**Sanctions and Rights between Hierarchy and Heterarchy**

Chapter:

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**Abstract and Keywords**

Chapter 5 analyses the dispute over rights protection in United Nations sanctions to elucidate emerging structures of postnational law. This dispute, which pitches high politics—security—against diverse interpretations of fundamental rights, brings out the increasing enmeshment of layers of law in a particularly pointed way, exemplified here in UK and EU law and jurisprudence. Courts in these jurisdictions have developed very different approaches to the broader challenge this enmeshment represents, ranging from monist/constitutionalist to pluralist visions, and from clear assertions of supremacy of the international, regional, and national levels to more accommodating attitudes. The overall picture here is again pluralist, but despite the high stakes and the substantial diversity in approaches, it has not proved to be unstable. Challenges to the UN regime have failed to produce serious non-compliance, and the pluralist contestation over fundamentals has generally been buffered by an accommodating, pragmatic mode of cooperation.

*Keywords:*   [United Nations](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=United%20Nations), [sanctions](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=sanctions), [human rights](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=human%20rights), [courts](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=courts), [stability](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=stability), [pluralism](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=pluralism), [constitutionalism](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=constitutionalism), [postnational law](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=postnational%20law), [monism](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=monism), [dualism](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=dualism), [hierarchy](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=hierarchy), [heterarchy](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=heterarchy)

In the previous chapter, I have analysed a relatively benign case. Human rights, though often enough controversial, generally have such a positive connotation that a multiplicity of human rights regimes may appear simply to multiply the good: to add further layers of protection for the individual, something that in liberal times seems desirable anyway. And the cases in which European and national conceptions of rights have led to clashes between those layers were mostly of limited political salience; their ultimate lack of resolution in a pluralist order could then appear as of little consequence. Moreover, those conflicts all occurred on the background of remarkable homogeneity: with some exceptions, the European human rights regime evolved among countries with similar political systems and social values. And even though the accession wave of the 1990s has led to greater diversity, the core of the regime has remained in place. This fact may have paved the way for a relatively stable pluralist order—in line with Carl Schmitt's dictum that in federal systems the site of ultimate authority can be left undecided only if society and politics are sufficiently homogeneous.[1](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-596)

If this were true, pluralism would hardly present a suitable model for the postnational order beyond a few relatively cohesive regions. Yet I have argued in Chapter [3](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-3) that it is precisely the pronounced diversity of the global order that makes pluralism attractive there, and it is in the following two chapters that I seek to inquire in greater depth into the promise and problems of pluralist structures in the global context. This chapter will begin by examining the UN sanctions regime in its context of international, regional, and national law. The next chapter will then turn to the example of global risk regulation and analyse the interplay of different layers of law around the dispute over trade and genetically modified organisms, focusing on horizontal exchanges between World Trade Organization (WTO) law and the Biosafety Protocol as well as their interaction with European and national law.

(p.154) If the European human rights regime was an ‘easy’ case, global security governance is quite the opposite. The issues UN sanctions deal with are highly politicized, go to the core of essential state functions, and are often of significant salience in domestic as well as international discourse. If there is an area where one would expect a pluralist order to run into serious obstacles, it is probably this one. Yet as we will see, not only has the regulatory intensity of the field led to a serious enmeshment of different layers of law and thus challenged classical dualist conceptions to a particular extent; ithas also produced a pluralist order that has helped reflect and accommodate the serious tensions between actors and policies that are characteristic, and natural, in an area of such salience.

The chapter proceeds in three steps. It first sets the scene by outlining the shape of the UN sanctions regime and its transformation over the last fifteen years. In the second step, it goes on to explore the interaction of legal orders and governance regimes around the issue of sanctions, showing the degree to which layers of law are enmeshed yet not integrated into a coherent whole. Courts have approached this enmeshment with very different strategies, and I use examples from courts in the United Kingdom and the European Union to illustrate how they seek to shape, and cope with, the pluralist legal environment they inhabit (and help create). This is contrasted with the ways by which the EU's internal pluralism has been created and formed, reflecting similarities and differences in structures and judicial visions. The third step uses the case of the sanctions regime to continue the inquiry, begun in the previous chapter, into the stabilizing *vel* destabilizing force of pluralism. As we will see, pluralism appears here less as the cause of the relative instability of the overall sanctions regime than as an expression of underlying, political rather than institutional, obstacles to cooperation.

**I. THE TRANSFORMATION OF UN SANCTIONS ADMINISTRATION**

In the course of the last two decades, the character of ?UN sanctions has changed radically, and so have the administrative structure and legal framework in which they operate.[2](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-597) This is due in part to the increasing normalization of (p.155) economic enforcement measures.[3](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-598) During the Cold War, the UN Security Council adopted sanctions infrequently (only against Southern Rhodesia and South Africa), and their implementation was largely left to ad hoc, exceptional arrangements. Since 1990, in contrast, they have become a common tool of UN action—the Security Council has used them in more than twenty cases, and in 2010, eleven sanctions regimes were in place simultaneously, many of them involving a variety of particular measures, such as travel bans, asset freezes etc.[4](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-599) This has raised the challenge of implementation significantly, but it has also provided an impetus for the normalization and consolidation of structures, both within the UN and in member states.

Yet sanctions have not only increased in scope and extent, they have also undergone a transformation in substance. The sanctions regimes of the early 1990s were aimed at economically isolating the target countries and thereby exerting maximum pressure for behavioural change. Thus, in cases such as Yugoslavia, Haiti, and—most prominently—Iraq, the Security Council adopted ‘comprehensive’ economic measures, requiring member states to cut all economic relations with the countries concerned.[5](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-600) This had only limited success and disastrous humanitarian consequences, discrediting the sanctions for years and leading even then UN Secretary-General Boutros Ghali to call them a ‘blunt instrument’.[6](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-601) The Council responded with a phase of low activity, before it turned in the late 1990s from ‘comprehensive’ to ‘targeted’ (or, rather euphemistically, ‘smart’) sanctions. Rather than affecting the economy and population as a whole, these were designed to hit particular individuals by freezing their financial assets and banning them from travelling abroad.[7](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-602)

While alleviating humanitarian concerns, targeted sanctions raised doubts about their effectiveness, and round after round of expert consultations was (p.156) convened to tackle the issue.[8](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-603) Because the impact of these relatively light sanctions depends in large part on comprehensive implementation, the Security Council also stepped up its efforts to monitor and control how the measures were applied. This began with the creation of monitoring teams to identify shortcomings and, in some cases, actual violations; involved the establishment of expert groups to advise the Council's sanctions committees on the general design of the measures; and led to broader steps to improve states' capacity to implement their obligations on a practical level.[9](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-604) All this went furthest in the area of terrorism where the Council targeted hundreds of individuals and entities and also established, with the Counter-Terrorism Committee (CTC) and the Counter-Terrorism Executive Directorate (CTED), new bodies to help anchor counter-terrorist measures in member states' legal and administrative structures.[10](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-605)

As a result, the UN sanctions regime today bears little resemblance to the classical ways in which international law is created and implemented. First, of course, rules are made not by agreement and ratification of the states concerned, but by a fifteen-member body on the basis of majority voting. For most states, this means little influence on the shape of their obligations.[11](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-606) Secondly, states' freedom to determine the mode of implementation has become increasingly circumscribed, as the rules have become ever more precise and are concretized further by the sanctions committees and the CTC through monitoring and the development of best practices. What is more, the CTC, in its mission of capacity-building, conveys a distinctive vision of administrative organization as a basis for a state's ability to fulfill its obligations, thus providing a push for ‘good governance’ reform in many countries.[12](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-607) Thirdly, the turn to targeted sanctions has given Security Council (p.157) action itself an administrative character: individuals are directly affected by a public listing (at least in their reputation); and even insofar as member state implementation is necessary to give measures effect (as is the case for asset freezes and travel bans), states' action is reduced to a subordinate, non-discretionary role in the overall administrative machinery directed by the Council and its committees.[13](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-608)

This transformation has significantly reduced the distance between national and international law in this domain, and it has in practice led to an increasing enmeshment between those layers, a point I will return to in the next section. It has also shifted the focus of human rights concerns. The comprehensive sanctions of the 1990s had triggered critique mainly from the angle of economic and social rights, reflected in the fact that the UN Committee on Economic, Social and Cultural Rights issued a General Comment on the issue in 1997.[14](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-609) Given the transboundary nature of the problems and the difficult issues of causality and responsibility, the human rights critique faced serious obstacles at the time.[15](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-610) The focus shifted with the move to targeted sanctions as their effect on the designated individuals was intentional and more immediate, thus triggering interference with civil rights ranging from the protection of property to the right to privacy and free movement, and often raising concerns about due process and procedural rights.[16](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-611) As we will see, this new constellation brought the Security Council into the spotlight of constitutional and administrative lawyers and of domestic courts, normally unconcerned by phenomena beyond the national (or in case of Europe, EU) realm. This new attention is evidence of the growing linkages between the different layers of law and institutions, (p.158) and it seems to have played a part in the Security Council's growing awareness of, and eventual response to, the human rights critique.

Initially, the Council barely paid attention to those human rights issues. Regarding itself as a political, diplomatic body, it situated its sanctions regimes in the context of international security and intelligence rather than in that of administration and fair procedures.[17](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-612) Complaints about its designation of particular individuals, which intensified soon after it added many to its list of Al-Qaeda/Taliban targets after the attacks of 9/11, were thus dealt with in the typical diplomatic fashion of confidential intergovernmental approaches.[18](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-613) It took the Council until late 2002 to respond to increasing pressure and court cases in member states to establish a first procedure for delisting individuals.[19](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-614) Yet this procedure did not define the relevant standards or offer individuals access to the sanctions committee, and over the next few years, discontent among both non-governmental organizations (NGOs) and governments grew. It found reflection in the report of the UN High Level Panel on Threats, Challenges and Change in 2004,[20](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-615) and then also in the World Summit Outcome document in 2005, which called for ‘fair and clear procedures’ in sanctions administration.[21](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-616)

Pressure intensified in 2006 when the UN Secretary-General, a Special Rapporteur of the Commission on Human Rights, and eventually also the General Assembly called for procedural reforms and greater accountability.[22](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-617) (p.159) In response, the Security Council acknowledged the need for change, instituted a ‘focal point’ to which individuals could direct their request for delisting, and clarified some procedural standards.[23](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-618) The procedure was further strengthened in 2008,[24](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5%22%20%5Cl%20%22acprof-9780199228317-note-619) yet still without instituting any form of independent review or a true, effective opportunity for appeal by an individual. The decisions on listing and delisting continued to be taken by consensus in the Sanctions Committee and were not subject to outside scrutiny.[25](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-620) Unsurprisingly thus, the human rights critique did not go away, was taken up by the UN Human Rights Committee in the 2008 *Sayadi* case,[26](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-621) and vindicated by domestic courts, for example by the European Court of Justice in its famous *Kadi* judgment which I will discuss below in greater detail.[27](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-622) An English High Court judge found the procedure did ‘not begin to achieve fairness for the person who is listed’,[28](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-623) and a Canadian federal judge went so far as to state that the situation was ‘for a listed person not unlike that of Josef K. in Kafka's *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime’.[29](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-624)

Faced with those challenges and wary of further litigation in courts around the world, especially in Europe, the Security Council responded by delisting further individuals and instituting another round of reforms. It did not go as far as establishing an independent review panel, called for by many states and observers, but instead put into place an Ombudsperson competent to receive delisting requests, discuss them with members of the Sanctions Committee, (p.160) inquire into their merits, and present a report to the Committee as a basis for its decision.[30](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-625) In the interplay of increasing pressure and gradual concessions, however, this step is unlikely to be the last. Domestic courts, now aware of their influence, continue to press for more. The new UK Supreme Court, for one, ‘welcomed’ the improvements but still saw them as falling short of providing an effective judicial remedy.[31](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-626)

**II. SANCTIONS AMID A MULTIPLICITY OF LAWS**

The contestation over fair procedures in sanctions administration is part of the broader debate about the relationship of security and human rights that has regained intensity in the wake of the 9/11 attacks.[32](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-627) Its peculiarity derives in part from the fact that the different elements of this broader debate are reassembled here as a competition not just of countervailing principles within one legal order, but as a contest between legal orders the relationships between which are far from clear. The different institutions involved face the task not only of defining a substantive position but also of positioning themselves, and the legal order(s) of which they are part, vis-à-vis others, thereby engaging in far-reaching, principled argument. As we will see, different courts have responded to this challenge in very different ways, and quite a few of them have, in one way or another, sought to transcend the classical, dichotomous concepts of monism and dualism and tried to shape a suitable strategy for navigating in a world of plural, but heavily enmeshed, legal orders.

**1. The Enmeshment of Laws**

As I have pointed out in the introductory chapter, this enmeshment is a pervasive feature of global regulatory governance, triggering conceptualizations such as that of a ‘global administrative space’.[33](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-628) It is particularly visible in the UN sanctions regime where the classical separation between domestic and international law has come under severe pressure for functional reasons. For not only are Chapter VII measures of the Security Council binding, (p.161) they also require speedy implementation. The legislative process, which typically provides the link between international and domestic law by transforming one into the other, is ill-suited to this task—it is usually too slow to give sanctions rapid domestic effect; and it is also too cumbersome for issues that are often seen as technical and administrative in nature. Extending an arms embargo to yet another rebel group or geographic area, including yet another person on a target list, or establishing a travel ban for those responsible for yet another conflict are often matters of course, beyond political controversy once the Security Council has decided on them. But they require immediate impact to be effective, and executive implementation may appear as more adequate to the task.

As a result, the structures and institutions of domestic sanctions implementation have evolved significantly since the early 1990s.[34](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-629) Many countries have introduced framework legislation allowing for the executive transformation of Security Council decisions, taking parliaments out of the process or reducing them to an oversight role.[35](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-630) In other countries, the same effect is achieved on the basis of delegations contained in existing legislation on foreign trade or immigration.[36](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-631) Sometimes, legislation or governmental regulations even provide for the automatic transformation of certain sanctions decisions, as we shall see below in the case of the UK. Taken together, this amounts to a normalization of facilitated sanctions implementation through governmental or administrative bodies, resulting in an increasingly immediate effect of Security Council decisions in the domestic realm.[37](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-632)

An impressive example of the resulting maze of legal orders is a recent case in the UK courts, involving individuals hit by different sanctions regimes.[38](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-633) In our context, the case of *G* is the most instructive. Upon request of the UK (p.162) government, G had been listed by the Security Council's 1267 Committee[39](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-634) as suspected of supporting the Taliban or Al-Qaeda. As a result of a remarkable chain of legal instruments, this made him automatically subject to enforcement measures under UK law. These were based on the United Nations Act 1946 which grants the UK government wide implementation powers:

If…the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied…[40](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-635)

The government had made use of these far-reaching powers on many occasions and come to act routinely on this basis whenever the Security Council enacted new sanctions.[41](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-636) As regards Security Council action against terrorism, it had created an especially tight link. Its Al Qaida and Taliban (United Nations Measures) Order 2006 (AQO) subjected to financial measures every ‘designated person’, including *ipso facto* all persons listed by the Sanctions Committee, thus granting such listings direct effect in the UK legal order.[42](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-637) As a result, after his UN listing, G's bank accounts in the UK were frozen immediately.

When G sought to contest these measures in court, he learned that the AQO provided for judicial review on the merits only against designations by the Treasury, not against those automatically following from Security Council listings. Because of a lack of alternative channels of appeal in the UN context, this would have completely deprived G of meaningful review options. The Court of Appeal decided to reinterpret the AQO, despite its clear language, and make merits review available to G. Both the High Court and the Supreme Court found such a construction impossible and quashed the AQO for lack of effective review mechanisms.

(p.163) There is no need to examine the (in part quite convoluted) reasoning of the courts in detail, but it is important to highlight how multiple layers of law mattered for their decisions. Domestic and international law were not only intertwined on the sanctions side, they were also tightly linked on the opposite side, that of human rights. For a right to an effective remedy exists in UK law, apart from common law foundations, mainly on the basis of the Human Rights Act (HRA) which incorporates the European Convention on Human Rights (ECHR). In the interpretation of the House of Lords, the HRA does not ‘domesticate’ the Convention but refers to it as an international law document[43](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-638)—implying that international legal limits to Convention rights are transposed into UK law too. This also applies to the limits imposed by the UN Charter and especially its Article 103 which provides that in case of conflict, obligations under the Charter—including those created by the Security Council on the basis of its delegated powers—prevail over other international agreements. Thus, insofar as sanctions measures conflict with rights under the ECHR, the former enjoy primacy—and not only under international law, but because of the linkages, also as a matter of UK law.

Both the High Court and the Court of Appeal recognized this, but did not for this reason disregard Convention rights altogether. For the House of Lords had held in a previous judgment concerning detention in Iraq that, despite Article 103, such conflicts should as far as possible be resolved by reconciliation—by attempts at interpreting Security Council resolutions in a rights-friendly way and by using discretion in implementation in accordance with the ECHR.[44](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-639) In the present case, the lower courts regarded such a reconciliation as possible: the measures could be examined on the merits; only the remedy needed to be limited to avoid conflict. If the court found the complaint justified, it could thus not order the government to lift the asset freeze; it could only require it to pursue delisting in the sanctions committee.[45](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-640)

I have presented this case to highlight the entanglement of various layers of law. G's asset freeze is the result of a Security Council determination imported automatically into UK law and—through a designation by the European Commission—also into EU (and consequently domestic) law. And his remedies against it are based on a mélange of the common law, the UK (p.164) Human Rights Act and the ECHR, though these again oscillate between domestic and international law and find their limits in the primacy of the UN Charter (though ultimately only in the sovereignty of the UK parliament). The High Court and Court of Appeal grappled hard to structure their argument, and the ‘conciliation’ solution is certainly an attempt not to press the issues of principle—of hierarchies and distinctions between legal orders—too hard. This is typical English judicial style, but it also reflects the intricacies of the matter and a particular caution of the courts. They could have found in favour of merits-based judicial review also on the basis of the common law alone—in fact, much of the argument before the court turned on this issue. This would have avoided the difficulties with international law caused by the reliance on the HRA and the ECHR.

It is this common law course that the UK Supreme Court ultimately embarked upon. It recognized the limitations on HRA arguments because of Article 103 and decided not to address them pending clarification of the matter by the Grand Chamber of the European Court of Human Rights. Instead, it founded its judgment primarily on the common law principle of legality, which for serious interferences with certain rights requires a basis in parliamentary statute. In the view of the Supreme Court, the United Nations Act 1946 was not specific enough to provide such a basis; the AQO thus had to be quashed.

Though important for stressing (and clarifying) separation of powers issues, the Supreme Court judgment largely avoids the difficult issues at the intersection of the different layers of law. It decides the case on narrow grounds, in a minimalist fashion,[46](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5%22%20%5Cl%20%22acprof-9780199228317-note-641) and its main effect is to move the proceedings a step back, forcing the government to secure a more explicit legislative grounding. The government did so just two weeks after the judgment, at least in temporary fashion, and thus avoided non-compliance with UN resolutions.[47](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-642) But as the legislation merely re-enacts the orders quashed by the court, it raises the same substantive questions about the protection of rights and judicial review—questions left open by the Supreme Court, to be addressed in future adjudication. The 2010 judgment is so far little more than a warning shot.

Overall, thus, the UK courts have taken a cautious approach. They decided not to adopt the confrontational course of insisting on the supremacy of domestic rights which, as we shall see shortly, was taken by the European Court of Justice (ECJ). They instead either postponed a decision on the substantive issues (as the Supreme Court did) or situated their solution in the (p.165) midst of a pluralist web of legal orders. They thus acted more in the spirit the ECJ's Advocate-General, Miguel Maduro, had advocated in his opinion in the *Kadi* case:

In an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other's jurisdictional claims. As a result, the [ECJ] cannot always assert a monopoly on determining how certain fundamental interests ought to be reconciled.[48](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-643)

The enmeshment of different legal orders does not do away with their distinctive natures: they continue to rely on different sources, *Grundnormen*, and substantive principles. From a theoretical perspective, all those outside norms are not a necessary, only a contingent part of the UK's legal order—the UK could have refrained from an automaticity in listing and could have insisted on its autonomy in determining who is sanctioned and when. In practice, though, these options were hardly real in today's interwoven legal and political structure. Just as monism does not capture the distinctness of the parts of that order, dualism overstates their separation. What is far more interesting, then, are the efforts at coordination and distancing that characterize their relationships. The winding argument, the avoidance of statements of principle, and the quest for reconciliation we have observed in the UK courts is a reflection of precisely such an effort. It is the search for a judicial voice in a new, pluralist context.

**2. Pluralism and Principle in the Judicial Response to Sanctions**

Other courts have adopted a more principled stance on the structural questions involved. I cannot analyse all the relevant jurisprudence in detail here[49](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-644) and will instead focus on two decisions from the EU context that exemplify the opposing positions and help clarify the difficulties when courts undertake the task of determining the relationship between the different layers of law in a systematic way. They have also attracted the strongest political (p.166) attention, including by the 1267 Committee's Monitoring Team,[50](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5%22%20%5Cl%20%22acprof-9780199228317-note-645) and are thus worth analysing in some detail.

The contrasting judgments stem from the same proceedings in the EU courts, brought by, among others, Yassin Abdullah Kadi, a Saudi businessman whose European assets had been frozen following his listing by the 1267 Committee soon after the 9/11 attacks. As I have mentioned above, the transformation of Security Council decisions into EU law is not automatic; it requires a Commission regulation, which in Mr Kadi's case was adopted two days after the UN decision.[51](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-646) This regulation, together with the Council regulation on which it was based, formed the object of Mr Kadi's challenge in the European courts; he argued that he had been listed mistakenly, had no effective way of appealing this decision on the international level, and that his rights to a fair hearing and to effective review as well as his property rights were infringed.

The European Court of First Instance (CFI) approached the issue from a largely monist angle.[52](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-647) Because it constructs a comprehensive, hierarchically ordered system of which EU law is a part, it can also be characterized as a ‘constitutionalist’ approach.[53](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-648) For the CFI, even though the EU is not a member of the UN, the EC Treaty had to be read as limited by member states' obligations under the UN Charter. This followed from both general international law, which through Article 103 of the UN Charter established a primacy of the Charter over other obligations, and from the EC Treaty itself, which in Article 307 provides that pre-existing rights and obligations of members under international agreements shall not be affected by the Treaty's entry into force.[54](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-649) Moreover, the EU was now exercising powers previously exercised by member states and had entered into their obligations in this respect. The Court thus found

first, that the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very (p.167) Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.[55](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-650)

The hierarchy of norms under international law thus continued in EU law, and the CFI regarded an exercise of judicial review powers as contrary to the norms of UN law which enjoyed primacy. It therefore rejected the claim of the applicant that it should apply EU fundamental rights standards to the Commission's listing decision. However, it allowed for limited judicial review in order to establish whether the listing decision by the Security Council contravened higher norms of international law, namely *ius cogens*—this was possible in the Court's view because peremptory norms of international law also limited Security Council powers, and Security Council resolutions that violated them could accordingly not bind the EU or its member states so that the initial rationale against judicial review would no longer apply. Even though the CFI took a very generous view of what norms *ius cogens* encompassed, it eventually rejected the applicant's claims.

The recourse to peremptory norms and their extensive interpretation may have been a warning shot to the Security Council, indicating that despite the limited ambit of judicial review European courts might decide to intervene at some point.[56](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-651) But as with a largely parallel judgment by the Swiss Federal Court,[57](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-652) this threat was widely regarded as weak and the decision as an abdication of judicial power in the face of sanctions decisions of the Security Council.[58](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-653) This challenged some common alliances—human rights activists, typically much in favour of an internationalist, constitutionalist approach of the kind the CFI defended, were now very critical of that general stance, while those keen on security interests, usually more (p.168) nationally minded, grew fonder of an international law that played into their hands.[59](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-654)

Apart from this reconfiguration, the CFI decision follows conceptually predictable lines—in its clear, integrated construction of the global legal order it takes a largely monist turn, without grappling much with the tensions between different parts of the order or efforts at reconciling conflicting substantive rules. A greater awareness of these tensions can be found in the appeals judgment by the ECJ, a judgment that has sometimes been described as epitomizing a pluralist vision.[60](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-655) I will return later to the question whether it can indeed be described in these terms. Pluralism certainly was an explicit theme in the opinion of the ECJ's Advocate-General—unsurprisingly, as Miguel Maduro had long been a protagonist of pluralist, ‘counterpunctual’ conceptions of the European legal order.[61](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-656) In this opinion, however, pluralist sensitivities—as in the passage quoted in the previous section—do not engender conclusions different from those to be expected in a classical dualist setting. For Maduro gives pride of place to fundamental rights under European law and relegates international law to a place on the outside, largely irrelevant for decision-making. This is, as he emphasizes, because the Security Council decisions in question are out of sync with European understandings of rights:

the Court cannot, in deference to the views of…institutions [such as the Security Council], turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect. Respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them.[62](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-657)

In the end, this simply reiterates the dualist position:

The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can (p.169) permeate that legal order only under the conditions set by the constitutional principles of the Community.[63](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-658)

The freeze of Mr Kadi's assets in the EU is consequently assessed on the basis of the same criteria that would have been applied had no Security Council measure preceeded it—an entirely ‘domestic’ solution.

The judgment of the ECJ's Grand Chamber largely follows in this track, even if it is less explicit in its theoretical choices.[64](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-659) It draws a clear dividing line between EU law and international law, stressing the autonomy of the EU legal order in determining which international legal rules enter that order and at what place in the hierarchy of norms. The ECJ describes international law as important within the EU, for example as binding EU institutions in the exercise of their powers[65](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-660) and as possibly even trumping primary law in certain cases.[66](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-661) But it leaves no doubt that under no circumstances will international rules affect the fundamental, constitutional pillars of EU law:

Those provisions [on international law as part of EU law] cannot…be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.[67](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-662)

The Court thus acts—as it had been invited to do by the Advocate-General[68](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-663)—as a constitutional court, protecting the core of European law from internal and external challenge. This becomes clearest in the summarizing paragraph:

[T]he review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.[69](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-664)

The ECJ thus claims for itself the power to ‘ensure the review, in principle the full review’[70](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-665) of the acts that give the Security Council decisions effect, and (p.170) it softens the resulting blow to the international system only by emphasizing that the effect of its judgments are limited to the European legal order and do ‘not entail any challenge to the primacy of [the Security Council] resolution in international law’.[71](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-666) The two spheres are thus neatly divided, linked only by certain provisions of EU law that open it up to the outside world. Just as under many national constitutions, international law thus imported enters the domestic sphere below the constitutional level, trumping ordinary legislation, not constitutional guarantees.[72](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-667)

Unlike many constitutional courts, though, the ECJ leaves unclear whether and to what extent European standards of rights protection may be modified for the sake of international cooperation. Ever since the German Constitutional Court's first *Solange* judgment,[73](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-668) it has become a typical topos in constitutional adjudication to argue that insisting on full compliance of international institutions with the constitutional rules of *all* member states would unduly inhibit cooperative efforts, and that consequently domestic constitutions should be read as allowing for some flexibility. This approach has also been adopted by the European Court of Human Rights (ECtHR) which in a series of judgments has insisted that member states cannot evade their human rights obligations by transferring powers to international institutions, but that they do not have to ensure full compliance of these institutions with the ECHR, only a standard of ‘equivalent protection’. Where such equivalent protection is generally assured, the ECtHR would only exercise limited scrutiny of the particular acts of the institution in question—as it has accepted to do, for example, vis-à-vis the European Space Agency and the European Union itself, as we have seen in the discussion of the *Bosphorus* judgment in Chapter [4](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-4).[74](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-669)

The ECJ's stance towards the Security Council shows traces of such an approach, but no explicit endorsement. The Court states, for example, that:

the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee…cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community…. [S]uch immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC (p.171) Treaty, appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection.[75](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-670)

It then goes on to explain the shortcomings of the Sanctions Committee listing process, but it leaves unspecified what would have been the consequence of a fairer procedure. Would it have given rise to a ‘generalized immunity’? To a more limited level of scrutiny? And what level of rights protection would have triggered such a consequence—full compliance with EU fundamental rights, or some adjusted standard such as ‘equivalent protection’?

A judgment is not a scholarly treatise and one should not expect too much elaboration on theoretical questions that are not immediately necessary for deciding the case at hand. Commentators disagree on how to interpret the Court's ‘somewhat cryptic’[76](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-671) statements: some believe they indicate a *Solange*-style approach;[77](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-672) others see them as rejecting it.[78](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-673) It is probably best to understand them as deliberately vague, leaving open the question of whether, and under what conditions, the Court may in the future practise deference to the Security Council or other international institutions with binding powers.

Apart from this point, though, the ECJ's approach in *Kadi* is entirely domestic—as in the case of the Advocate-General's opinion, the result does not seem any different from what it would have been had an isolated EU measure been challenged.[79](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-674) It is not a strictly dualist stance because in the reading of the Court, certain obligations under international law form part of the European legal order and even trump secondary Community law. But it is clear that the impact of international law is controlled solely by EU law itself, and insofar as EU law does not import it or imposes limits on its application, international law is of no relevance to the Court. On a theoretical level, this is not unlike what we have found to be the situation in the UK. But in their judicial approaches, the ECJ and the UK courts are worlds apart: while the latter actively seek (or, in the Supreme Court's case, allow for) ways to accommodate the positions of different layers of law, the former insists on the supremacy of European law in its sphere of jurisdiction, and (p.172) the interwovenness of the parts of the global legal order does not really enter the picture.[80](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-675)

The ECJ's judgment nevertheless fits into an overall pluralist structure, one that is characterized by the coexistence of different legal orders, all with their own foundational norms and substantive commitments.[81](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-676) For it is typical for pluralism that relations with other orders are assessed and governed by each order itself—*how* they are governed may then vary widely.[82](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-677) The ECJ's stance may be characterized as one of distance, that of the UK courts as one of greater proximity. All of them—unlike the CFI that tried to construct EU law and international law as part of one, overarching legal order with clear hierarchies and conflict rules—devise frameworks that interrelate foundational difference with practical interaction among different orders. Their strategies for this differ, and they may indeed be *strategies*: attempts at influencing the evolution of other orders. Yet these strategies are embedded in broader understandings of who should enjoy ultimate supremacy and how far cooperation with the outside should go.

**3. Europe's Internal Pluralism**

The discussion so far has made it seem as if international law were the only ‘outside’ the ECJ needed to position itself towards. It was certainly the only explicit one in *Kadi*. But in the background—both practically and theoretically—loomed others that could also have created difficulties for the court: domestic constitutional orders. As Jo Murkens has highlighted, the strong insistence on fundamental rights and on the autonomy of EU law can be understood as an attempt by the ECJ to ward off potential challenges by national courts. For had it let the contested EU regulation stand, domestic constitutional courts may have seen it as their duty to intervene and protect the human rights anchored in their constitutions, challenging the supremacy of European law in the process.[83](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-678)

This was no merely academic risk; after all, the ECJ has been under the supervision of domestic courts ever since the German Constitutional Court, in the above-mentioned *Solange* judgment of 1974, announced that it would (p.173) scrutinize European Community acts for fundamental rights violations unless the EC developed a satisfactory system of human rights protection.[84](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-679) Twelve years later, the German court recognized the progress the ECJ had achieved and retreated to a role in the background, without however relinquishing its right to resume closer scrutiny should the situation change.[85](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-680) And from time to time, it has fired warning shots, also outside the area of fundamental rights, to rein the EU in when it appeared to have gone too far—the notorious *Maastricht* judgment is only the most prominent among them.[86](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-681)

The German court was not alone with this stance; other constitutional courts followed suit and reinforced the challenge to the ECJ.[87](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-682) The conflict was, of course, about much more than the correct interpretation of rights—it was about who was entitled to decide on the right interpretation (national or European judges) and what legal order was ultimately controlling (national or European). For the national courts, EU law derived its foundation from the various national legal orders of member states and had not been able to cut this umbilical cord; it was up to the member states to define the conditions and limits for EU competences and for national courts to police that these limits, contained in national constitutions and in the treaties by which powers had been transferred, were respected.

From this perspective, the supremacy of European law, already claimed by the ECJ in the 1960s, had to appear as conditional. This did not change when the 2004 draft constitutional treaty sought to anchor supremacy explicitly.[88](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-683) The treaty left some room for the argument that the supremacy (p.174) clause only applied to the ordinary law of member states, not to their constitutions. And because of an additional declaration to the effect that the clause merely reflected the jurisprudence of the ECJ, it was unclear to what extent it could be interpreted as a major element of change.[89](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-684) Doubts in this respect were confirmed when both the French *Conseil constitutionnel* and the Spanish *Tribunal Constitucional* ruled that, even under the Constitutional Treaty, EU law remained subject to national constitutional law and that the supremacy clause was only of limited scope.[90](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-685) This position was reinforced when, after the failure of the constitutional treaty, a series of highest national courts fired warning shots by challenging the legislation implementing the European arrest warrant.[91](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-686) The Lisbon Treaty, then, does not contain a supremacy clause; it is only accompanied by a declaration that refers to the settled case law on the primacy of EU law.[92](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-687) The treaty thus explicitly does not move beyond the status quo.[93](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-688)

Awareness had already risen in the 1990s, especially after the German Constitutional Court's *Maastricht* judgment, of the fact that the opposing (p.175) positions on supremacy were not provisional, accidental, or merely strategic but reflected fundamental convictions of the different courts involved—convictions that also had a basis in popular attitudes to the European Union.[94](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-689) As I have mentioned in Chapter [3](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-3), it was Neil MacCormick who sought to capture this overall picture by understanding the conflicting views as positions that, in the contexts within which the institutions operated, were entirely rational.[95](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-690) The conflict was thus not merely about interpretation within one legal order, it reflected a clash between different systems with different starting points. It was thus also not amenable to a legal solution, for there was no independent standpoint that could have provided a decision—there were only the competing, fundamentally diverging perspectives of the different systems, which could at most be pragmatically bridged for the solution of concrete problems. The overall structure was thus pluralist.

MacCormick's assessment later underwent some change, but his initial conception still proved highly influential.[96](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-691) It has provided a counterpart to interpretations of EU law in constitutional, hierarchically ordered terms on the one hand, and to understandings in a classical international law framework on the other. These have significant downsides: the latter cannot quite capture the level of integration the European legal order has achieved; the former, constitutional reading downplays the fundamental tension between the supremacy claims of the competing levels, and ignores the absence of an accepted, overarching frame to resolve it. MacCormick's later view came in fact close to such a constitutional interpretation, understanding international law as the frame within which national and EU law interacted.[97](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-692) But this supposed frame was heavily contested itself: one key element in the dispute over supremacy was whether or not EU law had cut the link to its international law origins—and to the sovereignty of member states these origins implied.

(p.176) The pluralist reading of European law has attracted much normative critique, especially from a rule-of-law perspective, which I will return to in Chapter [8](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-8). In analytical terms, however, critics of pluralism have had less resonance, and they have had difficulties integrating the supremacy contest, with its multiplicity of systemic perspectives, into alternative frameworks.[98](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-693) For example, the attempt to rationalize it as a form of ‘civil disobedience’ on the part of national courts[99](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-694) is not overly plausible when it is in fact the ECJ that the national courts accuse of disobedience.

The value of the pluralist interpretation becomes even clearer when the European example is situated in the broader global context, as we have seen in this chapter. For the contestation between national law, European law and both security and human rights regimes under international law can hardly be captured in the well-ordered terms constitutionalist frameworks of whatever kind are built upon. Hierarchies are here even more contested than in the regional context, and Europe's internal pluralism (which of course also extends to the pluralism of its human rights regime, as the previous chapter has shown) then becomes a piece in a broader transnational mosaic,[100](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-695) in the interplay between radically diverging visions of what order is ultimately controlling. And just like in Europe, the global pluralist structure provides the backdrop to a strategic positioning of actors—courts and political bodies—seeking to influence each other and ward off fundamental challenges.

**III. PLURALISM VS EFFECTIVENESS IN SECURITY GOVERNANCE?**

Pluralism may be attractive as an account of the current structure of postnational governance, in Europe and beyond, but it still faces serious normative concerns, and in particular unease about its ability to secure stability and effectiveness. These need not always pose problems, as we have seen in the previous chapter on European human rights, but in that case stability might simply have been a result of benign circumstances. The present chapter provides a harder test: international security cooperation operates in far less favourable conditions than the European human rights regime, especially as regards the homogeneity of the countries at its core.

**(p.177) 1. The Security Council's Authority in a Pluralist Order**

Because the Security Council's authority rests on relatively weak pillars, the international security regime is highly vulnerable to destabilizing factors. In the case of sanctions against terrorism, the Council benefits from the support—and enforcement efforts—of the United States, but this support alone does not guarantee compliance by other states; in fact, too close an alignment with the powerful might be harmful to the Council's efforts to win acceptance from the rest of the international community.[101](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-696) This acceptance, as far as it goes,[102](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5%22%20%5Cl%20%22acprof-9780199228317-note-697) can most plausibly be explained on a rationalist basis as a function of the benefits the Security Council provides.[103](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-698) On the one hand, it helps solve cooperation problems on urgent security issues, by establishing a focal point for the terms of cooperation and by enforcing those terms and preventing defection.[104](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-699) That this should be the task of the Council and not some other institutional arrangement may be due to path-dependence and a lack of realistic alternatives, but it is possibly due also to the procedural benefits many states derive from it compared to more informal, ad hoc means of coordination. Unlike less institutionalized options, the Security Council provides at least some restraint on the most powerful states: by its more inclusive membership, by the modest degree of transparency it offers, and perhaps also by a demand for justifiying security policies in its midst.[105](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-700) Despite the inequalities in composition and voting power, most states derive advantages (however modest) from the Council's centrality in the global security regime.

The resulting authority of the Council is thin; it is subject to a recalculation of interests in every single case. Some governments may have developed (p.178) a habit of implementing Security Council decisions, but many have not; and there is uneven resonance among publics for the proposition that Council decisions ought to be generally obeyed.[106](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-701) In many sanctions regimes, even reporting duties are only followed reluctantly, and further obligations are implemented unevenly. If the Council possesses anything resembling legitimacy—a generalized acceptance stemming from a sense of appropriateness—it is very fragile.[107](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-702)

Pluralism might weaken the authority of the Council further. By maintaining a plurality of parallel legal orders, it seems to undermine the hierarchy the UN Charter establishes and to open up paths to justify non-compliance. If this facilitates violations of Council decisions, it could set in motion a cascade of further violations—too many defections are likely to undercut the utility of the regime even for those willing to cooperate. And as it also allows space for alternative normative frameworks, it might make attempts at delegitimation easier—and may damage what little legitimacy the Security Council enjoys.

Such effects are indeed visible in our context. Reliable data about compliance rates are not available, but there is impressionistic evidence about attitudes towards the global security regime. For example, the 1267 Committee's monitoring team as well as outside observers have noted an increasing reluctance of governments to propose new names for inclusion in the sanctions list, and more generally a dwindling of support.[108](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-703) This may stem from a lack of trust in the effectiveness of the regime, but it may also be due to (p.179) delegitimating effects[109](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-704)—many governments had raised concerns about the lack of procedural guarantees in the listing and delisting process.[110](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-705) The monitoring team closely observes legal challenges to the sanctions regime, and after the ECJ's judgment in *Kadi*, it feared that other courts might follow suit. Its coordinator even described the court's stance as ‘a major challenge to the use of sanctions as an international counterterrorism tool’.[111](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-706)

**2. Destabilizing Pluralism?**

Whether those adverse effects for the overall regime are due to the pluralist structure, though, may be doubted. First, possibilities for judicial resistance do not arise solely in a pluralist order; they are also present in constitutional settings. Courts could have found the sanctions regime wanting even on the basis of a pre-eminence of international law and the UN Charter. They could have taken the reconciliation approach of the lower English courts further and interpreted Security Council resolutions in conformity with the Charter's emphasis on human rights in its purposes and principles. This would have posed a limit on the 1267 Committee's use of its delegated powers when establishing procedural guidelines.[112](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-707) Courts could also have focused on the remaining discretion of governments—as the UN Human Rights Committee (HRC) did when, in late 2008, it found that Belgium had violated the International Covenant on Civil and Political Rights in the *Sayadi* case. In the HRC's view, Belgium had enjoyed considerable freedom in deciding whom to put forward for listing, and its listing proposal, combined with later enforcement measures, triggered the government's responsibility under the Covenant.[113](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-708)

(p.180) Secondly, resistance by courts in a pluralist setting does not need to lead to non-compliance. This has been obvious in the judgments of the English Court of Appeal—which limited potential remedies to the pursuit of delisting requests by the government—and the UK Supreme Court, which only insisted that parliament, rather than the executive, provide the legal basis. Because of an immediate legislative reaction, non-compliance did not become a serious issue.[114](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-709) The same is true for the ECJ. The *Kadi* decision did not ask the EU organs to violate sanctions obligations; it only required them to establish a procedure through which targeted individuals could make their views heard and potentially contest a decision to place them under sanctions.[115](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-710) In the case at hand, Mr Kadi was subsequently offered such a hearing; as could be expected, the Commission did not change its views and renewed his listing soon after.[116](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-711) The EU's broader response to the judgment does not go any further: the amended European listing procedure only provides for a communication of the reasons as well as an opportunity for the affected individial or entity to file observations, resulting in a review by the Commission of its decision.[117](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-712) Whether this will be sufficient in the eyes of the courts remains to be seen; Mr Kadi has already challenged the Commission's relisting decision in the European courts.[118](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-713)

This response by the EU's political bodies has been criticized as half-hearted, but it is not clear that the ECJ had required more from them, and we also do not know whether in the future European courts will subject the merits of future listing decisions to particularly strict scrutiny.[119](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-714) Thus, even though it came with much fanfare and broad assertions of principle, the *Kadi* judgment's actual consequences may be less far-reaching. This would fit with the split between principle and pragmatism we have observed in courts' positions in the previous chapter, and it also corresponds with the general observation that courts rarely mount serious challenges to the (p.181) political branches in areas as sensitive as security and foreign affairs.[120](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-715) If they have done so increasingly in recent times, this may have been a reaction to greater transnational cooperation among executives and the result of increased coordination among courts from different countries in checking them.[121](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-716) In this case, too, the ECJ did not make a solitary move—as mentioned above, its position formed part of a mounting critique from different directions. Institutionally, it might have gone further than earlier challenges; but as a matter of substance, it gave expression to a point of view shared by many UN members and especially by European governments, which had raised the issue consistently in the Security Council.[122](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-717) This is unlikely to be accidental—courts typically respond to public opinion in one way or the other.[123](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-718) Insofar as pluralism favours challenges by courts, these challenges are thus unlikely to be too frequent.[124](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-719) They are likely to arise (and to be effective) mainly when they are part of a broader web of normative critiques—critiques that pose a challenge to the global security regime in any case, regardless of the institutional structure.[125](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-720)

The pluralist structure may thus be seen as a reflection of underlying problems rather than the problem itself. This is also suggested by the fact that where hierarchical structures are formally available, they are typically left unused. In the counter-terrorism context, this is most obvious in (p.182) the Security Council's approach to the implementation of Resolution 1373 (2001), which had established general obligations of member states soon after the attacks of 9/11. The resolution was unprecedented in its assertion of legislative authority beyond a particular country or situation,[126](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-721) but its implementation followed far less hierarchical lines.[127](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-722) Even though coercive means were at the disposal of the Security Council, its Counter-Terrorism Committee deliberately adopted a cautious, cooperative approach. It monitors implementation progress on the basis of member state reports, seeks to detect areas where they require assistance with capacity-building, and has defined best practices for applying the vague norms contained in the original resolution. It has not taken up suggestions to use more confrontational means, such as ‘naming and shaming’ non-complying states, apparently (at least in part) out of concern that this might undermine the generally positive attitude of member states towards implementation.[128](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-723)

The approach to implementation in the Al-Qaeda/Taliban context has been somewhat less cautious—necessarily so, as implementation requirements are more concrete and failure to comply can easily lead to gaps that undermine the sanctions more broadly, especially as regards asset freezes. Yet here, too, the Security Council has avoided open confrontation. The first monitoring team of the 1267 Committee, for example, stirred controversy for its ‘naming and shaming’ attitude and was soon replaced by the current, so-called Analytical Support and Sanctions Monitoring Team.[129](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-724) And here, too, a main focus is on capacity-building and the solution of technical obstacles to implementation, rather than on identifying deliberate violations.[130](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-725)

The Council committees have been criticized for this non-confrontational stance,[131](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5%22%20%5Cl%20%22acprof-9780199228317-note-726) but it brings into relief the political constraints they face. Even where hierarchical tools exist, normative and prudential reasons as well as (p.183) disagreements within the Council seriously limit their utility. In a highly diverse polity, cooperative network governance seems to be preferred over hierarchical approaches, regardless of formal institutional possibilities.[132](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-727) Pluralism is an institutional expression of that accommodative stance, and an order along constitutional, hierarchical lines might not be more effective in practice as long as it does not resonate better with the shape of the global polity. The real obstacles to stable and effective cooperation here are political and societal, not institutional.

**3. Pluralism and Regime Design**

Overcoming the obstacles to stability is not easy in any global institutional setting, but a pluralist order may have certain advantages in this respect. We have just seen the risks of friction in the international security regime if hierarchical tools are actually used; pluralism's push for accommodation may reduce this risk somewhat.

**Change**

A pluralist order might also help to tackle the challenge of institutional change. In classical international law, change faces high hurdles because of widespread unanimity requirements; replacing it with more effective, majoritarian amendment processes, however, would provoke not only political resistance but also raise normative concerns. Requiring all states' consent to change may be impractical, but ignoring states' objections risks neglecting their well-grounded claim for political autonomy.[133](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-728) In Chapter [3](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-3) I argued that pluralism helps steer a middle course between those positions—one that does not grant ultimate authority to any collective or process, but can help bring the competing visions into an informal balance.[134](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-729) In the sanctions example we can observe how this might work in practice. Litigation in member states and in the EU courts has very likely contributed to the procedural improvements in the listing process and may well instigate further change.[135](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-730) But it is not formally relevant to the Security Council and cannot *determine* the outcome; the practical result is one of (limited) convergence on the observance of certain due process standards.

(p.184) This accommodation is not an arbitrary process: as we have seen, the impact of a challenge depends on a number of political conditions, including the weight of the underlying normative concerns in the polity from which they emanate and the extent to which they are shared more broadly in the international community. Litigation around sanctions received attention because it was part of a broader movement for change. This has been similar in the development of pluralism within the EU: the rights challenge launched by the German Constitutional Court against the ECJ reflected mounting concerns over a lack of fundamental rights protection in the ever more powerful European Communities, and as it was supported by political initiatives as well as courts in other countries, it helped drive institutional change. Such change would not have been impossible in a constitutionalist order, yet pluralism facilitated it by allowing recourse to normative resources that had broad resonance politically but only particularistic status legally: rights guarantees contained in member state constitutions. Pluralism, unlike constitutionalism, allowed for the full mobilization of this resource as a legal, not only political tool.

**Signals**

If pluralism opens up avenues for change, it might also enhance regime design in other ways. For example, it may allow for more reliable information about preferences and their strength.[136](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-731) In global regulatory regimes, signalling is typically limited to the positions of governments and often occurs only at the stage of regime design. Governments not taking part in the design process as well as other actors are largely excluded, and the classical processes of international law and organization allow for less signalling at later stages in the life of a regime. This is especially true when later decisions are taken by bodies with limited membership. As the regime changes, though, it risks becoming unstable if it clashes with strong preferences of excluded actors. This is particularly likely if it goes against entrenched positions of certain domestic actors. The standpoint of domestic parliaments, courts, interest groups, or societies more broadly will remain highly relevant in powerful states that can employ two-level games to their advantage. In most countries, though, they will matter far less in foreign policy decision-making than in the course of domestic politics. As global regimes impact further on internal affairs, this will cause increasing friction as these actors see themselves being sidelined and may seek to undermine global (p.185) decisions.[137](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-732) A pluralist order might then be a vehicle for institutionalized signalling of the weight of their interests or values.[138](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-733)

I will return to this issue more fully in Chapter [7](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-7), but the present case presents a good example. As we have seen, procedural safeguards in sanctions administration were an important issue for a number of states, and they brought it up repeatedly in the Security Council and pushed it as part of processes of sanctions improvement. On the international level, they could not press the issue too hard if they wanted to be seen as committed to the overall sanctions regime; and because of the decision-making practices in the Council, they did not manage to achieve decisive successes there.[139](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-734) The degree of entrenchment the underlying values enjoyed domestically—their constitutional status—could not be brought to bear in this international process, but the actors charged with defending them domestically—mainly courts—took up the challenge. The pluralist setting facilitated this because, unlike a constitutionalist order, it allowed for a primary emphasis on domestic values and rules.

One might not find this result satisfactory, and one would certainly not want all domestically entrenched interests to have a decisive impact on the global level; otherwise, cooperation would be seriously hampered. But as the global and the domestic planes are ever further entangled, there is a distinct need for processes by which the guiding values of both can communicate with each other. I have discussed this challenge already in Chapter [1](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-1). Moreover, as I have noted earlier in the present chapter, there are serious political constraints on courts' assertions of overriding interests, which will typically limit them to exceptional cases. But when these constraints are overcome and a certain value has sufficient resonance to ground a judicial challenge, one can usually assume that the international regime has an interest in taking note of it—it is typically a signal of a broader problem for the regime, an indicator of a resistance that might spread further and cause significant friction.

**Power**

Even if this is true, such opportunities for institutional resistance may be distributed too asymmetrically to make pluralism an attractive option. (p.186) Eyal Benvenisti and George Downs suggest that powerful states can typically make better use of the structures and tools of a fragmented order, for example by forum-shopping between competing regimes.[140](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-735) I will take this challenge up in greater detail in Chapter [7](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-7); suffice it to note here that in the present context, which is primarily about the heterarchical relations between domestic, regional, and global levels of governance, this conclusion is not so easily drawn. Judicial challenges naturally have a greater impact when they originate from powerful states, and it is not accidental that it was an attack from a court of the EU, one of the world's most influential players, that received the greatest attention in the UN. Likewise, in the pluralist interplay about rights within the European Union, the most influential domestic player has been the constitutional court of Germany—not exactly a negligible force in EU politics. Yet in the sanctions context, litigation in other countries has gone far from unnoticed, and challenges in a number of countries—especially in Turkey and Pakistan—have been followed with a keen interest, even if none of them have ultimately been successful so far.[141](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-736) Moreover, the ECJ's move was embedded in a political process that reached well beyond Europe—a number of other countries, among them Mexico and Brazil, had prominently pursued the cause of procedural safeguards[142](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-737), and the 1267 Committee noted in 2005 that more than fifty countries had voiced similar concerns about the listing process.[143](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-note-738) And those European countries that were most vocal about the issue—Germany, Sweden, and Switzerland—are not (all) among the strongest players in or around the Security Council.

The pluralist interaction in this case presented an indirect challenge to the dominant Council members—the US, Russia, and China—who had sought to preserve the Council's unfettered discretion in security affairs. Rather than preventing alliances from being formed,[144](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5%22%20%5Cl%20%22acprof-9780199228317-note-739) it allowed for the creation of coalitions excluded in the formal, institutional setting of the Security Council. A pluralist order may not be free from problems of power; but as (p.187) we can see here, it can at times serve as a counterweight to institutionalized dominance.

**IV. CONCLUSION**

There is little doubt that in an ideal world constitutionalism would be the best option for structuring global law. It would provide us with a reasoned framework in which different institutions would fulfil important collective functions within the bounds of clearly delimited competences. Common values would be given expression in constitutional guarantees, to be enforced by courts on different levels. This would not eliminate conflicts, but it would channel them into civilized, institutional mechanisms and often into legal solutions, aspiring to coherence and justification and eschewing the vagaries of politics.

Yet the world is not ideal, and our models of order have to cope with the actual constraints politics and social structures on the global level impose on us. It may not quite be the world of devils Immanuel Kant wanted to make his proposals fit for,[145](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5%22%20%5Cl%20%22acprof-9780199228317-note-740) but it is still one in which radical disagreement and enormous power differentials are central features. In this context, justice and stability are not easily achieved, or even approximated; and institutional structures will not be able to make more than a limited contribution to their pursuit. Our models of order will always be non-ideal, and rather than measuring them against ideal standards, we will have to compare actually available alternatives, knowing that the best will be the one with the least flaws.

This chapter has tried to illuminate what structures emerge and how they fare in the conditions of global politics using the example of the UN sanctions regime and the struggle over due process guarantees in it. This is not as benign a case as the one in the previous chapter; on the contrary, it epitomizes the extent of the political challenges on the global level. These challenges are here encapsulated in the tension between a strong interest in effective security cooperation and the far-reaching disagreements among countries and institutions about the right balance between security concerns and the protection of fundamental rights.

As we have seen, this tension has led to a characteristic process of approximation and distancing between various layers of law and politics. The imperative of security cooperation has brought these layers closer together, creating an enmeshment of legal orders in the shaping and implementation of the (p.188) sanctions regime. But the differences in values have also led to attempts to re-establish greater distance between the layers and thus a certain degree of political autonomy. The resulting maze is best characterized neither as monist or dualist but as pluralist—as deeply entangled yet not integrated into one coherent whole. Within that framework, there is space for widely diverging conceptions of the shape of this entanglement, as we have seen in the approaches of the lower English courts, on the one hand, and the European Court of Justice, on the other. While the UK courts framed their challenge to the overall sanctions regime as an attempt at reconciling the countervailing approaches of the different levels of law, the ECJ conceived its challenge as based solely on the European legal order, thus insisting on distance in the face of ever greater enmeshment.

Neither of these approaches may appear satisfying from a constitutionalist perspective, but they pose fewer problems than is usually assumed. As we have seen, the problems with stability and effectiveness, which the UN sanctions regime undoubtedly has, stem from political and societal conditions pluralist and constitutionalist orders face alike—conditions that in most circumstances favour networked, cooperative approaches over hierarchical decision-making styles. Pluralism also has distinct advantages: it opens up avenues for change that otherwise do not exist and are difficult, if not impossible, to establish. And it allows for institutionalized signals about actual and potential resistance that any regime must be interested in receiving in order to ensure its longer term stability.

Pluralism is not without flaws, but its openness and contestatory elements perform important functions in today's global order. We have arrived at a point where political and functional needs bar a return to the old order of international law in which difference was processed through consent-based law-making and strictly domestic mechanisms of implementation. Yet difference remains strong, and pluralism's open architecture helps bridge it to some extent. It helps to bring the diverging viewpoints, the universal and the many particulars, into communication—without, however, favouring one over the other or even seeking to merge all of them into one.

**Notes:**

([1](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-596)) C Schmitt, *Verfassungslehre*, 9th edn, Berlin: Duncker & Humblot, [1928] 2003, 375–9.

([2](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-597)) For an overview of the evolution of the UN sanctions regime, see D Cortright & G A Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Boulder, CO: Lynne Rienner, 2000; D Cortright, G A Lopez, & L Gerber-Stellingwerf, ‘The Sanctions Era: Themes and Trends in UN Security Council Sanctions since 1990’ in V Lowe et al (eds), *The United Nations Security Council and War*, Oxford: Oxford University Press, 2008, 205–25. On the legal issues involved, see J A Frowein & N Krisch, ‘Article 41’ in B Simma et al (eds), *The United Nations Charter: A Commentary*, 2nd edn, Oxford: Oxford University Press, 2002, 735–49; J M Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press, 2007.

([3](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-598)) ‘Sanctions’ and ‘enforcement measures’ are used here interchangeably, though the latter term is a better characterization in the UN context; see H Kelsen, *The Law of the United Nations*, London: Stevens & Sons, 1950, 724–5, 732–7.

([4](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-599)) Cf 〈<http://www.un.org/sc/committees/>〉. See also the survey of sanctions regimes in Farrall, *UN Sanctions*, Appendix 2.

([5](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-600)) See, eg, SC Res 661 (1990), 6 August 1990, on Iraq.

([6](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-601)) *Supplement to an Agenda for Peace*, UN Doc A/50/60–S/1995/1, 3 January 1995, para 70.

([7](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-602)) See, eg, SC Res 1173 (1998), 12 June 1998, on Angola; more generally D Cortright & G A Lopez (eds), *Smart Sanctions: Targeting Economic Statecraft*, Lanham, MD: Rowman & Littlefield, 2002.

([8](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-603)) See: 〈<http://www.watsoninstitute.org/tfs/CD/sanc.html>〉.

([9](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-604)) See Farrall, *UN Sanctions*, 163–80, for a survey of the different bodies created.

([10](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-605)) See N Krisch, ‘The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council’ in C Walter et al (eds), *Terrorism as a Challenge for National and International Law*, Berlin/Heidelberg: Springer Verlag, 2004, 879–908; also E Rosand, ‘Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism’, *American Journal of International Law* 97 (2003), 333–41; E Rosand, ‘The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions’, *American Journal of International Law* 98 (2004), 745–63.

([11](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-606)) On the ‘hegemonic’ character of much of Security Council-made law, J E Alvarez, ‘Hegemonic International Law Revisited’, *American Journal of International Law* 97 (2003), 873–88.

([12](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-607)) D Cortright et al, ‘Global Cooperation Against Terrorism: Evaluating the Counter-Terrorism Committee’ in D Cortright & G A Lopez (eds), *Uniting Against Terror: Cooperative Nonmilitary Responses to the Global Terrorist Threat*, Cambridge, MA: MIT Press, 2007, 23–50 at 37–9.

([13](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-608)) On the concept of a global administrative space, and on understanding global governance as administration, see B Kingsbury, N Krisch, & R B Stewart, ‘The Emergence of Global Administrative Law’, *Law & Contemporary Problems* 68:3 (2005), 15–61. On the administrative turn of the Council, see Krisch, ‘Rise and Fall’.

([14](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-609)) UN Committee on Economic, Social and Cultural Rights, *General Comment 8: The relationship between economic sanctions and the respect for economic, social and cultural rights*, UN Doc E/C.12/1997/8, 12 December 1997.

([15](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-610)) But see W M Reisman & D L Stenvick, ‘The Applicability of International Law Standards to United Nations Economic Sanctions Programmes’, *European Journal of International Law* 9 (1998), 86–141.

([16](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-611)) See the discussion of affected rights in P Gutherie, ‘Security Council Sanctions and the Protection of Individual Rights’, *NYU Annual Survey of American Law* 60 (2004), 491–541 at 499–511.

([17](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-612)) On this contrast with a focus on transparency, see D Hovell, ‘The Deliberative Deficit: Transparency, Access to Information and UN Sanctions’ in J Farrall & K Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World*, Cambridge: Cambridge University Press, 2009, 92–122.

([18](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-613)) On an early case, see P Cramér, ‘Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council’ in E de Wet & A Nollkaemper (eds), *Review of the Security Council by Member States*, Antwerp: Intersentia, 2003, 85–106.

([19](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-614)) On the developments summarized in this paragraph, see, eg, M Kanetake, ‘Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee’, *Max Planck Yearbook of United Nations Law* 12 (2008), 113–75 at 142–64; M Heupel, ‘Multilateral sanctions against terror suspects and the violation of due process standards’, *International Affairs* 85 (2009), 307–21.

([20](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-615)) High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN Doc A/59/565, 2 December 2004, para 152, available at: 〈<http://www.un.org/secureworld/>〉.

([21](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-616)) General Assembly Res 60/1, 24 October 2005, para 109.

([22](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-617)) See Report of the UN Secretary-General, *Uniting against terrorism: recommendations for a global counter-terrorism strategy*, UN Doc A/60/825, 27 April 2006, para 42; *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc A/61/267, 16 August 2006, paras 38–41; General Assembly Res 60/288, *The United Nations Global Counter-Terrorism Strategy*, 20 September 2006, Annex: Plan of action, Part II, para 15.

([23](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-618)) SC Res 1730 (2006), 19 December 2006; 1735 (2006), 22 December 2006.

([24](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-619)) SC Res 1822 (2008), 30 June 2008.

([25](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-620)) The procedure is laid out in the Guidelines of the Committee administering the sanctions against Al-Qaeda and the Taliban (1267 Committee), 〈<http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>〉.

([26](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-621)) UN Human Rights Committee, Views concerning Communication no 1472/2006, *Sayadi and Vinck v Belgium*, 22 October 2008, UN Doc CCPR/C/94/D/1472/2006, 29 December 2008.

([27](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-622)) See Section II.2 below.

([28](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-623)) England and Wales High Court, Queen's Bench Division, Administrative Court, Judgment of 24 April 2008, *A, K, M, Q & G v HM Treasury* [2008] EWHC 869 (Admin), para 18.

([29](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-624)) Federal Court of Canada, Judgment of 4 June 2009, *Abousfian Abdelrazik v Minister of Foreign Affairs*, 2009 FC 580, para 53.

([30](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-625)) SC Res 1904 (2009), 17 December 2009. For a discussion of the different reform options, see the *Tenth Report of the Analytical Support and Sanctions Implementation Monitoring Team*, UN Doc S/2009/502, 2 October 2009, paras 34–54.

([31](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-626)) UK Supreme Court, Judgment of 27 January 2010, *HM Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2, paras 78 (Lord Hope), 239 (Lord Mance).

([32](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-627)) See, eg, B J Goold & L Lazarus (eds), *Security and Human Rights*, Oxford: Hart Publishing, 2007.

([33](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-628)) See Chapter 1, II, and Kingsbury, Krisch, & Stewart, ‘Emergence of GAL’.

([34](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-629)) See the overview in V Gowlland-Debbas, ‘Implementing Sanctions Resolutions in Domestic Law’ in V Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, The Hague: Martinus Nijhoff, 2004, 33–78.

([35](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-630)) This is the case, eg, in Finland; see M Koskenniemi, P Kaukoranta, & M Björklund, ‘Finland’ in Gowlland-Debbas, *National Implementation*, 167–94.

([36](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-631)) This is the case, eg, in Germany; see J A Frowein & N Krisch, ‘Germany’ in Gowlland-Debbas, *National Implementation*, 233–64.

([37](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-632)) See Gutherie, ‘Security Council Sanctions’, 516–18; and the findings in Gowlland-Debbas, ‘Implementing Sanctions Resolutions’. The conclusions should not be overstated; most existing studies, for example, focus on European countries, and it is not fully clear to what extent their findings apply beyond Europe.

([38](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-633)) See England and Wales High Court, *A, K, M, Q & G v HM Treasury*; England and Wales High Court, Judgment of 10 July 2009, *HAY v HM Treasury* [2009] EWHC 1677 (Admin); England and Wales Court of Appeal, Judgment of 30 October 2008, *A, K, M, Q & G v HM Treasury* [2008] EWCA Civ 1187; UK Supreme Court, *Treasury v Mohammed Jabar Ahmed and others*.

([39](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-634)) The 1267 Committee—the sanctions committee administering sanctions against these targets—derives its name from SC Res 1267 which first created it; see SC Res 1267 (1999), 15 October 1999.

([40](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-635)) Section 1(1) United Nations Act 1946.

([41](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-636)) See C Greenwood, ‘United Kingdom’ in Gowlland-Debbas, *National Implementation*, 581–604. An ‘Order in Council’ requires a meeting of the Privy Council; see [ibid, 592](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-bibItem-526).

([42](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-637)) Art 3(1)(b) AQO.

([43](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-638)) See House of Lords, Judgment of 17 June 2004, *R v Special Adjudicator, ex parte Ullah*, [2004] UKHL 26, para 20. See also the discussion in Chapter 4, II.2.

([44](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-639)) House of Lords, Judgment of 12 December 2007, *R (Al Jeddah) v Defence Secretary* [2007] UKHL 58, para 39 (Lord Bingham).

([45](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-640)) High Court, *A, K, M, Q & G v HM Treasury*, paras 34–6; Court of Appeal, *A, K, M, Q & G v HM Treasury*, paras 116–19.

([46](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-641)) On minimalism in pluralist adjudication, see Chapter 8, III.1.

([47](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-642)) Terrorist Asset-Freezing (Temporary Provisions) Act 2010, 10 February 2010.

([48](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-643)) European Court of Justice, Opinion of Advocate-General Poiares Maduro, 16 January 2008, C-402/05, *Kadi*, para 44.

([49](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-644)) See A Tzanakopoulos, ‘Domestic Court Reactions to UN Security Council Sanctions’ in A Reinisch (ed), *Challenging Acts of International Organizations Before National Courts*, Oxford: Oxford University Press, 2010, forthcoming, available at: 〈[http://ssrn.com/abstract=1480184](http://ssrn.com/abstract%3D1480184)〉. On litigated cases, see the reports of the 1267 Committee's monitoring team, available at: 〈<http://www.un.org/sc/committees/1267/monitoringteam.shtml>〉; for example, the Ninth Report, UN Doc S/2009/245, 13 May 2009, Annex I.

([50](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-645)) See especially the Ninth Report, paras 19–23, 27.

([51](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-646)) Commission Regulation (EC) No 2062/2001, 19 October 2001, *Official Journal EU* 2001, L 277/25. For the general framework of UN sanctions implementation in the EU, see D Bethlehem, ‘The European Union’ in Gowlland-Debbas, *National Implementation*, 123–65.

([52](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-647)) CFI, Judgment of 21 September 2005, T-315/01, *Kadi*.

([53](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-648)) See G de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’, *Jean Monnet Working Paper* 01/09, 〈<http://www.jeanmonnetprogram.org/papers/09/090101.html>〉, 45.

([54](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-649)) CFI, *Kadi*, paras 181–97.

([55](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-650)) [ibid, para 204](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-bibItem-531).

([56](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-651)) C Tomuschat, note on *Kadi, Common Market Law Review* 43 (2006), 537–51 at 551, observes that under the cover of *ius cogens* the CFI ‘resorted to applying to their full extent the standards evolved in the practice of the Community's judicial bodies’.

([57](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-652)) Schweizerisches Bundesgericht, Judgment of 14 November 2007, 1A.45/2007, *Nada v SECO, Staatssekretariat für Wirtschaft*, available at: 〈<http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>〉.

([58](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-653)) See, eg, P Eeckhout, ‘Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit’, *European Constitutional Law Review* 3 (2007), 183–206; J Almqvist, ‘A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions’, *International and Comparative Law Quarterly* 57 (2008), 303–31 at 319–26.

([59](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-654)) On some of those tensions, see A Gattini, note on *Kadi and Al Barakaat, Common Market Law Review* 46 (2009), 213–39 at 213–14.

([60](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-655)) de Búrca, ‘ECJ and International Legal Order’, 45; D Halberstam & E Stein, ‘The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order’, *Common Market Law Review* 46 (2009), 13–72 at 58–61.

([61](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-656)) M Poiares Maduro, ‘Europe and the Constitution: What if This is as Good as it Gets?’ in J H H Weiler & M Wind (eds), *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press, 2003, 74–102; M Poiares Maduro, ‘Contrapunctual Law: Europe's Constitutional Pluralism in Action’ in N Walker (ed), *Sovereignty in Transition*, Oxford: Hart Publishing, 2003, 501–38.

([62](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-657)) Opinion of the Advocate-General, *Kadi*, para 44.

([63](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-658)) [ibid, para 24](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-bibItem-536).

([64](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-659)) ECJ, Grand Chamber, Judgment of 3 September 2008, C-402/05 P & 415/15 P, *Kadi and Al-Barakaat v Council of the European Union*.

([65](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-660)) [ibid, para 291](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-bibItem-536).

([66](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-661)) [ibid, para 301](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-bibItem-536).

([67](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-662)) [ibid, para 303](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-bibItem-536).

([68](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-663)) Opinion of the Advocate-General, *Kadi and Al-Barakaat*, para 37.

([69](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-664)) ECJ, *Kadi and Al-Barakaat*, para 316.

([70](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-665)) [ibid, para 326](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-bibItem-536).

([71](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-666)) [ibid, para 288](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-bibItem-536).

([72](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-667)) [ibid, paras 307–8](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#acprof-9780199228317-bibItem-536).

([73](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-668)) Bundesverfassungsgericht, Judgment of 29 January 1974, BVerfGE 37, 271, *Solange I.*

([74](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-669)) ECtHR (Grand Chamber), Judgment of 18 February 1999, *Waite & Kennedy v Germany*; ECtHR (Grand Chamber), Judgment of 30 June 2005, *Bosphorus Hava Yolları Turizm v Ireland.* See also Chapter 4, II.1.

([75](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-670)) ECJ, *Kadi and Al-Barakaat*, paras 321–2.

([76](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-671)) Halberstam & Stein, ‘UN, EU, and the King of Sweden’, 60.

([77](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-672)) P Eeckhout, ‘Kadi and Al Barakaat: Luxembourg is not Texas—or Washington DC’, *EJIL:Talk!*, 25 February 2009, at: 〈<http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/>〉.

([78](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-673)) Halberstam & Stein, ‘UN, EU, and the King of Sweden’, 60–1; Gattini, note on *Kadi and Al Barakaat*, at 234–5.

([79](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-674)) J H H Weiler, ‘Editorial’, *European Journal of International Law* 19 (2008), 895–9 at 895–6.

([80](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-675)) See also the critique of a missing attempt at interjurisdictional dialogue in Halberstam & Stein, ‘UN, EU, and the King of Sweden’, 61–8; Gattini, note on *Kadi and Al Barakaat*, 224–35.

([81](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-676)) See the discussion in de Búrca, ‘ECJ and International Legal Order’, 45–55.

([82](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-677)) See Chapter 3, I and III.3 and Chapter 8, III.

([83](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-678)) J Murkens, ‘Countering Anti-Constitutional Argument: The Reasons for the European Court of Justice's Decision in *Kadi and Al Barakaat*’, *Cambridge Yearbook of European Legal Studies* 11 (2009), 15–51 at 43–50.

([84](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-679)) See Bundesverfassungsgericht, *Solange I*.

([85](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-680)) Bundesverfassungsgericht, Judgment of 22 October 1986, BVerfGE 73, 339, *Solange II*.

([86](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-681)) See Bundesverfassungsgericht, Judgment of 12 October 1993, *Maastricht,* BVerfGE 89, 155; Judgment of 18 July 2005, *European Arrest Warrant,* BVerfGE 113, 273; Judgment of 30 June 2009, 2 BvE 2/08 et al, *Lisbon Treaty*.

([87](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-682)) See A-M Slaughter, A Stone Sweet, & J H H Weiler (eds), *The European Court and National Courts: Doctrine and Jurisprudence*, Oxford: Hart Publishing, 1997; F C Mayer, *Kompetenzüberschreitung und Letztentscheidung*, Munich: C H Beck, 2000, 140–259. On recent cases, see W Sadurski, ‘“Solange, Chapter 3”: Constitutional Courts in Central Europe—Democracy—European Union’, *European Law Journal* 14 (2008), 1–35; J Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’, *European Law Journal* 14 (2008), 389–422 at 391–403.

([88](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-683)) Art I-6 of the Treaty establishing a Constitution for Europe, *Official Journal EU*, C 310/1, 16 December 2004, read: ‘The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States’.

([89](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-684)) Declaration No 1 on Article I-6, *Official Journal EU*, C 310/1, 16 December 2004, 428. For the view that the supremacy clause left the situation unchanged, see A Weber, ‘Zur föderalen Struktur der Europäischen Union im Entwurf des Europäischen Verfassungsvertrags’, *Europarecht* 39 (2004), 841–56; G Beck, ‘The Problem of *Kompetenz-Kompetenz*: A Conflict between Right and Right in Which There is No *Praetor*’, *European Law Review* 30 (2005), 42–67. For the opposite position, see M Kumm & V Ferreres Comella, ‘The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union’ in J H H Weiler & C Eisgruber (eds), ‘Altneuland: The EU Constitution in a Contextual Perspective’, *Jean Monnet Working Paper* 5/04, at: 〈<http://www.jeanmonnetprogram.org/papers/04/040501-15.html>〉.

([90](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-685)) Tribunal Constitucional, Judgment of 13 December 2004, DTC 1/2004, part II, sections 3–4; Conseil constitutionnel, Decision of 19 November 2004, no 2004-505 DC, para 10-3. On the latter, see F C Mayer, ‘Europarecht als französisches Verfassungsrecht’, *Europarecht* 39 (2004), 925–36. For a similar argument, see V Röben, ‘Constitutionalism of the European Union after the Draft Constitutional Treaty: How Much Hierarchy?’, *Columbia Journal of European Law* 10 (2004), S339–77.

([91](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-686)) See J Komárek, ‘European Constitutionalism and the European Arrest Warrant: In Search of the Limits of “Contrapunctual Principles”’, *Common Market Law Review* 44 (2007), 9–40.

([92](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-687)) Declaration no 17 annexed to the Lisbon Treaty, *Official Journal EU* 2008, C 115/344.

([93](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-688)) See S Griller, ‘Is this a Constitution? Remarks on a Contested Concept’ in S Griller & J Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, Vienna: Springer Verlag, 2008, 21–56 at 46–50.

([94](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-689)) See N Krisch, ‘Die Vielheit der europäischen Verfassung’ in K Groh et al (eds), *Die Europäische Verfassung–Verfassungen in Europa*, Baden-Baden: Nomos, 2005, 61–90 at 71–9, on pluralism and social attitudes in the EU.

([95](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-690)) See Chapter 3, I and N MacCormick, ‘Beyond the Sovereign State’, *Modern Law Review* 56 (1993), 1–18; N MacCormick, ‘The Maastricht-Urteil: Sovereignty Now’, *European Law Journal* 1 (1995), 259–66.

([96](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-691)) See, eg, J Shaw, ‘Postnational Constitutionalism in the European Union’, *Journal of European Public Policy* 6 (1999), 579–97; N Walker, ‘The Idea of Constitutional Pluralism’, *Modern Law Review* 65 (2002), 317–59; Poiares Maduro, ‘Europe and the Constitution’ and ‘Contrapunctual Law’; also the collected essays in Walker, *Sovereignty in Transition*; Weiler & Wind, *European Constitutionalism*.

([97](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-692)) N MacCormick, ‘Risking Constitutional Collision in Europe?’, *Oxford Journal of Legal Studies* 18 (1998), 517–32.

([98](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-693)) See also N W Barber, ‘Legal Pluralism and the European Union’, *European Law Journal* 12 (2006), 306–29 at 323–7.

([99](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-694)) Baquero Cruz, ‘Legacy of the Maastricht-Urteil’, 416–17.

([100](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-695)) I borrow the image of a mosaic from Neil Walker; see, eg, N Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’, *International Journal of Constitutional Law* 6 (2008), 373–96 at 388.

([101](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-696)) Cf K W Abbott & D Snidal, ‘Why States Act through Formal International Organizations’, *Journal of Conflict Resolution* 42 (1998), 3–32 at 18–19.

([102](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-697)) On the expansion of the Council's authority in recent decades, see B Cronin & I Hurd (eds), *The UN Security Council and the Politics of International Authority*, London: Routledge, 2008.

([103](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-698)) N Krisch, ‘The Security Council and the Great Powers’ in Lowe et al, *Security Council and War,* 133–53 at 145–7.

([104](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-699)) This aspect is emphasized by E Voeten, ‘The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force’, *International Organization* 59 (2005), 527–57.

([105](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-700)) On the latter, see the (overly idealistic) account of I Johnstone, ‘Security Council Deliberations: The Power of the Better Argument’, *European Journal of International Law* 14 (2003), 437–80. See also G J Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars*, Princeton, NJ: Princeton University Press, 2001, for a broader account of institution-building as stabilizing self-restraint by great powers.

([106](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-701)) In a 2007 poll, sixteen publics around the world were asked whether their governments ‘should be more willing to make decisions within the United Nations even if this means that [the respective country] will sometimes have to go along with a policy that is not its first choice’. Majorities agreed in four countries, pluralities in six; pluralities disagreed in three countries, a majority in one territory. Two countries were divided. See WorldPublicOpinion.org, ‘World Publics Favor New Powers for the UN’, 9 May 2007, 〈<http://www.worldpublicopinion.org/pipa/articles/btunitednationsra/355.php?lb=btun&pnt=355&nid=&id=>〉.

([107](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-702)) See also Krisch, ‘Security Council and Great Powers’, 146–7. For an example for contestations over legitimacy, see I Hurd, ‘The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003’, *International Organization* 59 (2005), 495–526. For a broader account of the politics of legitimacy at the Council, see I Hurd, *After Anarchy: Legitimacy and Power in the UN Security Council*, Princeton, NJ: Princeton University Press, 2007.

([108](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-703)) See the *Seventh Report* of the Monitoring Team, UN Doc S/2007/677, 29 November 2007, paras 25–6; C Whitlock, ‘Terrorism Financing Blacklist at Risk’, *Washington Post*, 2 November 2008, 〈<http://globalpolicy.org/component/content/article/178/33243.html>〉.

([109](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-704)) See Heupel, ‘Multilateral Sanctions’, 311–12; and the *Ninth Report* of the Monitoring Team, para 16: ‘several factors have undermined…effective implementation: some States lack the capacity to introduce and enforce the measures; some regard its targets as of marginal national relevance; some grant it a low priority because they believe it ineffective, and some have questioned its legitimacy’.

([110](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-705)) See the report of the 1267 Committee, UN Doc S/2005/761, 6 December 2005, Annex, para 37.

([111](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-706)) R Barrett, ‘Al-Qaeda and Taliban Sanctions Threatened’, *PolicyWatch* 1409, 〈<http://www.washingtoninstitute.org/templateC05.php?CID=2935>〉.

([112](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-707)) On further possible arguments regarding human rights limits of Chapter VII action, see J A Frowein & N Krisch, ‘Introduction to Chapter VII’ in Simma et al, *United Nations Charter*, 701–16 at 710–12; Frowein & Krisch, ‘Article 41’, 745–6. For a cautious view, see J E Alvarez, ‘The Security Council's War on Terrorism: Problems and Policy Options’ in de Wet & Nollkaemper, *Review of the Security Council*, 119–45 at 123–35.

([113](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-708)) UN Human Rights Committee, *Sayadi and Vinck*.

([114](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-709)) See Section II.1 above.

([115](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-710)) ECJ, *Kadi and Al Barakaat*, para 348.

([116](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-711)) Commission Regulation (EC) 1190/2008, 28 November 2008, *Official Journal EU* 2008, L 322/25.

([117](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-712)) Council Regulation (EU) No 1286/2009, 22 December 2009, *Official Journal EU* 2009, L 346/42, Art 7a.

([118](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-713)) See D Hovell, ‘A House of Kadis? Recent Challenges to the UN Sanctions Regime and the Continuing Response to the ECJ Decision in Kadi’, *EJIL:Talk!*, 7 July 2009, 〈<http://www.ejiltalk.org/a-house-of-kadis-recent-challenges-to-the-un-sanctions-regime-and-the-continuing-response-to-the-ecj-decision-in-kadi/>〉.

([119](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-714)) On different possible levels of scrutiny, see Alvarez, ‘The Security Council's War on Terrorism’, 138–40.

([120](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-715)) See E Benvenisti, ‘Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts’, *European Journal of International Law* 4 (1993), 159–83.

([121](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-716)) E Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’, *American Journal of International Law* 102 (2008), 241–74.

([122](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-717)) See, eg, UN Doc S/PV.5474 and S/PV/5474 (Resumption 1), 22 June 2006; R Foot, ‘The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas’, *Human Rights Quarterly* 29 (2007), 489–514 at 504–5. See also Section I above on institutional initiatives.

([123](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-718)) Cf, eg, R A Dahl, ‘Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker’, *Journal of Public Law* 6 (1957), 279–95; G Vanberg, *The Politics of Constitutional Review in Germany*, Cambridge: Cambridge University Press, 2005.

([124](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-719)) See E de Wet & A Nollkaemper, ‘Review of Security Council Decisions by National Courts’, *German Yearbook of International Law* 45 (2002), 166–202, also on conditions for review by national courts that may help to mitigate the risk of friction.

([125](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-720)) On alternative policy options for expressing the normative concerns in this context, see Alvarez, ‘The Security Council's War on Terrorism’, 140–4.

([126](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-721)) eg, P C Szasz, ‘The Security Council Starts Legislating’, *American Journal of International Law* 96 (2002), 901–5.

([127](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-722)) M Heupel, ‘Combining Hierarchical and Soft Modes of Governance: The UN Security Council's Approach to Terrorism and Weapons of Mass Destruction Proliferation after 9/11’, *Cooperation and Conflict* 43 (2008), 7–29; see also I Johnstone, ‘The Security Council as Legislature’ in Cronin & Hurd, *UN Security Council*, 80–104 at 90–2.

([128](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-723)) See Heupel, ‘Hierarchical and Soft Modes’, 20, 22; Cortright et al, ‘Global Cooperation’, 25, 33, 46.

([129](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-724)) Cortright et al, ‘Global Cooperation’, 42.

([130](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-725)) See, eg, the focus in the *Eighth and Ninth Reports* of the Monitoring Team.

([131](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-726)) E Rosand & A Millar, ‘Strengthening International Law and Global Cooperation’ in Cortright & Lopez, *Uniting Against Terror*, 51–82 at 71–2; see also Cortright et al, ‘Global Cooperation’, 46.

([132](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-727)) See also the comparison with the EU's Open Method of Coordination in Heupel, ‘Hierarchical and Soft Modes’, 23.

([133](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-728)) See also B Kingsbury, ‘Sovereignty and Inequality’, *European Journal of International Law* 9 (1998), 599–625.

([134](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-729)) See Chapter 3, II.3 and III.

([135](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-730)) Heupel, ‘Multilateral Sanctions’, 320.

([136](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-731)) On information supply as a central element in the demand for international regimes, see R O Keohane, ‘The Demand for International Regimes’, *International Organization* 36 (1982), 325–55 at 343–5.

([137](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-732)) See M Zürn, ‘Global Governance and Legitimacy Problems’, *Government & Opposition* 39 (2004), 260–87 at 283–4, on national resistance to executive multilateralism.

([138](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-733)) For a similar argument in the context of global trade, see also M A Pollack & G C Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods*, Oxford: Oxford University Press, 2009, 176.

([139](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-734)) See Heupel, ‘Multilateral Sanctions’, 313–14.

([140](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-735)) E Benvenisti & G W Downs, ‘The Empire's New Clothes: Political Economy and the Fragmentation of International Law’, *Stanford Law Review* 60 (2007), 595–631.

([141](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-736)) See the annexes on instances of litigation in the reports of the Monitoring Team, available at: 〈<http://www.un.org/sc/committees/1267/monitoringteam.shtml>〉.

([142](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-737)) Foot, ‘UN, Counter Terrorism, and Human Rights’, 501–10.

([143](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-738)) See the report of the 1267 Committee, UN Doc S/2005/761, 6 December 2005, Annex.

([144](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-739)) Which Benvenisti & Downs, ‘Empire's New Clothes’, see as a central downside of fragmented orders.

([145](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5#ref_acprof-9780199228317-note-740)) I Kant, ‘Zum ewigen Frieden: Ein philosophischer Entwurf’ in I Kant, *Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Pädagogik I* (Werkausgabe, vol XI; W Weischedel, ed), Frankfurt am Main: Suhrkamp Verlag, 1993, 191–251 at 224.