

<sup>22</sup> See for instance: ECJ, Case C-192/89 *Sevince* [1990] ECR I-3461.

<sup>23</sup> See the contribution of Bruno de Witte elsewhere in this volume.

<sup>24</sup> See F. Hoffmeister, ‘The Contribution of EU Practice under International Law’, in M. Cremona (Ed.), *Developments in EU External Relations Law*, Oxford: Oxford University Press, 2008, pp. 37-127.

<sup>25</sup> F.C. Mayer, ‘European Law as a Door Opener for Public International Law?’, in *Droit International et Diversité des Cultures Juridiques – International Law and Diversity of Legal Cultures*, Paris: Editions Pedone, 2008, pp. 241-255 at 253.

monism or dualism and that perhaps the term ‘Unionisation’ should be used to reflect the integration of international law in the EU legal order.<sup>26</sup>

Secondly, ‘monism’ and ‘dualism’ are often used to describe the relationship between legal orders in far too general terms. Claims based on ‘monism’ often confuse the ‘validity’ of norms with their ‘direct applicability’, ‘direct effect’ or even their ‘supremacy’. At least at a theoretical level, it may still be helpful to differentiate between the different notions. ‘Monism’ and ‘dualism’ would formally only relate to the status of international norms within the European or domestic legal orders. In that sense ‘monism/dualism’ relates to the ‘validity’ (or existence) of international norms in those orders. In monist systems international norms enjoy automatic validity, whereas in dualist systems they need to be transferred into domestic law in order to become valid. The fact that international agreements are an ‘integral part’ of EU law seems to relate to this idea. Hence, the existence of international norms should not be equated with the question of whether they can be invoked by individuals before a court of law, let alone with the question of whether they would be of a hierarchical higher order in case of a conflict with a domestic or European norm. Article 216 (2) TFEU provides that international agreements are ‘binding’, but does not offer a priority rule to solve a conflict with other ‘binding’ (Union) norms. In fact, the Court held that “the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, *so far as possible*, be interpreted in a manner that is consistent with those arguments”.<sup>27</sup> This shows that the validity of international norms does not automatically lead to supremacy of those norms.

Thirdly, this validity does not imply a direct effect, in the sense that the international norms (as part of the EU legal order) may be invoked to challenge existing conflicting Union law. The classic example is formed by WTO law, in which area the Court denied direct effect as a possibility of individuals to refer to WTO law, both before national courts and the court of the European Union. The reason still is that “[...] having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions”.<sup>28</sup> The nature of WTO law thus prevents the Court from giving effect to these norms within the EU legal order. This may be referred to as the dualist exception in a mostly monist system, but is it really? There is perhaps no doubt that the norms of WTO agreements are valid within the EU legal order – the problem lies more in the possibilities to apply them in case of a conflict.

While WTO law had long been the odd one out, more recently the Court seems to have extended the idea to the Law of the Sea. In *Intertanko* the Court argued that “it must be found that UNCLOS [the UN Convention on the Law of the Sea] does not establish rules intended to apply directly and immediately to individuals and confer upon them rights or

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<sup>26</sup> Chr. Tietje, ‘The Status of International Law in the European Legal Order: The Case of International Treaties and Non-Binding International Instruments’ in Wouters, Nollkaemper and De Wet, *op.cit.*, pp. 55-69; A. Peters, ‘The Position of International Law Within the European Community Legal Order’, in *German Yearbook of International Law*, 1997, pp. 34-35. See for an extensive analysis of how and why the reception of international norms takes place also R. Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses*, Alphen a/d Rijn: Wolters Kluwer, 2008, pp. 185-194; F.G. Jacobs, ‘Direct Effect and Interpretation of International Agreements in the Recent Case Law of the European Court of Justice’, in A. Dashwood and M. Maresceau (Eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press, 2000, pp. 13-33; C. Kaddous, ‘Effects of International Agreements in the EU Legal Order’, in M. Cremona and B. De Witte, *EU Foreign Relations Law: Constitutional Fundamentals*, Oxford: Hart publishing, 2008, pp. 291-312.

<sup>27</sup> ECJ, Case C-61/94, *Commission v. Germany* [1996] ECR I-3989, para. 52.

<sup>28</sup> ECJ, Case C-377/02 *Léon Van Parys* [2005] ECR I-1465, para. 39, but established case law ever since *International Fruit* (Joined cases 21 t 24-72 [1972] ECR 1219).

freedoms capable of being relied upon against States [...]”.<sup>29</sup> Earlier the Court had established that “when an agreement established cooperation between the parties, some of the provisions of that agreement may [...] directly govern the legal position of individuals”.<sup>30</sup> Now, in *Intertanko*, the absence of individual rights and obligations, together with “the nature and broad logic of UNCLOS” prevents the Court from being able to assess the validity of a Community measure in the light of that Convention (par. 65). It seems that the absence of direct effect causes the problem; the Court does not deny the legal status of the Convention within the EU legal order. The question may rightfully be posed whether the criterion of ‘the governance of the legal position of individuals’ – which seems to be relevant for the acceptance of direct effect<sup>31</sup> – would not virtually rule out the legal effects of most international law within the EU legal order and hence *de facto* limit the so much applauded monist attitude of the Union.<sup>32</sup>

The well-analysed cases of *Yusuf* and *Kadi* may have given some answers,<sup>33</sup> but at the same time left many fundamental theoretical questions unanswered. In addition, the judgments even raised new questions in relation to the monist nature of the Union legal order. The effects of international agreements and international decisions were first of all quite clearly confirmed by the General Court (at that time called ‘the Court of First Instance’) when it argued that “the Court is bound, so far as possible, to interpret and apply [Community] law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.”<sup>34</sup> The notion of the monism (or perhaps even unity) of EU and international law was even more strengthened by the claim of the CFI that it was “empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood 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>35</sup> The idea must have been that ‘monism’ works both ways.

It is also well-known that the ECJ came with a different view in its appeal judgment.<sup>36</sup> Ironically, irrespective of the fact that the contested international norms *did* ‘govern the legal position of individuals’, the intention was to give priority to Community law and to limit the effect of binding international norms. In his Opinion, AG Poiares Maduro already started to highlight the good old (‘dualist’?) notion of the autonomous EU legal order, by arguing that the relationship between international law and EC law “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>37</sup> In turn, the ECJ held that “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all

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<sup>29</sup> ECJ, Case C-308/06, *Intertanko*, judgment of 3 June 2008.

<sup>30</sup> ECJ, Case C-265/03, *Simutenkov* [2005] ECR I-2579.

<sup>31</sup> Cf. ECJ, Case T-174/00 *Biret International SA v. Council of the European Union* [2002] ECR II-00017; Case T-210/00 *Etablissements Biret et Cie SA v Council of the European Union* [2002] ECR II-47; ECJ, Case C-93/02 P *Biret International SA v Council of the European Union* [2003] ECR I-10497; ECJ, Case C-94/02 P *Établissements Biret et Cie SA v Council of the European Union* [2003] I-10565; ECJ, Case C-265/03 *Simutenkov* [2005] I-02579; ECJ, C-344/04 *IATA* [2006] ECR I-403. See more extensively and eloquently the following Chapter by Enzo Cannizzaro.

<sup>32</sup> Compare also the contribution by Enzo Cannizzaro.

<sup>33</sup> See in particular the contributions by Christina Eckes, Andrea Gattini and Paolo Palchetti elsewhere in this volume.

<sup>34</sup> See para. 276 in CFI, *Ahmed Ali Yusuf v. Council and Commission*, 21.9.2005, T-306/01 and *Kadi v. Council and Commission* T-315/01.

<sup>35</sup> Para. 277.

<sup>36</sup> Cf. also the special ‘Forum’ on the *Kadi* judgment in *International Organizations Law Review*, 2008, no.2.

<sup>37</sup> Opinion in the *Kadi* case, *supra*, para. 21.

Community acts must respect fundamental rights.” (para. 285). Again, the Court did not clearly deny the legal nature (validity) of ‘an international agreement’ (note the general phrasing of this particular term), but rather the legal effects in relation to certain key Union principles.<sup>38</sup> To arrive at this conclusion without having to challenge the validity of norms flowing from UN Security Council resolutions, the Court pointed to the fact that the UN Charter leaves the members “the free choice among the various possible models for transposition of those resolutions into their domestic legal order” (para. 298). This would allow for judicial review of the ‘internal lawfulness’ of the EU acts, keeping in mind that fundamental rights form an integral part of the general principles of law, the observance of which is also to be ensured by the Court.

Although the Court’s focus is on the *implementation* of the Security Council resolutions by the Union and the Community, rather than on the validity of the international norms as such, the consequence of this exercise could very well be that any implementation of a Security Council resolution could entail the violation of fundamental EU rights. In this concrete case the Court annulled the contested acts (while maintaining the legal effects for three months). Rather than taking the formal hierarchical relationship between UN law and EU law as the basis for establishing the immunity from jurisdiction of Security Council resolutions (as was done by the CFI), the Court chooses to look at this hierarchy in more substantive terms. Security Council resolutions remain ‘untouchable’, but the acts by which the EU implements the resolutions are not and are subject to the fundamental rights and constitutional principles that form the basis of the Union legal order.

As a fourth problematic area in relation to monism/dualism, we may point to the division between the TEU and the TFEU. While the growing together of the Community and the Union legal order<sup>39</sup> reached an all-time high after the entry into force of the Lisbon Treaty, the status of international law in relation to the Union’s Common Foreign and Security Policy (CFSP) as well as the Common Security and Defence Policy (CSDP) may still differ from what has been established on the basis of the classic authorities in the case law on the policy fields that are now to be found in the TFEU.<sup>40</sup> Elsewhere we argued that the potential impact of the loyalty principle on the freedom of the Member States under for instance the Union’s CFSP should not be underestimated.<sup>41</sup> On the basis of the limited availability of case law related to CFSP no final conclusions can be drawn on the primacy, direct effect and justiciability of CFSP decisions and agreements. While I have argued that CFSP agreements are also to be regarded as forming ‘an integral part of Union law’ (a statement that is less controversial now that new Article 216 TFEU does not discriminate between CFSP and other EU agreements), it is also clear that there are still different parts of ‘Union law’ and that for understanding the internal effects of international agreements concluded by the European Union the monism/dualism approach may even be less helpful, because of the less developed nature of certain parts of the Union’s legal order.

The above findings not only underline the truism that “the relationship between the European Union and public international law is a complex one”<sup>42</sup>, but also reveal the tension

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<sup>38</sup> But note the somewhat ambiguous reasoning in paras. 305-308.

<sup>39</sup> R.A. Wessel, ‘The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation’, *European Constitutional Law Review*, 2009, No. 1, pp. 117-142.

<sup>40</sup> See on these policy areas also the contributions by Frederik Naert and Panos Koutrakos elsewhere in this volume.

<sup>41</sup> C. Hillion and R.A. Wessel, ‘Restraining External Competences of EU Member States under CFSP’, in M. Cremona and B. De Witte (Eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, Oxford: Hart Publishing, 2008, pp. 79-121.

<sup>42</sup> C. Timmermans, ‘The EU and Public International Law’, *European Foreign Affairs Review*, 1999, p. 181. We have taken the liberty of replacing ‘European Community’ by ‘European Union’ in this quote.

between the principles of ‘autonomy’ and ‘reception’ that together form the cornerstones of the relation between European and international law.<sup>43</sup> At the same time the analysis points to the limited explanatory power offered by an application of the notions of monism and dualism. If we wish to understand what it means for international law to form an integral part of Union law – in terms of validity, direct effect and supremacy – we may need more sophisticated theoretical tools. In times where the relationship between international law and Union law seems to be under construction, it is worthwhile to know where we stand.

### 3. Back to the Basics: Validity, Direct Effect and Supremacy

International law does not regulate its own status in the domestic legal orders of states or the legal orders of international organizations. Nevertheless, one may argue that the principle of *pacta sunt servanda* may call for internal measures to allow the state or international organization to live up to its international obligations. Whether this is done by accepting the international norms as valid norms in the domestic legal order or by transferring international norms into domestic law (or even by accepting a conflict between national and international obligations) is up to the state or international organization.

In this section we will revisit the relationship between international and EU law with respect to its three main dimensions: validity, direct effect and supremacy.<sup>44</sup> From a pragmatic perspective, this is what we need to know when confronted with conflicts between international and European law. From a more theoretical point of view this may give us some more insight into the tool box that is, often implicitly, used to decide on the role of international norms in the Union’s legal order.

A legal theoretical approach has frequently been used to study and understand the relationship between European and national law. As is well-known, the debate between those who view the domestic legal orders of the Member States as part of the EU legal order (and accept the overall supremacy of EU law) and those who cannot accept this view as it would deny the highest hierarchical position of the national constitution continues.<sup>45</sup> Less often, a similar exercise was made with regard to the relation between international and European law.<sup>46</sup> A combination of both analyses goes beyond the scope of this contribution, but would certainly provide new insight in the multilevel relationship between international, European and national law.

#### 3.1 Validity

Validity refers to the *existence* of a norm in a particular legal order. It is difficult to leave the question of supremacy aside for a moment, but not impossible.

Comparable to the position of national constitutional lawyers, who would perhaps opt for the model in which Union law is derived from national law which defines the relationship on the basis of constitutional choices (monism or dualism), many traditional EU lawyers would have a natural tendency to stress the autonomy of EU law and would only accept international law as valid once the Union itself decided that it is. From their point of view,

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<sup>43</sup> See the contribution by Jan Willem van Rossem elsewhere in this volume.

<sup>44</sup> Cf. also B. de Witte, ‘Direct Effect, Supremacy, and the Nature of the Legal Order’, in P. Craig and G. de Búrca, *The Evolution of EU Law*, Oxford University Press, 1999, 177-183.

<sup>45</sup> Recently on this issue: A. Tizzano, *Quelques réflexions sur la doctrine du droit de l’Union européenne: les ‘communautaristes’ et les autres*, XIII *Il diritto dell’Unione europea*, 2008, pp. 225-235.

<sup>46</sup> But see the different reactions to the *Kadi* case, *infra*.



Union law and the domestic law of Member States form an ‘integrated’ legal order (compare *Costa-ENEL*); while at the same time the ‘autonomy’ of the EU legal order makes it difficult to accept the same integration in relation to international law.<sup>47</sup> Nevertheless the notion of integrated legal orders seems to be at the basis of the recent judgments of the Court. Both in *Intertanko* and in *Kadi* – but also in the standing case law on the effects of WTO norms in the Community legal order – the Court faced a conflict of norms. From a theoretical perspective it would be very difficult to accept a conflict without accepting the validity of both norms. Therefore the notion that relevant (written and unwritten) international law forms an ‘integral part’ of Union law seems to be upheld by the recent cases, albeit that these cases equally make clear that it is EU law itself that sets the conditions for the validity of international norms within its legal order. Thus – as *Intertanko* for instance revealed in relation to the MARPOL treaty to which the EU is not a party – not *all* international norms can be an ‘integral’ part of the EU legal order.<sup>48</sup> Whereas the EU defines the status of its norms in the legal orders of its Member States, a similar system does not exist in the international legal order.

### 3.2 *Direct Effect*

It is quite easy to combine validity with direct effect.<sup>49</sup> Article 93 of the Constitution of The Netherlands even links the two notions explicitly: “Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.” Although one may still argue that ‘binding on all persons’ does not by definition imply a right of these persons to actually invoke international provisions, practice did reveal the close link between the two aspects. The *Intertanko* judgment in particular comes quite close to this idea by bringing in the argument that the international agreement “does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States [...]” (para. 64). However, in both cases (the Dutch and the European legal order) it would be difficult to argue on this basis that the absence of direct effect denies the ‘binding force’ of international agreements in the international legal order. This would imply that state and Union institutions would have a duty under international law to live up to their obligations – irrespective of the status of the agreements in their own legal order. The question of hierarchy may thus also emerge in the absence of direct effect.

### 3.3 *Supremacy*

The supremacy rule is nothing more (or less) than a rule to establish which norm precedes in case of a collision.<sup>50</sup> With regard to a possible conflict between European law and

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<sup>47</sup> See already P. Pescatore, *Le droit de l'intégration. Emergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communauté européennes*, Dordrecht: Martinus Nijhoff, 1972.

<sup>48</sup> This was in fact the main point of this case. See more extensively: J.W. van Rossem, ‘Interaction between EU Law and International Law in the Light of *Intertanko* and *Kadi*: The Dilemma of Norms Binding the Member States but not the Community’, *Netherlands Yearbook of International Law*, 2009, pp. 183-227; also published as *CLEER Working Paper* 2009/4.

<sup>49</sup> See on the close link between the two also J. Klabbers, ‘International Law and Community Law: The Law and Politics of Direct Effect’, *Yearbook of European Law* 2002, pp. 292-295.

<sup>50</sup> Cf. R. Barents, ‘De voorrang van unierecht in het perspectief van constitutioneel pluralisme’, *SEW*, 2009, no. 2, pp. 44-53.

international law this rule is not articulated in the treaties. Article 216 (2) TFEU does indeed refer to the fact that international agreements concluded by the EU are binding in the EU legal order, but remains silent on the hierarchy in relation to all other ‘binding’ norms within that order. One may argue that a hierarchy between legal orders can only be established once one legal order forms a part of the other. The hierarchy then implies that all norms in the higher (overarching) legal order precede over all norms in the lower (or sub) legal order. Exceptions to this rule can only be made through norms in the higher legal order.

The question of the sub-ordination of the EU legal order to the international legal order has been raised ever since the Court held that the Community was to be seen as “a new legal order of international law”.<sup>51</sup> In this new legal order international legal norms may collide with other norms. One way to solve this collision may be by denying the direct effect of the international norms (as has traditionally been the approach with regard to WTO norms). The problem the Court faced in *Kadi* was that the norms set by the UN Security Council clearly had an effect on individuals. This left the Court with a conflict of norms: the Court seemed to conclude (although indeed not quite clearly) that international agreements (such as the UN Charter) form an ‘integral part’ of EU law, but also noted that “fundamental rights form *an integral part* of the general principles of law whose observance the Court ensures.”<sup>52</sup> The fact that both norms were part of the EU legal order, allowed the Court to solve the supremacy question in an ‘internal’ setting, in which it gave priority the constitutional principles related to the protection of fundamental rights.<sup>53</sup>

This underlines the complexity of the relationship between international and European law and the difficulty to analyse this relationship in terms of monism and dualism. In the end both notions are not very useful in understanding the (absence of) hierarchy between international and European law. In various legal analyses in reaction to the *Kadi* judgment, some of the arguments that are traditionally used by the ‘communautarists’ (or ‘neocoms’) to stress the supremacy of EU law in relation to national law are now used to point to the need to accept the supremacy of international law over Union law. So, where EU law enjoys primacy over national law because without a uniform application it would lose its relevance, at least with respect to the nature and function of the Charter of the United Nations it is argued that without the supremacy of the Charter and the decisions based on it (cf. Article 103 of the Charter), the United Nations system of collective security would not be able to function. So far, the controversy between the ‘internationalists’ (stressing the values of a coherent legal world order) and the ‘European constitutionalists’ (pointing to higher ranking constitutional values) could not be overcome on the basis of legal theoretical arguments. This seems to have triggered new approaches to make sense of the relationship between different legal orders.

#### **4. Taking Content Seriously: From Monism/Dualism to Constitutionalism/Pluralism**

##### *4.1 Constitutionalist Approaches*

The two traditional theoretical approaches to the relationship between international and European law are both consistent in themselves. At the same time they are mutually

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<sup>51</sup> ECJ, Case 6/64, *Costa v. ENEL* [1964] ECR 585.

<sup>52</sup> Par. 283; emphasis added.

<sup>53</sup> More in general, the ‘internalisation’ of international law has been referred to as a ‘Europeanisation’ of international law: “To the extent that it is binding upon the EU institutions, international law become part of the EU legal order and is therefore ‘europeanised’.” J. Wouters, A. Nollkaemper and E. de Wet, ‘Introduction: The ‘Europeanisation’ of International Law’, in their edited volume, *op.cit.*, pp. 1-13, at 3.

exclusive. Both imply the existence of a hierarchy and hence the existence of one autonomous and one sub-ordinate legal order.<sup>54</sup> In the debate on the relation between European and national law, alternative approaches have been introduced in order to overcome the two equally valid approaches.<sup>55</sup> After all, to base the ‘integrated legal order’ on a one-sided Union perspective makes acceptance of supremacy of EU law (*Simmenthal*) difficult. At the same time, the notion of the integrated legal order does not explain the relevance of direct effect: as in national law, the effect of a norm is established on the basis of its content.<sup>56</sup>

It is this ‘content’ of a norm that seems to be at the basis of most alternative approaches.<sup>57</sup> Hence, many of these approaches follow a ‘constitutional’ logic. One way of making sense of the complexity is not to focus on an emerging constitution at the EU level, but instead to take the complex relationship with the Member States as well as the unity of national and supranational legal orders into account and to try and see a constitution made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties.<sup>58</sup> This is what Pernice once labelled a multilevel constitution:<sup>59</sup>

“This perspective views the Member States’ constitutions and the treaties constituting the European Union, despite their formal distinction, as a unity in substance and as a coherent institutional system, within which competence for action, public authority or, as one may also say, the power to exercise sovereign rights is divided among two or more levels. [...] According to the concept of ‘multilevel constitutionalism’, the Treaties are the constitution of the Community – or, together with the national constitutions, the constitution of the European Union – made by the peoples of the member States through their treaty-making institutions and procedures.”

Pernice thus proposed to conceive of the European Constitution as a *process* rather than a specific document.<sup>60</sup>

This approach has also been used to describe the relationship between national, European and international law. What I have coined ‘multilevel regulation’,<sup>61</sup> has also been described in terms of a ‘three-layer cake’: “[t]he law on each level is not separate but interwoven with the others and sticks to the others like the layers within a cake.”<sup>62</sup> This implies that “for EU Member States, [the] ‘classical’ dual legal relationship *international law / national law*, is gradually becoming replaced by a new triangular relationship, *international*

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<sup>54</sup> See also Barents, *op.cit.*, p. 49.

<sup>55</sup> M. Dougan, ‘When Worlds Collide: Competing Visions of the Relationship between Direct Effect and Supremacy’, *Common Market Law Review*, 2007, p. 931.

<sup>56</sup> See also Barents, *op.cit.*, at p. 50.

<sup>57</sup> Cf. also De Sena and M.C. Vitucci, *op.cit.* Their analysis shows that ‘content’ can work both ways. The authors pointed to the fact that the General Court in *Kadi* aimed in fact at “guaranteeing – as much as possible – the implementation within the national legal systems of the substantive content of several UN Security Council resolutions in accordance with the values which they themselves pursue.”

<sup>58</sup> Cf. Lenaerts and Desomer, ‘New Models’, 1219: “[t]here are no convincing legal arguments why a Constitution may not be made up of a variety of interconnected Treaty texts founding the legal order”.

<sup>59</sup> I. Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making-Revisited?’, *Common Market Law Review*, 1999, pp. 703-750, at 706-7 and 715. Cf. also for an (even) more philosophical approach N. Walker, *op.cit.*

<sup>60</sup> See also F. Mayer and I. Pernice, ‘La costituzione integrata dell’Europa’, in G. Zagrebelsky (Ed.), *Diritti e Costituzione nell’Unione Europea*, Laterza, Roma-Bari, pp. 43-68.

<sup>61</sup> R.A. Wessel and J. Wouters, ‘The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres’, in A. Føllesdal, R.A. Wessel and J. Wouters, *op.cit.*, pp. 9-47; in shorter form published in *International Organizations Law Review*, 2007, No. 2, pp. 257-289.

<sup>62</sup> R. Wahl, ‘Europeanisation beyond Supremacy’, in Wouters, Nollkaemper and De Wet, *op.cit.*, pp.17-37, at 20.

law / EU law / national law”,<sup>63</sup> and that “it is no longer exclusively the EU Member States’ national legal systems that determine how the decisions of international organizations are implemented and which legal rank they have in their domestic legal order, but rather [...] the European legal order which supersedes and thus replaces this function of the national legal orders.”<sup>64</sup>

Along similar lines Besselink proposed to replace the notion of an ‘integrated’ legal order by one of a ‘composite’ legal order, in which the supremacy of EU law is put into perspective.<sup>65</sup> A composite constitution is a constitution “whose component parts mutually assume one another’s existence, both *de facto* and *de iure*” (at p. 6). However, Besselink’s paper criticizes the concept of multilevel constitutionalism on the two grounds. Firstly, “Thinking in terms of ‘levels’ [...] involves inescapably the concept of hierarchy” because levels imply “by definition the existence of ‘higher’ and ‘lower’ levels, super-ordination and subordination, superiority and inferiority”; and secondly, “Even if the dynamics between the ‘levels’ are emphasized – the higher level influences the lower one and the lower one tries to influence the higher one – the implicit point of departure is that these are separate levels”. By ignoring the primacy of EU law (for instance in relation to not directly effective provisions) the notion of a ‘composite’ constitution or legal order does not seem to give an answer to the question concerning the ultimate source (and supremacy!) of the ‘collision’ rule.

A clearly substantive preference is perhaps best visible in the emergence of ‘international constitutional law’. In this strand an ‘international constitutional order’ refers to “the fundamental structural and substantive norms – unwritten as well as codified – of the international legal order as a whole, which contain the outer limitations for the exercise of public power. The fundamental substantive elements of the international constitutional order primarily include the value system of the international legal order, meaning norms of positive law with a strong ethical underpinning (notably human rights norms) that have acquitted a special hierarchical standing vis-à-vis other international norms through state practice.”<sup>66</sup> The argument here is that there exists a “hierarchical superior value system across different regimes (whether domestic, regional, functional) [which can] reduce the potential for inter-regime normative conflict”.<sup>67</sup> Obviously, this has an impact on the relationship between international law and EU law and in particular on the ‘autonomy’ of the EU legal order. In this approach it is not so much the formal hierarchy that settles a conflict between an international and an EU norm, but rather the *status* of a particular international norm: an ‘international constitutional norm’ not only constitutes an outer limit for (for instance) Security Council action, but also for action by regional normative actors.

What seems to lie behind the constitutionalist approaches is a “their advocacy of some kind of systemic unity, with an agreed set of basic rules and principles to govern the global realm”.<sup>68</sup> Constitutionalists seem to worry about the idea that new forms of governance

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<sup>63</sup> J. Wouters, A. Nollkaemper and E. de Wet, ‘Introduction: The ‘Europeanisation’ of International Law’, in their edited volume, *op.cit.*, pp. 1-13, at 8.

<sup>64</sup> N. Lavranos, *Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States*, Groningen: Europa Law Publishing, 2004, p. 5. Cf. also D. Bethlehem, ‘International Law, EC Law, National Law: Three Systems in Search of a Framework’, in M. Koskenniemi (ed.), *International Law Aspects of the EU*, The Hague, 1998, pp. 169-196.

<sup>65</sup> L.F.M. Besselink. *A Composite European Constitution. Een Samengestelde Europese Constitutie*. Groningen: Europa Law Publishing, 2007. Bi-lingual text of his inaugural lecture.

<sup>66</sup> E. De Wet, ‘The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation’?, *European Constitutional Law Review*, 2009, pp. 284-306; see also her ‘The International Constitutional Order’, *International and Comparative Law Quarterly*, 2006, pp. 51-76.

<sup>67</sup> *Ibid.*, at 288.

<sup>68</sup> G. de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’, *Harvard International Law Journal*, 2010, pp. 1-49 at 36.

escape domestic constitutional control, which calls for an appropriate translation of domestic constitutional principles (such as rule of law, checks and balances, human rights protection and democracy) to the international or global context.<sup>69</sup> Whereas ‘strong’ constitutionalist approaches would insist of a clear hierarchy of rules (with constitutional norms at the top of the list), a ‘soft’ constitutional approach would rely on commonly negotiated and shared principles for addressing conflict. De Búrca advocated this softer (‘Kantian’) variant while pointing to three of its characteristics: the assumption of an international community of some kind; an emphasis on universalizability; and an emphasis on common norms or principles of communication for addressing conflict.<sup>70</sup>

#### 4.2 *Pluralist Approaches*

The emphasis on the existence of an international community and hierarchical superior universal norms and principles clearly distinguishes constitutionalism from pluralism. Where international constitutional law aims for the recognition of norms that enjoy a higher status because of their superior substantive nature, ‘pluralism’ aims at overcoming the problem of the ultimate source of the ‘collision rule’ by putting the notion of hierarchy as such into perspective. In this model the normative force of norms is derived from the legal order in which they operate. Hence, both the Union legal order and the domestic legal orders of the Member States define the criteria. Thus, it is a pragmatic way out of a theoretical dilemma and the supremacy which is claimed by one legal order is regarded as a fact rather than a norm in the other legal order.<sup>71</sup> ‘Legal pluralism’<sup>72</sup> accepts that two conflicting rules may be applicable to the same situation and relocates the battle from the world of legal norms to the world of empirical facts. In that sense, it seems to accept the much described phenomenon of the ‘fragmentation’ of international law.<sup>73</sup>

As indicated by De Búrca, while in the constitutionalism/pluralism debate arguments are used that are familiar from the monism/dualism approach, there is a difference.

“Pluralist approaches share with dualism the emphasis on separate and distinct legal orders. Pluralism, however, emphasises the plurality of diverse normative systems, while the traditional focus of dualism has been only on the relationship between national and international law. Similarly, strong constitutionalist approaches to the international order overlap significantly with monist approaches in their assumption of a single integrated legal system. There are many constitutional approaches to the international order and some do not necessarily assume such systemic integration and cannot comfortably be described in the traditional language of monism.”<sup>74</sup>

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<sup>69</sup> A. Peters, ‘Compensatory Constitutionalism’, *op.cit.*

<sup>70</sup> De Búrca, *op.cit.* at 39.

<sup>71</sup> Cf. S. Besson, ‘From European Integration to European Integrity: Should European Law Speak With Just One Voice’, *European Law Journal*, 2004, pp. 255-362; and N. MacCormick, ‘The Maastricht Urteil: Sovereignty Now’, *European Law Journal*, 1995.

<sup>72</sup> The notion of ‘legal pluralism’ precedes the current debate and seems to have emerged out of a broader legal theoretical discourse. See for instance J. Griffiths, ‘What is Legal Pluralism?’, *Journal of Legal Pluralism*, 1986; G. Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’, *Cardozo Law Review*, 1992, p. 1143; or B. Tamanaha, ‘A Non-Essentialist Version of Legal Pluralism’, *Journal of Law and Society*, 2000, pp. 296-321.

<sup>73</sup> See for instance *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission; finalized by Martti Koskenniemi, Helsinki: The Erik Castrén Institute Research Reports 21/2007; and A. Fischer-Lescano and G. Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, *Michigan Journal of International Law*, 2004, pp. 999-1046.

<sup>74</sup> De Búrca, *op.cit.*, at 32.

The emphasis on the value of diversity and difference amongst various national and international normative systems is indeed clearly present in most pluralist approaches. Indeed, and perhaps contrary to some popular notions, pluralism is not to be differentiated from constitutionalism on the basis of a lack of interest in values. Krisch, for instance, argued for pluralism *because* it could lead to stronger transnational accountability.<sup>75</sup> By not focusing on the interdependence of legal orders to ensure accountability, human rights protection or democracy, pluralist approaches would thus seem to force law (as well as politics!<sup>76</sup>) to come up with more pragmatic solutions.

The frequent use of the term ‘constitutional pluralism’ reveals that, just like constitutionalism, pluralism has a normative driver. Around a decade ago<sup>77</sup> it mainly emerged out of the study of the constitutional dimension of EU law, in which the idea that states are the sole constitutional authorities was challenged. In the words of Walker, “Constitutional pluralism [...] recognizes that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-national law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the order, that is to say, is now horizontal rather than vertical – heterarchical rather than hierarchical.”<sup>78</sup>

An application of this model to the relationship between international and European law is not new,<sup>79</sup> but seems to form a good starting point to overcome the current deadlock in a debate that was particularly triggered by the *Yusuf* and *Kadi* judgments of the European courts. The ECJ *Kadi* judgment in particular has been interpreted in many different ways, thereby reflecting the positions we are familiar with from the EU/domestic constitutional debate. When asked to give their opinion on *Kadi*, even experts in the field come to different – and clearly irreconcilable – conclusions. Thus, it has been argued that the judgment “indirectly calls into question the primacy of the UN Security Council, if not the entire UN system of collective security”, that “it is not possible to justify disobedience to the UN Charter by arguing that the particular European legal order is autonomous”, that “the categorical conclusion of the CFI and ECJ that they would have no power to engage in (any type of ) Security Council review seems unconvincing”, that “the ECJ’s ruling in *Kadi* is an attempt to stop the executive from hollowing-out the rule of law from above”, and that “the decision may help wean legal scholars and judges off from the sirens of international constitutionalism”.<sup>80</sup>

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<sup>75</sup> Krisch (2006), *op.cit.*, at 256.

<sup>76</sup> N. Krisch, ‘The Open Architecture of European Human Rights Law’, *Modern Law Review*, 2008, p. 183 at 185.

<sup>77</sup> See for instance: J.H.H. Weiler, *The Constitution of Europe*, Cambridge; Cambridge University Press, 1999; N. MacCormick, *Questioning Sovereignty? Law, State and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999; and M. Kumm, ‘Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice’, *Common Market Law Review*, 1999, pp. 351-386.

<sup>78</sup> N. Walker, ‘The Idea of Constitutional Pluralism’, *EUI Working Paper LAW*, No. 2002/1, p. 27.

<sup>79</sup> See already J. Combacau, ‘Le droit international: bric à brac ou système?’, *Archives de philosophie de droit*, 1986, p. 84.

<sup>80</sup> See the contributions to the ‘Forum’ on *Kadi* in *International Organizations Law Review*, 2008, No. 2; respectively: L. van den Herik and N. Schrijver, ‘Eroding the Primacy of the UN System of Collective Security: The Judgment of the European Court of Justice in the Cases of *Kadi* and *Al Barakaat*’ (pp. 329-338); L.M. Hinojosa Martinez, ‘Bad Law for Good Reasons: The Contradictions of the *Kadi* Judgment’ (pp. 339-357); E. de Wet, ‘The Role of European Courts in Reviewing Conflicting Obligations under International Law’ (pp. 359-364); D. Curtin and C. Eckes, ‘The *Kadi* Case: Mapping the Boundaries between the Executive and the Judiciary in Europe’ (pp. 365-369); and J. d’Aspremont and F. Dopagne, ‘*Kadi*: The ECJ’s Reminder of the Elementary Divide between Legal Orders’ (pp. 371-

It is quite easy to discover the different positions we are familiar with from the debate on the relationship between EU law and domestic law. Hence, the same problems that called for alternative approaches to make sense of that complex relationship – as well as of the obviously possible different interpretations – seem to have emerged in the relationship between two other levels. In particular when constitutional questions arise, “the ECJ demonstrates that monism is simply a ‘modality of dualism’.”<sup>81</sup> Translated to the constitutionalism/pluralism debate, it has been argued that the CFI judgment in *Kadi* reflects “strong constitutionalism”, whereas the ECJ “adopted a robustly pluralist approach”.<sup>82</sup>

Brought back to its very essence, ‘pluralism’ primarily seems to draw attention to the elementary divide between legal orders. Although not using the same terminology, something like that was also argued by d’Aspremont and Dopagne:<sup>83</sup>

“Behind the reasoning of the ECJ lies the idea that the relationship between legal orders is essentially designed by the constitutional rules and principles of each legal order. In other words, each legal order decides for itself whether or not it incorporates rules laid down in another legal order and, if so, how such an incorporation must be carried out. And this is not different in the case of the European legal order as was more expressly recalled by the [...] ECJ [*Kadi*, paras 283-287]. The relation between European law and international law is governed by *European law* to the same extent as the relationship between municipal law and international law is governed by municipal law.”<sup>84</sup>

The implication of this assertion would indeed be a denial of any form of formal hierarchy. As the international and European legal order are to be seen as two separate legal orders, rules in one order are not automatically part of the European legal order. This in turn implies that the European Courts can stick to their own rules and will not have to refer to norms lying outside the European legal order (as the CFI seems to do in *Kadi* by looking at fundamental principles of the international legal order). At the same time this would mean that priority rules established by one legal order (cf. Article 103 UN Charter) do not sort out conflicts of norms which may arise within the legal orders of the Union or its Member States.<sup>85</sup> This does not necessarily harm the ‘open’ attitude of the EU legal order towards international law. The ECJ may remain very receptive to the outside world and on some occasions the Union will only be able to live up to its international obligations by granting priority to international norms.<sup>86</sup>

So, to what extent can a more ‘pluralist’ approach as developed with regard to the relation between European and national law be helpful to understand the relationship between European and international law? To some extent the solution seems to be too easy: if we cannot find a way to establish a hierarchy, we simply accept the divide – and in a way the autonomy – of legal orders. In building their case for an understanding of the *Kadi* case on the basis of a ‘value oriented’ approach, De Sena and Vitucci already pointed to the problematic use of dualist notions:

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379); S. Griller, ‘International Law, Human Rights and the EC’s Autonomous Legal Order’, *European Constitutional Law Review*, 2008, pp. 528-553.

<sup>81</sup> J. d’Aspremont and F. Dopagne, *op.cit.*, pp. 374-75.

<sup>82</sup> De Búrca, *op.cit.*, at 31.

<sup>83</sup> *Ibid.*, at 373.

<sup>84</sup> See on this comparison also Von Bogdandy, *op.cit.*; as well as G. Arangio-Ruiz, ‘International Law and Interindividual Law’, in J. Nijman and A. Nollkaemper, *op.cit.*, pp. 39-43.

<sup>85</sup> Cf. J. d’Aspremont and F. Dopagne, *op.cit.*, p. 376.

<sup>86</sup> Cf. the debate in The Netherlands on how to combine ‘monism’ with an increased attention for fundamental constitutional values. See L.F. M. Besselink and R.A. Wessel, *Naar een bredere constitutionele verankering van het monisme. De invloed van ontwikkelingen in de internationale rechtsorde op de doorwerking naar Nederlands constitutioneel recht*, Deventer: Kluwer, 2009.

“The very fact that the Court acted the way it did means that the findings reached in its judgment can, ultimately, be regarded as the outcome of a *direct* balancing of the EC principles on fundamental rights with the value of cooperation of the EU states with the UN in the fight against terrorism. More precisely, the Court was prompted to reaffirm its power to review the lawfulness of Community acts not so much by its ‘dualistic’ attitude, but, *rather*, by the need to guarantee the right to an effective judicial remedy – as this right is framed in EC law – to the individuals and entities concerned, in the light of the absence of such a remedy in the UN legal order. In other words, this outcome can be deemed the consequence of the ECJ’s will not to overestimate the value of cooperation with the UN in the fight against terrorism, in comparison with the need to safeguard human rights in EC law.”<sup>87</sup>

While the *Kadi* judgment indeed seems to underline the inadequacy of monism and dualism to make sense of the way the Courts deal with the relationship between EU and international law, it is clear that new questions arise. To name just a few: 1. Is the notion of international law as an ‘integral part’ of Union law indeed limited to those international norms that are accepted by the EU?; 2. If norm collisions are only solved on the basis of internal rules, how can we prevent undermining international obligations (for instance laid down in Security Council resolutions)?; and 3. What exactly differentiates ‘pluralism’ from ‘dualism’ or even from (state centred) ‘monism’?<sup>88</sup>

These questions reveal the difficulty to overcome thinking in terms of hierarchical relations between norms. However, if there is one thing that seems to emerge from the recent case law, it is that choices seem to be based on the extent to which ‘the legal position of individuals’ is governed by the norms (cf. *Simutenkov*). This criterion indeed seems to transcend hierarchical relations between norms, by giving more attention to the substance of the norm.

## 5. Conclusion: Towards a More Substantive Approach of the Relationship between International and EU Law?

In recent cases before the European Court of Justice, the effects on individuals played a crucial role in the final judgment of the Court. Whereas in *Intertanko* the *absence* of individual rights and obligations formed a reason not to give priority to international law,<sup>89</sup> *Kadi* revealed that it was exactly the *existence* of an effect on individuals that triggered the Court to underline ‘domestic’ constitutional principles, albeit by translating the norm collision into an ‘internal’ conflict. Both cases seem to take the *content* of the norm, rather than the nature of the agreement (cf. WTO) or the claimed primacy (cf. UN), as a starting point. To understand this, a ‘pluralist’ view may indeed be more helpful than views that focus on a formal hierarchy between legal orders following from the integration of one order in the other. The *pluriversum* referred to by Von Bogdandy (see the Introduction to this paper) would thus replace the normative *universum* and doctrines such as direct effect and consistent interpretation would be based on a ‘balancing of constitutional principles’ rather than on a hierarchy between legal orders.

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<sup>87</sup> De Sena and Vitucci, *op.cit.*, at 224.

<sup>88</sup> Cf. S. Griller, *op.cit.*, at 551: “Arguably this [pluralism] is not much different from the debates in the first half of the 20th century.” Griller points out that “monism in the version of state centred monism (as opposed to a monist view favouring the international legal order as the prevailing one) is nothing else than ‘pluralism’, given that in this case legal validity has to be derived from all the different national constitutional authorisations.”

<sup>89</sup> Admittedly, as stated above, this was not the main point in *Intertanko*, which was mainly about the MARPOL treaty, which did not form part of the EU legal order because it is not binding upon the EU as such.



Nevertheless, the case law of the ECJ reveals that – even if we would accept the pluralist assumption of diverse orders – conflicts of norms will not disappear. Norm collisions between international and European norms may even occur more frequently now that ‘constitutionalism’ is being stressed at the EU level and the ‘European’ tradition of international law is being questioned.<sup>90</sup> At the same time, norm collisions within legal orders would have to be solved on the basis of internal constitutional principles, irrespective of international standards. Pluralism may thus strengthen the fragmentation of international law and in times of on-going internationalisation and globalisation – stressing the ‘fuzziness’ of the borders between the domestic, EU and international legal order – new calls for a clearer hierarchy between norms can be awaited.

In a way this is not all that new. Looking back, monism and dualism have never been able to fully explain the relationship between EU and international law and the Court has been far from consistent in its rulings on the question if and to what extent international law is to be seen as law of the European Union. In the words of one observer: “To a certain extent, the discussion at stake is on reconciling two different systems in their attempt to establish an effective legal order of their own and at the same time taking account of the repercussions of such interaction”.<sup>91</sup> Indeed, what the new approaches seem to have in common is more attention for the equality and the mutual respect of the respective legal orders, while recognising ever more frequently that the international legal order and the EU legal order do not “pass by each other like ships in the night”.<sup>92</sup>

Even more interestingly, perhaps, is that – much more than monism and dualism – both constitutionalism and pluralism seem to share a content-based approach. Constitutionalism points to the need to repair ‘Rule of law-deficits’ now that nation-states are no longer the ultimate decision-maker in all situations. Pluralism argues for a pragmatic, non-hierarchical, approach to this. Both emerged from a concern over international decisions that seem to be ‘binding on all persons’ and thus take the content of a norm (or the ‘fate of the individual’) into account. The debate on the relationship between international and EU law thus seems to be shifting from a systemic to a more substantive approach.<sup>93</sup> Irrespective of a preference for either of the new ‘alternative’ approaches, this seems to be a healthy phase in the development of any relationship.

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<sup>90</sup> See on the latter point A. Orakhelashvili, ‘The Idea of European International Law’, *EJIL*, 2006, no. 2, p. 315-347. Cf. also T. Stein, ‘The European Union and the Development of a European Culture of International Law’, in *Droit International et Diversité des Cultures Juridiques – International Law and Diversity of Legal Cultures*, Paris: Editions Pedone, 2008, pp. 321-332.

<sup>91</sup> S. Griller, *op.cit.*, at 552.

<sup>92</sup> AG Poiares Maduro in his Opinion in the *Kadi* case, *op.cit.*, paras. 21-22.

<sup>93</sup> Cf. on this point also the contribution by Jan Klabbers elsewhere in this volume.