

## The EU as a Promoter of Values and the European Global Project

By Ester Herlin-Karnell\*

### A. Introduction

The international arena is increasingly important in EU legal discourse. Using the word “global” is highly fashionable at present, but what does it mean to refer to this concept?<sup>1</sup> It is not an exaggeration to claim that if “constitutionalism” is added to the picture you have a new catchphrase for understanding the EU legal architecture beyond the nation state and its interrelationship with the external sphere: “Global constitutionalism.”<sup>2</sup> Much of the discussion on the normative dimension of EU powers is centered on the function of the EU as a promoter of values abroad.<sup>3</sup> This is also what the Lisbon Treaty promises as set out in Article 3(5) and Article 21 in the Treaty of the European Union (TEU) by guaranteeing, *inter alia*, that the EU shall uphold its values in the relationship with the wider world and contribute to the protection of its citizens. As witnessed in the recent judgment on the validity of the EU’s Emissions Trading System (ETS), the EU’s values may sometimes spill over to the global level.<sup>4</sup> In the *ETS* case, the Court of Justice set out to

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\*Centre for European Legal Studies (CELS), VU University Amsterdam. An earlier version of this paper was presented at the joint Amsterdam Centre for European Law and Governance (ACELG) and the CELS Workshop held at the University of Amsterdam on May 2, 2012. Thanks go to Sanja Bogojevic, Gareth Davies, Geoff Gordon, Elaine Fahey and the participants in this symposium for their useful comments and discussion. Thanks also to the GLJ editors for their clarifying suggestions. The usual disclaimer applies. Email: e.herlinkarnell@vu.nl

<sup>1</sup> See Antje Wiener, Anthony F. Lang Jr., James Tully, Miguel Poyares Maduro, Mattias Kumm, *Global Constitutionalism Human Rights, Democracy and the Rule of Law*, 1 GLOBAL CONSTITUTIONALISM 1, 1 (2012). See also e.g., Christine Schwöbel, *The Appeal of the Project of Global Constitutionalism to Public International Lawyers*, 13 GERMAN L.J. 1, 1 (2012); Antje Wiener, *Global Constitutionalism: Mapping an Emerging Field* (Jan. 27, 2011) (unpublished manuscript) (available at [http://cosmopolis.wzb.eu/content/program/conkey\\_Wiener\\_Mapping-Field.pdf](http://cosmopolis.wzb.eu/content/program/conkey_Wiener_Mapping-Field.pdf)), and Anne Peters, *The Merits of Global Constitutionalism* 16 IND J GLOBAL LEGAL STUD (2009) 387.

<sup>2</sup> See Joseph Weiler, *Prologue: Global and Pluralist Constitutionalism—Some Doubts*, in THE WORLDS OF EUROPEAN CONSTITUTIONALISM 1, 8 (Grainne de Burca & Joseph Weiler eds., 2012).

<sup>3</sup> Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 JCMS 235, 235 (2002).

<sup>4</sup> Case C-366/10 *Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change*, 2011 E.C.R. I-000 [hereinafter *Air Transp.* case]. See also Elaine Fahey, *The EU Emission Trading Scheme and the Court of Justice: the 'High Politics' of indirectly Promoting Global Standards*, 13 GERMAN L.J. \_\_\_\_, \_\_\_\_ (2012); Theodore Konstadinides, *When in Europe: Customary international law and EU competence in the sphere of external action*, 13 GERMAN L.J. \_\_\_\_, \_\_\_\_ (2012).

make a powerful statement on the importance of environmental protection, even when such concerns extend beyond the borders of Europe. Therefore, the question of global constitutionalism in the EU seems inextricably linked to the normative question of what values the EU should promote or conversely “borrow” from the outside world.

The purpose of this paper is to investigate the notion of EU values and their adjudication in the global sphere. The paper assesses the theoretical framework for understanding the EU’s function as an agent of values—both internally and externally. It cautiously asks to what extent the different—and new—strands of constitutionalism in

EU law, such as pluralism, global constitutional law, and cosmopolitan law, are all fragments or expressions of the same constitutional message at the global level: how to ensure increased legitimacy as well as “good governance” in terms of a proper transnational balance. Thereafter, the paper sets out to look at two distinct fields, namely, environmental protection and security regulation. Both are policy areas where the EU is currently very active and where the question of EU values as well as the desirability of EU action is put to the test on a global scale.

The paper proceeds in three stages. The first section discusses what the EU’s values are, and how the EU’s mission as a promoter of these values in the legal context has intensified with the adoption of the Lisbon Treaty. Secondly, the paper looks at the normative framework to understand the EU’s function as a promoter of values in the transnational—and increasingly global—setting. In doing so, the article focuses on the EU’s “missionary” principle as stipulated in Article 3 (5) TEU, specifically, the EU’s tendency to promote its values not only within, but also outside of, Europe. Thirdly, the paper considers the viability of the EU becoming a successful actor in the global sphere. In doing so, the paper focuses on the protection of the environment through ETS, and the question of EU security regulation. These two areas represent important elements of what could arguably be referred to as global constitutionalism. Hence, the paper will discuss not only the EU global concern for the protection of the environment, as demonstrated in the recent *ETS* case, but will also look to the governance of the internal/external security in the EU, as an example of where the EU would benefit from a less global, and more integrative upholding of the rule of law approach.

## B. The Plethora of EU Values: The Legal Framework

The notion of shared values has made a remarkable journey in the EU. The identification of common values and the recognition of the need for such values has been a reoccurring European theme ever since the enlightenment, a time where the move towards a more humane system, particularly with regard to the national criminal law justice system, emerged in Europe.<sup>5</sup> Several centuries later, the conception of a “normative European power,” although contested, has become an increasingly popular starting point in the discussion of the EU’s involvement in external relations and foreign policy issues through which Europe’s global position is often understood.<sup>6</sup> Clearly, the EU’s mission to spread its values is no longer a side-effect of the EU free movement mission, in general in terms of EU spill over into national law, but has evolved into a freestanding desire to promote the Treaty promises of democracy, human rights, equality, and sustainable development.<sup>7</sup> Of course, the Council of Europe and the European Convention on Human Rights has largely influenced the EU’s commitment to certain values, and has helped the EU shape its human rights agenda.<sup>8</sup>

When trying to pin down what values the EU should safeguard, the starting point is obviously the Lisbon Treaty, and the legal definitions provided by the Treaty. Article 2 TEU reminds us that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.<sup>9</sup> In addition, Article 3 TEU makes it clear that not only shall the Union aim to promote the well-being of its peoples, but it shall also offer its citizens an area of freedom, security, and justice.<sup>10</sup> Of particular importance in understanding how the EU promotes its values is, however, Article 3(5) TEU—which has

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<sup>5</sup> For example, the questioning of the legitimacy of the death penalty dawned in the context of the Enlightenment, at the end of the 18th century. See *EU Policy on the Death Penalty*, EUROPEAN UNION, available at <http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm> (last visited Nov. 1, 2012) [hereinafter *EU Policy on Death Penalty*].

<sup>6</sup> See Thomas Diez, *Constructing the Self and Changing Others: Reconsidering Normative Power Europe*, 33 *MILLENNIUM: J. INT’L STUDIES* 613, 613 (2005); Manner, *supra* note 3; Thomas Forsberg, *Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type*, 49 *JCMS* 1183, 1183 (2011); Marike de Goede, *The SWIFT Affair and the Global Politics of European Security*, 50 *JCMS*, 214, 214 (2012).

<sup>7</sup> See Treaty on European Union, art. 2-3, Feb. 7, 1992, O.J. (C191) 1 [hereinafter *TEU*].

<sup>8</sup> For a recent account on values, see generally Andrew Williams, *THE ETHOS OF EUROPE: VALUES, LAW AND JUSTICE IN THE EU* (2009).

<sup>9</sup> See *TEU*, *supra* note 7.

<sup>10</sup> Moreover, Article 6 of the TEU stipulates that the Union recognizes the rights, freedoms, and principles set out in the Charter of Fundamental Rights. It is also stated that the Union shall accede to the European Convention on Human Rights (ECHR) (which is underway). See *TEU*, *supra* note 7, at art. 6.

been dubbed the EU's "missionary principle"—as the Article regulates the EU's presence on the global scene and sets the goals of the EU's relations with the rest of the world.<sup>11</sup> According to this Article, in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It also states that the EU shall uphold strict observance of, in addition to development of, international law, including respect for the principles of the United Nations Charter. This promise is reiterated in Article 21(1) TEU that stipulates, *inter alia*, that the Union's action on the international scene shall be guided by the principles that have inspired its own creation. However, the EU's mission does not stop there: it also seeks to ensure good global governance (21)(2)(h) TEU.

Notably, Article 21 TEU refers to certain principles of paramount importance to the EU's relationship with the rest of the world while Articles 2 and 3 TEU simply refer to "values" that are part of the objectives of the EU. Nonetheless, rather than seeing this dichotomy as an inconsistent use of values and principles, Article 2 and Article 21 TEU should be seen as interchangeable.<sup>12</sup> Moreover, it should perhaps be observed that there is a similar distinction between values in terms of rights and principles in the Charter of Fundamental Rights, which distinguishes between the indivisible universal values (human dignity, freedom, equality, and solidarity) and, for example, the principles of democracy and the rule of law.<sup>13</sup> After all, both values and principles certainly express and represent a certain normative value or claim.<sup>14</sup> And, the EU promotes these aspirations, not only internally, but also externally. However, interestingly, although the EU's remit of competence is far more extensive domestically than internationally; the EU and its Member States have been unwilling to treat respect for human rights with the same cross-cutting concern internally as they have in their external policies.<sup>15</sup>

Furthermore, it is well known that the EU has actively exported its values to candidate countries where human rights have been used as the main driver for institutional

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<sup>11</sup> See, e.g., Morten Broberg, *What is the Direction for the EU's Development Cooperation After Lisbon?—A Legal Examination*, 16 EUR. FOREIGN AFFAIRS REV., 539, 539 (2011).

<sup>12</sup> On values in EU Foreign relations law, see Marise Cremona, *Values in EU Foreign Policy*, in BEYOND THE ESTABLISHED LEGAL ORDERS: POLICY INTERCONNECTIONS BETWEEN THE EU AND THE REST OF THE WORLD 275 (Malcom Evans & Panos Koutrakos eds., 2011).

<sup>13</sup> The problem is how to identify fully justiciable rights as opposed to partially justiciable principles in Article 52 of the Charter. See Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT. L. REV. 617, 617 (2008); PAUL CRAIG, *THE LISBON TREATY: LAW, POLITICS AND TREATY REFORM* 193-244 (2010).

<sup>14</sup> See, e.g., Giovanni Sartor, *A Teleological Approach to Legal Dialogue*, in LAW, RIGHTS AND DISCOURSE: THE LEGAL THEORY OF ROBERT ALEXY (George Pavlakos ed., 2007) (discussing Alexy and the notions of principles and values in legal reasoning).

<sup>15</sup> Grainne de Burca, *The Road Not Taken: The EU as a Global Human Rights Actor*, 105 AM. J. INT'L L. 649, 649 (2011).

reforms.<sup>16</sup> The Copenhagen criteria in 1993 emphasized democracy and adequate protection of human rights as the number one benchmark for EU membership.<sup>17</sup> The question of the function of the EU as a driver for change and a promoter of human rights in candidate countries has had a great impact on the EU law of enlargement and, as such, is doubtless of the utmost importance and well-explored.<sup>18</sup> Yet the present article focuses on a slightly different angle, namely, that of the constitutional implications of the reference to values. Indeed, it appears as if the debate on the role of the EU as a promoter of values on the global scale is deeply connected to the broader debate on the allocation of competence in EU law. Hence, it could easily be concluded that values, just like the realm of EU competences, are being expanded, with the exception of the occasional touchstone of subsidiarity inspired reasoning in the Court, and this requires careful consideration from the perspective of the proper monitoring of EU competences.<sup>19</sup>

In addition, the Court of Justice has, of course, been an active player early on with regard to which values the EU should promote.<sup>20</sup> This is particularly the case in the intersection of international law and EU constitutional law, where the loyalty principle has played a crucial role in ensuring the survival of the Union project on the margins of Europe by insisting on a united face to the rest of the world.<sup>21</sup> For example, in the judgment of *Commission v. Sweden*,<sup>22</sup> the Court of Justice held that where the subject matter of a convention falls partly within the competence of the EU and partly within that of the Member States, it is imperative to ensure close cooperation between the Member States and the EU

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<sup>16</sup> Cremona, *supra* note 12. See also Europe and the Challenge of Enlargement, 3 E.C. BULL., no. 92, at 11 (1992).

<sup>17</sup> The criteria set out by Copenhagen stipulated that "The EU combines geographical, historical, and cultural elements which all contribute to European identity. The shared experience of proximity, ideas, values, and historical interaction cannot be condensed into a simple formula and is subject to review by each succeeding generation." See European Council Meeting in Copenhagen, June 21-22, 1993, available at [http://ec.europa.eu/bulgaria/documents/abc/72921\\_en.pdf](http://ec.europa.eu/bulgaria/documents/abc/72921_en.pdf).

<sup>18</sup> See generally STEVEN BLOCKMANS, TOUGH LOVE: THE EUROPEAN UNION'S RELATIONS WITH THE WESTERN BALKANS (2007).

<sup>19</sup> For a classic example of limits to EU law making and emphasis on the conferral of powers see Case C-376/98, Germany v. Parliament and Council, 2000 E.C.R. I-8419; Stephen Weatherill, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide,"* 12 GERMAN L.J. 827, 827 (2011).

<sup>20</sup> See, e.g., Case C-159/90, Soc'y for the Prot. of Unborn Children Ireland Ltd. v. Grogan, 1991 E.C.R. 4685; Case C-36/02, Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-09609; Case C-208/09, Sayn-Wittgenstein v. Von Wien, 2011 E.C.R. I-13693.

<sup>21</sup> See generally PIET ECKHOUT, EU EXTERNAL RELATIONS LAW (2011); see Case C-22/70, Comm'n of the European Cmty. v. Council of the European Cmty., 1971 E.C.R. 263; see also Case C-246/07, European Commission v. Kingdom Sweden, 2010 E.C.R. I-03317 [hereinafter *Kingdom Sweden*].

<sup>22</sup> See *Commission v Sweden*, *supra* note 21 (holding that, by unilaterally proposing that a chemical substance be listed in Annex to the Stockholm Convention on Persistent Organic Pollutants (2001), Sweden failed to fulfill its obligations under Article 4(3) of the TEU).

Institutions—especially where a single Member State action would breach the loyalty obligation towards the Union.<sup>23</sup>

In somewhat simplified terms, EU values operate at a dual level: The EU accepts that some national values are European values, but as stated in Article 4(2) TEU (the national identity clause), national values can also form part of a national identity and then are no longer “European.” In addition, national security is a national value in that it remains the sole responsibility of the Member States: Article 4(2) TEU. The mixed compote of supranational values and retained national sovereignty in particular areas and dimensions is highly complex. In any case, it seems quite obvious that the general principles of EU law are manifestations of values. After all, the most fundamental of all EU law principles, the rule of law, is an expression of democratic values.<sup>24</sup> Indeed, it appears as if the rule of law—Article 2 of the TEU—constitutes the main constitutional compass in EU law when spreading the EU’s values. The *Kadi I* case offers a well-known example of where the EU placed EU law values at the center of the discussion by stressing the importance of the autonomous legal order of the EU.<sup>25</sup> In doing so, the Court emphasized the significance of an EU that not only respects fundamental rights, but also actively safeguards them in a legal order based on the rule of law and respect for due process rights.<sup>26</sup>

With regards to the EU’s perception in the outside world, it is clear that the abolition of the death penalty has become one of the most visible and respected elements of the EU’s human rights policy globally.<sup>27</sup> As Manners so famously pointed out in 2002:

In the past decade the EU has helped accelerate an abolitionist movement and that the concept of normative power is an attempt to suggest that not only is the EU constructed on a normative basis but importantly that this prompts it to act in a normative way in world politics.<sup>28</sup>

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<sup>23</sup> See Konstadinides, *supra* note 4 and Christina Eckes *Environmental Policy “Outside-In”: How the EU’s Engagement with International Environmental Law Curtails National Autonomy* 13 GERMAN L.J. \_\_\_\_, \_\_\_\_ (2012).

<sup>24</sup> On the rule of law and the EU see, e.g., Armin von Bogdandy, *Founding principles*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 11 (Armin Von Bogdandy and Jürgen Bast eds., 2011).

<sup>25</sup> Cases C-402/05 & C-415/05, *Kadi & Al Barakaat v. Council*, 2008 E.C.R. I-6351.

<sup>26</sup> See, e.g., CIAN MURPHY, *EU COUNTER TERRORISM LAW* 224 (2012); CHRISTINA ECKES, *EU COUNTER-TERRORIST POLICIES AND FUNDAMENTAL RIGHTS—THE CASE OF INDIVIDUAL SANCTIONS* (2009).

<sup>27</sup> EU Policy on Death Penalty, *supra* note 5.

<sup>28</sup> Manners, *supra* note 3, at 252.

Therefore, according to the same commentator, one could dismiss the accusation that the EU's norms are really cultural imperialism. The reason for this, according to Manners, is that the EU often finds itself at odds with the United States and Japan.<sup>29</sup> As will be discussed below, it seems as if this approach has now changed with regard to not only the protection of the environment, as demonstrated in the above mentioned *ETS* ruling,<sup>30</sup> but also with regard to security governance, where the shockwaves set by the events of 11 September 2001 still have important repercussions for how the EU has dealt, and continues to deal, with security governance.

Yet, the EU's stand against the death penalty is not the only example of the EU as a promoter of values. For example, development cooperation was introduced with the Maastricht Treaty and represented one of the first cases of unilateral EU action abroad.<sup>31</sup> After all, the Laeken declaration discussed the EU's future as a promoter of values beyond the EU borders.<sup>32</sup> It is worth repeating the famous lines asked by Laeken:

What is Europe's role in this changed world? Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?<sup>33</sup>

Nevertheless, it could perhaps be argued that the EU would need to model itself on the utopia that it seeks to project on the rest of the world to ensure greater coherence within the EU itself.<sup>34</sup> The commitment to consistency between the EU's pursuit of justice, both within its borders and beyond, is often considered a paramount concern in the European process.

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<sup>29</sup> Manners, *supra* note 3, at 235.

<sup>30</sup> See *Air Transp.*, *supra* note 4.

<sup>31</sup> See, e.g., Maurizio Carbone, *Mission Impossible: The European Union and Policy Coherence for Development*, 30 J. EUR. INTEGRATION 323 (2008).

<sup>32</sup> Laeken Declaration on the Future of the European Union (Dec. 14-15, 2001), available at <http://european-convention.eu.int/pdf/lknen.pdf>.

<sup>33</sup> Carbone, *supra* note 31.

<sup>34</sup> Kalypso A. Nicolaidides & Robert L. Howse, 'This is My EUtopia ...': Narrative as Power, 40 J. COMMON MKT. STUDIES 767, 767 (2002).

According to some scholars, the EU's credibility rests on what it can do unilaterally, by seeking greater consistency between internal practices and proclaimed external objectives, where the need for consistency is coupled with the quest for solidarity.<sup>35</sup> The Lisbon Treaty tries to follow this path by singling out consistency as the guiding principle for EU action abroad and at home. Hence, it should be recalled that Article 7 of the Treaty of the Functioning of the EU (TFEU) stipulates that the EU "shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers." In the same vein, Article 13(1) TEU provides that the EU's institutional framework "shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions." A closer look at Articles 7 TFEU and 13 TEU suggests that, not only is consistency an important way of ensuring that the EU is acting *intra vires*, but consistency also acts as a significant aid in the drafting and negotiation of EU legislative proposals.<sup>36</sup> Therefore, consistency of EU action is as important internally as externally. Moreover, Article 222 TFEU makes it clear that the EU and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or manmade disaster. Article 222 TFEU does not, however, say anything about solidarity on a global scale.

In what follows, the paper endeavors to briefly map the theoretical framework for how to understand the EU's values in a global context. And yet, the question of whether the EU should "go global" is obviously more political than legal. Regardless, the normative implications of global EU action has broader consequences for the future, pertaining to questions of legitimacy in the EU and the function of law in this European (global project) process.<sup>37</sup> The next section will look at the different manifestations of EU values in the constitutional context. It explores how global law is linked to not only the external dimension of EU law but also to the core of the EU constitutional narrative.

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<sup>35</sup> Nicolaidides & Howse, *supra* note 34.

<sup>36</sup> For a discussion on consistency in EU law, see Ester Herlin-Karnell & Theodore Konstadinides, *The Many Expressions of Consistency in EU Law* (forthcoming).

<sup>37</sup> See Anond Menon & Stephen Weatherill, *Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union 1* (LSE Law, Society and Economy, Working Paper No. 13, 2007), available at <http://eprints.lse.ac.uk/24618/1/WPS13-2007MenonandWeatherill.pdf>.

### C. Naming Problems: Tracking EU Constitutionalism in the Global Arena in the Search for Values

Much of EU involvement at the global level is related to the more general aim of ensuring good global governance as stipulated in Article 21 TEU. “Good governance” in the present paper is not taken as traditional administrative practice but rather seen as an overarching principle for understanding European governance.<sup>38</sup> As such, it is associated with the rule of law and competence distribution. Still, at the macro level, the discussion also

concerns *how* one sees Europe, i.e. the level of supranational features (and intergovernmental aspects) at stake. In MacCormick terminology, Europe has been described as a commonwealth that marked post-sovereign Europe.<sup>39</sup> Others have described the EU project as European Empire.<sup>40</sup> Without going into the deeper question of the characterization of Europe, it is clear that the discussion takes place “beyond” the nation state, and it concerns research into the process and actors in post national society.<sup>41</sup> Therefore, the more general debate on European constitutional law beyond the nation state not only asks some difficult questions of what EU supranationalism or post national law really means, but also unavoidably prompts the question of the identity of EU law when discussed in the global setting.

#### *I. Beyond Europe: “Global Law” as the New Lingua Franca*

Using the word “global” is increasingly fashionable in EU legal circles. Perhaps it poses questions about what is meant by the “new world order” when applied to the EU.<sup>42</sup> Thus, to use the cliché: Invoking the word “global” is like opening Pandora’s Box of legal concepts. As pointed out by Somek, the notion of “global law” sweeps so broadly that it is difficult to know exactly what referring to it means.<sup>43</sup>

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<sup>38</sup> For a recent account on governance, see Tanja A. Börzel, *European Governance: Governing With or Without the State?*, in *THE TWILIGHT OF CONSTITUTIONALISM?* 73 (Petra Dobner & Martin Loughlin eds., 2010).

<sup>39</sup> NIEL MACCORMICK, *QUESTIONING SOVEREIGNTY* 155 (1999).

<sup>40</sup> JAN ZIELONKA, *EUROPE AS EMPIRE: THE NATURE OF THE ENLARGED EUROPEAN UNION* (2006).

<sup>41</sup> Hendrik Huelss, *A Force for Good Governance? The European Union’s Normative Power and Standards of Appropriate Governing*, 17 *EUROPEAN FOREIGN AFFAIRS REVIEW* 93, 93 (2012).

<sup>42</sup> See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

<sup>43</sup> Alexander Somek, *The Twilight of Constitutional Law* (University of Iowa College of Law, Paper No. 09-04, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1333282](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1333282).

Indeed, there are several well-observed problems with applying the concept of global governance<sup>44</sup> to the EU context; the most frequent critique is the lack of accountability and the limited legitimacy of global governance.<sup>45</sup> However, just as the concept of constitutionalization appears to be a process in the EU integration discourse,<sup>46</sup> so too does the globalization phenomenon in the EU seem to be a process with no clear destination.<sup>47</sup> This is not unique to global law and its interaction with the EU legal sphere. Already, Pernice's theory of "Multilevel constitutionalism" depicts an ongoing process for the establishment of new structures of governance complementary to, and building upon—while also changing—existing forms of self-organization of people or society.<sup>48</sup> There is a great debate on the different interpretations of constitutionalism and pluralism in

contemporary EU law with the latter aiming to address concerns of those who believe that the time is here to recognize diversity without the need of a static, one size fits all model.<sup>49</sup> In this context it is appropriate to mention a further strand of EU constitutionalism somewhat related to pluralism, namely, what has been referred to as "cosmopolitan law"—inspired by the works of Immanuel Kant.<sup>50</sup> According to the cosmopolitan view advocated by Eleftheriadis, the EU should confine itself to "eternal" peace.<sup>51</sup> Viewing the EU through this lens would mean that we move as far away from federal models as possible and limit the EU to what Europe needs: maintaining harmony. Other scholars, such as most prominently Kumm and Stone-Sweet, argue that there is a lot more to the concept of cosmopolitan law than that of maintaining peace in that a cosmopolitan legal

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<sup>44</sup> Interestingly, the already famous EU White paper on European governance stressed the virtue of global governance by stating that the Commission looks beyond Europe and thus contributes to the debate on global governance. In achieving these results, the White paper singled out the, by now famous, requirements of openness, participation, accountability, effectiveness, and coherence as guiding principles. See *Commission White Paper on European Governance*, COM (2001) 428 (July 25, 2001), available at [http://ec.europa.eu/governance/white\\_paper/en.pdf](http://ec.europa.eu/governance/white_paper/en.pdf).

<sup>45</sup> Gareth Davies, *International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism*, 13 GERMAN L.J. \_\_, \_\_ (2012); see, e.g., Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1504 (2006).

<sup>46</sup> Alexander Somek, *Constitutionalization and the Common Good* (University of Iowa College of Law, Paper No. 10-23, 2010).

<sup>47</sup> Joseph Weiler, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, 31 J. COMMON MKT STUDIES. 417, 437 (1993).

<sup>48</sup> Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 EUR. L. REV. 511, 511 (2002), available at <http://www.whi-berlin.eu/documents/whi-paper0502.pdf>.

<sup>49</sup> Or as an expression of "contrapunctual law," aiming for harmony, see Miguel Poyares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in SOVEREIGNTY IN TRANSITION 501, 502 (Neil Walker ed., 2003).

<sup>50</sup> IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS 117 (1983).

<sup>51</sup> See Pavlos Eleftheriadis, *Cosmopolitan Law*, 9 EUR. L.J. 241, 241 (2003).

order presupposes that fundamental rights are respected with regard to every person in a given territory regardless of their nationality or citizenship, and where the ‘categorical imperative’ becomes the golden thread or norm.<sup>52</sup> In legal practical terms, insisting on and applying a universal human rights standard based on the right to justification of decisions and a strict balancing of interest in national courts, then helps achieving a cosmopolitan order. In any case, the popular concept of pluralism also stresses the notion of non-conflict as the key to a successful relationship between different legal orders where the primary notion is finding a balance.<sup>53</sup> It could be argued that both these views are reflected in decentralized approaches – that the EU should not do more than is needed at the supranational level (but at the same time do *enough* to make sure that fundamental rights are protected). Hence, it could be argued that pluralism is also *Kantian*, just like cosmopolitan law, in the way it (if using a bit of imagination) accepts that there can be multiple “legal times” and that different courts refer to different jurisdictions.<sup>54</sup>

Whichever interpretation is chosen with regards to the conception of the EU constitutional dialogue and multi-level Europe,<sup>55</sup> it is instructive in that it tells us that the search for the right constitutional lens is an ongoing process. More crucially, it could help us conceptualize the framework for how to understand the EU from a global perspective. As observed by Zumbansen, “‘Constitution,’ then, becomes an anchoring point and reference perspective for the collision of existing and emerging legal semantics” where global constitutionalism comprises just one layer.<sup>56</sup>

<sup>52</sup> Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1.1 J. GLOBAL CONST. 53, 53 (2012), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1043&context=alec\\_stone\\_sweet](http://works.bepress.com/cgi/viewcontent.cgi?article=1043&context=alec_stone_sweet); Mattias Kumm, Inge Rennert Professor of Law, New York University School of Law, Paper Delivered in The Law and Cosmopolitan Values Lectures: The Cosmopolitan State and Humanity’s Law: An Integrative Conception of Global Public Law (Oct. 29, 2012) (on file with the author).

<sup>53</sup> See Gareth Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 269, 281 (Matej Avbelj & Jan Komárek eds., 2012). For analysis of pluralism in EU law, see also, e.g., Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 317 (2002); Miguel Poiars Maduro, *Three Claims of Constitutional Pluralism*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 67, 67 (Matej Avbelj & Jan Komárek eds., 2012); Mattias Kumm, *The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 216, 216 (Julie Dickson & Pavlos Eleftheriades eds., 2012); Marco Goldoni, *Constitutional Pluralism and the Question of the European Common Good*, 18 EUR. L.J. 385, 385 (2012).

<sup>54</sup> There is not one legal truth, but many!

<sup>55</sup> See Peer Zumbansen, *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order*, 1 J. GLOBAL CONST. 16, 16 (2012), available at [http://journals.cambridge.org/download.php?file=%2F4723\\_A4E8FB894138D483EC22D06711D7BA22\\_journals\\_GCN\\_GCN1\\_01\\_S2045381711000037a.pdf&cover=Y&code=379a2953282d3ab64786ecfec8f757c2](http://journals.cambridge.org/download.php?file=%2F4723_A4E8FB894138D483EC22D06711D7BA22_journals_GCN_GCN1_01_S2045381711000037a.pdf&cover=Y&code=379a2953282d3ab64786ecfec8f757c2).

<sup>56</sup> Zumbansen, *supra* note 53, at 50.

Moreover, it was recently suggested that constitutionalism, as an idea, sits at the intersection of law and politics, and it is for this reason that when issues emerge at a global level, the notion of “global constitutionalism” becomes relevant.<sup>57</sup> In the EU context we are therefore confronted with an additional layer of complexity.<sup>58</sup> Not only does it concern the debate on whether the EU should expand its values into the global sphere,<sup>59</sup> but also to what extent the EU internal discourse is readily transferable to the external area. Can we use the EU model with global law,<sup>60</sup> or would it be as inappropriate as imposing the state model on the EU when debating the democratic deficit question?<sup>61</sup> While this issue remains largely unanswered, and while this piece can do no more than point at the importance of highlighting these issues, this paper stresses the need for an awareness of not only the need for improved legitimacy in mainstream EU law but also how to stretch it to the global field. And yet, if EU constitutionalism is in a constant state of flux, and its interaction with the global sphere is a moving target, then, it seems as if the interesting debate lies elsewhere. Arguably, such a debate concerns the legitimacy of EU action in the global arena. After all, it could be said that the different strands of EU constitutionalism all strive to achieve the same result, a proper transnational balance with the aim of ensuring good multilevel governance in a broad sense. This, in turn, poses perhaps the crucial question: To what extent do we really need the concept of global law at all, and what can it add to the debate on EU values?

Consequently, the question is how EU law on the global scale is reconcilable with subsidiarity. In other words, can there be global law while taking into account subsidiarity?

## *II. Global Subsidiarity?*

Subsidiarity has been in the limelight for a long time and, as such, appears to be a timeless concept. The contention is that, although it could be argued that the principle of subsidiary applies to the EU and its Member States only, and not to the EU in its relationship with the rest of the world, it would be wise of the EU to remain local (in some areas).

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<sup>57</sup> See Wiener, Lang, Tully, Maduro & Kumm, *supra* note 1.

<sup>58</sup> Wiener, *supra* note 1.

<sup>59</sup> See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2403 (1991).

<sup>60</sup> Along the same lines, regarding the suitability of using state models when debating accountability at the global level, see also Nico Krisch, *Global Administrative Law and the Constitutional Ambition, in THE TWILIGHT OF CONSTITUTIONALISM?* 245, 245 (Petra Dobner & Martin Loughlin eds., 2010).

<sup>61</sup> See, e.g., Jürgen Neyer, *Justice, not Democracy: Legitimacy in the European Union*, 48 J. COMMON MKT. STUDIES 903, 903 (2010).

The central question here is on what grounds could EU action outside Europe's borders be considered a legitimate source of a political power?<sup>62</sup> The EU is a new legal order according to its Court of Justice,<sup>63</sup> but how can this order be extended to the external realm? Plurality plays a further role here where it is seen as a strengthening

mechanism for the EU's legitimacy rather than a weakness of the EU's overall political legitimacy. Nonetheless, the familiar accountability lacuna and the lack of representation in EU decision making are central to the debate on the desirability of global law as well as the need for increased legitimacy as noted above.<sup>64</sup> These are huge questions and this paper can do no more than note their existence.

In any case, according to Harlow, there are two ways of understanding global law from the perspective of subsidiarity.<sup>65</sup> Either one sees global law as a centralizing factor not respecting national autonomy, and views pluralism and diversity as better options.<sup>66</sup> Or, one understands global law as an expression of pluralism by itself.<sup>67</sup> But, turning to Kant again, who famously said that centralization does not promote peace, it could perhaps be concluded that the very idea of global law is far-fetched.<sup>68</sup> More recently, Teubner stated that a world state as a new constitutional subject is a utopia, and a bad one too.<sup>69</sup> According to Teubner, the notion of global constitutional law functions best not as a unitary mission, but as a constitutional theory for conflict of laws.<sup>70</sup> This would then, in short, mimic Davies' view of pluralism: that it is all about finding the right balance as a

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<sup>62</sup> See Pavlos Eleftheriadis, Kalypto Nicolaïdis & J.H.H. Weiler, *Foreword: The Changing Landscape of European Constitutionalism*, 9 INT'L J. CONST. L. 673, 673 (2011).

<sup>63</sup> Case C-6/64, *Costa v. ENEL*, 1964 E.C.R. 587, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964CJ0006:EN:PDF>.

<sup>64</sup> See Krish, *supra* note 58, at 245 (arguing that accountability rather than legitimacy is the important aspect to debate). I would argue that legitimacy is connected to the rule of law and therefore crucial for the debate on EU action whether within or without the EU borders. See also *Symposium: The Changing Landscape of EU Constitutionalism*, *supra* note 60, at 673–792.

<sup>65</sup> Carol Harlow, *European Administrative Law and the Global Challenge* (RSC Working Paper, No. 98/23, 1998), available at <http://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Publications/WorkingPapers/9823.aspx>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* This is the interpretation advocated by some commentators in the international economic law context. See Francis Snyder, *Governing Economic Globalisation: Global Legal Pluralism and the European Union*, 5 EUR. L.J. 334, 334 (1999).

<sup>68</sup> KANT, *supra* note 48, at 117.

<sup>69</sup> GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 1* (2012).

<sup>70</sup> *Id.*

means of resolving constitutional conflicts.<sup>71</sup> Davies argues that, not only national courts, but also the EU, is under an obligation to show mutual respect. Pluralism is part of this exercise in the sense that it insists on mutual understanding rather than advocating for an absolute conflict-solver template. One could therefore argue that “pluralism,” from this perspective, is “milder” than the classic loyalty obligation under EU law—stipulated in Article 4(3) TEU—in that it does not always point in the direction of (more) EU law.<sup>72</sup> Consequently, if embracing “global pluralism,” it could conceivably be questioned why subsidiarity as a legal concept is needed at all.

According to Howse and Nicolaidis, the principle of subsidiarity is less interesting as a legal principle than as a multifaceted notion for rethinking European law in general.<sup>73</sup> Global governance law is seen as part of this process, in finding the right balance between centralization and decentralization. Be that as it may, we are still left without clear guidance on the question of how global law is reconcilable with subsidiarity, and more crucially, to what extent the different modes of governance and the debate on constitutionalism in contemporary European

law and politics is all about ensuring good (global) governance. Global subsidiarity could then be seen as an expression of the enterprise of ensuring the proper balance and degree of transnational lawmaking.

As Held envisages, the striving for inclusiveness can be performed in conjunction with a respect for subsidiarity, where some issues, such as education or housing, would remain local while other issues, like environmental problems with trans-boundary effects, would be dealt with on the regional or global scale.<sup>74</sup> And yet, this seems increasingly similar to the classical effectiveness test on subsidiarity in mainstream EU constitutional law: where EU action must be, to put it simply, more effective than action at the national level.<sup>75</sup> The

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<sup>71</sup> Davies, *supra* note 53, at 281.

<sup>72</sup> The classic example of the loyalty obligation is Case C-22/70, *Comm'n v. Council*, 1971 E.C.R. 263 [hereinafter *ERTA case*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61970J0022:en:HTML>. Among the many commentators, see, e.g., Eleftheria Neframi, *The Duty of Loyalty: Rethinking its Scope Through its Application in the Field of EU External Relations*, 47 *COMMON MKT. L. REV.* 323, 323 (2010).

<sup>73</sup> Robert L. Howse & Kalypso Nicolaidis, *Democracy Without Sovereignty: The Global Vocation of Political Ethics*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY, AND SUBSIDIARITY* 163, 163 (Yuval Shany & Tomer Broude eds., 2008). See, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 *S. CAL. L. REV.* 1155, 1207 (2007).

<sup>74</sup> Krish, *supra* note 58, at 253 (citing David Held, *Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective*, 39 *GOV'T & OPPOSITION* 364, 364 (2004), available at <http://onlinelibrary.wiley.com/store/10.1111/j.1477-7053.2004.00127.x/asset/j.1477-7053.2004.00127.x.pdf?v=1&t=h9bwcjus&s=59461bb9b4ec7e27d3f0f976e1c3acb508157326>).

<sup>75</sup> See, e.g., PAUL CRAIG, *EU ADMINISTRATIVE LAW* 422 (2012).

main problem is that the subsidiarity principle is considered too political, and therefore is not applied in legal reasoning.<sup>76</sup> From this, one may conclude that global law is legally flawed in the sense that it does not fit an all-encompassing model. Nonetheless, it could be argued that the political nature of global law makes it extra suitable for subsidiarity monitoring. So the global arena should be reserved to what it can do best: the regulation of transnational law. It is here that subsidiarity could serve an important function.

The final two sections of the present article will look at security regulation and the protection of the environment as representing two divergent fields where the EU is either acting as a norm importer or a norm exporter. These two fields of law demonstrate, if not the entire concept of “global constitutional law,” at least elements of it. By exploring these two case studies, this Article seeks to demonstrate that the merits of the EU as a norm importer or norm exporter depends to a large extent on what EU policies we are dealing with—a question of human rights or other common values such as the protection of the environment. The paper will also seek to demonstrate that, despite the Lisbon Treaty proclamation of values and due respect for democracy and human rights, the EU sometimes faces a revised scenario: That it imports values rather than exporting them.

#### **D. The Example of Security: The EU as a Norm Importer**

The area of security offers a good, although dangerous, example of the EU as a norm importer. In this area the EU has, to a large extent, copied the Council of Europe framework and applied it much further to the unique concept of the European area of freedom, security, and justice (AFSJ).<sup>77</sup> Yet, the EU has used the international *fora* to extend global norms into the domestic setting. It is well-known that ever since the events of 11 September 2001, there has been a growing focus on security within the AFSJ.<sup>78</sup> Article 67 TFEU—the portal provision of the AFSJ—proclaims that the Union shall not only constitute an AFSJ as such (as promised by title V of the TEU), but that it shall also endeavor to ensure to a high level of security. Therefore, the most important value here seems to be that of ensuring a high level of security. According to Article 67 TFEU, a high level of security is to be

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<sup>76</sup> See, e.g., Derrick Wyatt, *Subsidiarity: Is it Too Vague to be Effective as a Legal Principle?*, in WHOSE EUROPE? NATIONAL MODELS AND THE CONSTITUTION OF THE EUROPEAN UNION 86, 86 (Kalypto Nicolaidis & Stephen Weatherill eds., 2003), available at <http://denning.law.ox.ac.uk/iecl/pdfs/whoseeurope.pdf>; Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 COMMON MKT. L. REV. 63, 63 (2006).

<sup>77</sup> On the history of the JHA see, e.g., STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW (3d ed. 2011).

<sup>78</sup> See, e.g., Jörg Monar, *The Area of Freedom, Security and Justice*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 551, 551 (Armin Von Bogdandy & Jürgen Bast eds., 2009).

achieved through the adoption of measures to prevent and combat crime, racism, and xenophobia; through measures of coordination and cooperation between police, judicial authorities, and other competent authorities; through the mutual recognition of judgments in criminal matters; and, if necessary, through the approximation of criminal laws.

However, as Zedner points out, one of the thorniest issues of security in the criminology framework is its governance.<sup>79</sup> This is particularly relevant in the EU context, where the question of how to adequately govern security while ensuring the protection of fundamental rights remains controversial. The Communication on the EU's Counter-Terrorism Policy offers an example of the current strong security focus within the EU.<sup>80</sup> This communication is to be read in conjunction with a Commission staff working paper: "*Taking Stock of EU Counter-Terrorism Measures*."<sup>81</sup> This Communication points to the success of current instruments, such as the European Arrest Warrant and the Third Money Laundering Directive,<sup>82</sup> as well as a whole range of legislative measures for the prevention of the use of the Internet for terrorist purposes.<sup>83</sup> However, the aforementioned instruments have been criticized from a human rights perspective. The communication focuses on effectiveness concerns coupled with the need to prevent, pursue, and protect. The prevention of crime via data collection offers another example of an instance where security issues come into conflict with the protection of human rights and personal information.<sup>84</sup> A further example of the European Union's strong security focus is a recent proposal for a directive allowing for the freezing and confiscation of crime proceeds in the

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<sup>79</sup> See, e.g., LUCIA ZEDNER, *SECURITY* (2009).

<sup>80</sup> *The EU Counter-Terrorism Policy: Main Achievements and Future Challenges*, COM (2010) 386 final (July 20, 2010), available at <http://www.montesquieu-institute.eu/9353000/1/j9vvhfxcd6p0lcl/vikqhok3b3xh>. See also *First Annual Report on the Implementation of the EU Internal Security Strategy*, COM (2011) 790 final (Nov. 25, 2011), available at <http://www.ieee.es/Galerias/fichero/OtrasPublicaciones/Internacional/EUInternalSecurityStrategy.pdf>.

<sup>81</sup> *Taking Stock of EU Counter-Terrorism Measures*, SEC (2010) 911 final (July 20, 2010), available at [http://ec.europa.eu/dgs/home-affairs/news/intro/docs/sec\\_2010\\_911\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/news/intro/docs/sec_2010_911_en.pdf).

<sup>82</sup> Ester Herlin-Karnell, *The Development of EU Precautionary Criminalisation*, 1 EUR. CRIM. L. REV. 149, 149 (2011) (discussing Council Directive 05/60, 2005 O.J. (L 309) (EC)).

<sup>83</sup> See Council Framework Decision 08/919/JHA, On Combating Terrorism, 2008 O.J. (L 330) 21.

<sup>84</sup> *Commission Proposal for a Directive of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of Prevention, Investigation, Detection or Prosecution of Criminal Offenses or the Execution of Criminal Penalties, and the Free Movement of Such Data*, COM (2012) 10/3, available at <http://www.statewatch.org/news/2012/jan/eu-com-dir-dp-leas-com-10-3-12.pdf>.

EU.<sup>85</sup> The primary justification given for these instruments is the need to keep up with the international movement, which is tough on crime in addition to being security dominated.

The suppression of money laundering and terrorist financing offers perhaps the best example of the EU as a norm importer. In this area the interaction between the EU and the United States in the framework for terrorist tracking system mechanisms, and passenger name record collection, has been very far-reaching.<sup>86</sup> Indeed, international measures for the prevention of organized crime have, for a long time, largely influenced the EU legal framework. The Financial Action Task Force (FATF) is a particularly significant actor in the global war against money laundering and an important trendsetter for the EU on these matters pursuant to its forty recommendations on money laundering.<sup>87</sup> In particular, the FATF has adopted a series of special recommendations specific to terrorist financing which have been largely incorporated into the EU's approach. More specifically, the EU's mandate was extended to cover not only money laundering, but also terrorist financing, in conjunction with the adoption of nine special recommendations by the FATF. The primary justification for extending EU powers has been the need to update EU law in light of the FATF.<sup>88</sup> A question of coherence between internal EU values, objectives, and standards and external action arises on a number of occasions: in instances where the European Union is exporting its own standards, when it cooperates on a perceived equal footing with third states, and when it is called to incorporate into its internal legal order standards agreed to by the EU in international organizations.<sup>89</sup>

The problem the EU faces with regards to its current approach to security is that it has adopted an uncritical "copycat" approach with regard to the international forum.<sup>90</sup> This is a dangerous path chosen as a minimum level of transparency and a strong preventive focus characterizes the FATF framework.<sup>91</sup> Therefore, the main issue with the EU has

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<sup>85</sup> *Communication from the Commission to the European Parliament and the Council on Operations Carried out Under the EIB External Mandate in 2010*, COM (2012) 36 final (Feb. 7, 2012).

<sup>86</sup> Valsamis Mitsilegas, *The European Union and the Rest of the World: Criminal Law and Policy Interconnections*, in *BEYOND THE ESTABLISHED LEGAL ORDERS: POLICY INTERCONNECTIONS BETWEEN THE EU AND THE REST OF THE WORLD* 149, 149 (Malcolm Evans & Panos Koutrakos eds., 2011).

<sup>87</sup> VALSAMIS MITSILEGAS, *MONEY LAUNDERING COUNTER-MEASURES IN THE EUROPEAN UNION: A NEW PARADIGM OF SECURITY GOVERNANCE VERSUS FUNDAMENTAL LEGAL PRINCIPLES* (2003).

<sup>88</sup> See ESTER HERLIN-KARNELL, *THE CONSTITUTIONAL DIMENSION OF EUROPEAN CRIMINAL LAW* 146–89 (2012).

<sup>89</sup> VALSAMIS MITSILEGAS, *EU CRIMINAL LAW* 317–19 (2009).

<sup>90</sup> *But see* Goede, *supra* note 6.

<sup>91</sup> See e.g., WILLIAM GILMORE, *DIRTY MONEY: THE EVOLUTION OF INTERNATIONAL MEASURES TO COUNTER MONEY LAUNDERING AND THE FINANCING OF TERRORISM* (3rd ed. 2004) (discussing the FATF framework).

been the one-sided focus on prevention and enforcement, while the adequate protection of the individual has been largely ignored. Values in this context have been closely linked to the need to pursue preventive legislation. The use and implementation of values in this regard has become increasingly similar to that of risk regulation, where the external has become the internal.

While the EU's ambitions and norm setting are far more ambiguous in the area of security, and arguably too uncritical to the international trend setter, the protection of the environment offers a more delicate case whereby the EU should do more to impose its values.

### E. The Example of the Environment: The EU as a Norm Entrepreneur

In the field of EU climate change, norms deal with environmental problems in general, as well as the manner in which global, common good problems are to be dealt with on the world stage.<sup>92</sup> The EU has often taken the lead in environmental protection measures.<sup>93</sup> Article 11 TFEU makes it clear that environmental protection requirements to promote sustainable development must be integrated into the definition and implementation of European Union policies and activities. The use of the precautionary principle is perhaps the most famous example of an EU norm-driven agenda in the environmental sphere. The EU applies this principle to justify action

taken with risk, but on a subjective ground where a potential risk is likely, but where there is still no clear evidence of the risk at stake.<sup>94</sup> The precautionary principle has also had an impact on the external landscape, as well as the debate on genetically modified organisms (GMOs),<sup>95</sup> where the EU has actively promoted it.<sup>96</sup> While the principle guides EU environmental law, it has also become prominently enshrined in, for example, the Rio declaration and the United Nations's framework convention on climate change.<sup>97</sup>

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<sup>92</sup> Louise van Schaik & Simon Schunz, *Explaining EU Activism and Impact in Global Climate Politics: Is the Union a Norm—or Interest-Driven Actor?*, 50 J. COMMON MKT. STUDIES 169, 169 (2012), available at <http://onlinelibrary.wiley.com/store/10.1111/j.1468-5965.2011.02214.x/asset/j.1468-5965.2011.02214.x.pdf?v=1&t=h9c8wavu&s=343d5446fc59a548afa9077586ef3fb7d2a2ff4a>.

<sup>93</sup> See, e.g., Charlotte Burns & Neil Carter, *Environmental Policy*, in THE OXFORD HANDBOOK OF THE EUROPEAN UNION 511, 511 (Erik Jones, Anand Menon & Stephen Weatherill eds., 2012); Joanne Scott, *The Multi-level Governance of Climate Change*, in THE EVOLUTION OF EU LAW 805, 805 (Paul Craig & Gráinne de Búrca eds., 2nd ed. 2011).

<sup>94</sup> See, e.g., ELIZABETH FISHER, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM (2007).

<sup>95</sup> *Id.* at 207.

<sup>96</sup> See, e.g., GIANDOMENICO MAJONE, DILEMMAS OF EUROPEAN INTEGRATION: THE AMBIGUITIES & PITFALLS OF INTEGRATION BY STEALTH (2005).

<sup>97</sup> *Id.*

Again, the *ETS*<sup>98</sup> ruling offers a powerful test case for the EU as a global agent—or giant—on a green mission in an entrepreneurship spirit.<sup>99</sup> In particular, the *ETS* case serves as a reminder of the Lisbon Treaty’s promise that the EU will promote its values abroad—Article 3(5) TEU—and ensure a high level of environmental protection. In its *ETS* judgment, the Court stated that, in paragraph 129, that while matters contributing to the pollution of the air, sea, or land territory of the Member States may originate partly outside that territory is not such as to call into question, in the light of the principles of customary international law, the full applicability of EU Law in that territory. Interestingly, the Court did not refer to the “full effectiveness” of EU law,<sup>100</sup> as it usually does when stretching EU law into new domains, but simply referred to the “full applicability” of EU law, which would be hampered if it was denied extraterritorial scope. Therefore, the Court used the environmental provisions to enforce a spillover of EU law into the external sphere, while still emphasizing that EU law does not regulate externally via the application of the *ETS* to aviation.<sup>101</sup>

More specifically, the Court in the *ETS* case held that

[W]hile the ultimate objective of the allowance trading scheme is the protection of the environment by means of a reduction of greenhouse gas emissions . . . . The benefit for the environment depends on the stringency of the total quantity of allowances allocated, which represents the overall limit on emissions allowed by the scheme.<sup>102</sup>

According to the Court, for this reason, it made legal sense—given that the international regime had largely failed to act<sup>103</sup>—that the EU anti-pollution legislation governing the *ETS* was extended to include emissions caused by a foreign air carrier. Therefore, EU law applies not only upon European territory, but also upon European airspace.<sup>104</sup>

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<sup>98</sup> See *Air Transp.*, *supra* note 4.

<sup>99</sup> See Sanja Bogojević, *Legalising Environmental Leadership: A Comment on the CJEU’s Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme*, 24 J. ENVTL. L. 345, 345 (2012) (providing an analysis of the case).

<sup>100</sup> See, e.g., Case C-176/03, *Comm’n v. Council*, 2005 E.C.R. I-7879.

<sup>101</sup> Bogojević, *supra* note 97.

<sup>102</sup> See *Air Transp.*, *supra* note 4.

<sup>103</sup> Bogojević, *supra* note 97.

<sup>104</sup> For a more extensive discussion see Konstadinides, *supra* note 4; Fahey, *supra* note 4.

In any case, the opening lines of the Commission's communication on climate change are instructive in light of what they convey to us about the EU's stance on environmental protection.<sup>105</sup> The Commission states that "[w]hen the EU decided in 2008 to cut its greenhouse gas emissions, it showed its commitment to tackling the climate change threat and to lead the world in demonstrating how this could be done."<sup>106</sup> Therefore, the performance benchmark is not defined exclusively by reference to the regulation of EU destined goods; and the level of the EU's ambition, in terms of its capacity to leverage regulatory change, has been increased by the *ETS* scheme.<sup>107</sup> Notwithstanding the controversial issues raised by the judgment in *ETS*, there may nonetheless be reasons to favor this kind of contingent unilateralist approach as the EU cannot achieve its climate change goals acting alone.<sup>108</sup> This raises the complex issue of legitimacy and to what extent certain "imperialism" is merited in the name of the common good. In other words, if such action can be justified on the grounds of imperialism, is it in some cases necessary?

In discussing the broader question of what values the EU shall seek to promote with regard to the environment, commentators have referred to "the climate change regime complex," which is a loosely coupled system of institutions with no clear hierarchy or core, yet with many of its elements linked in complementary ways.<sup>109</sup> Such a regime operates at different levels of governance and in relation to narrowly drawn, discrete, but often overlapping, issue areas. Arguably, on the basis of the regime complex's normative justification there are six criteria for evaluating and assessing it: coherence, accountability, determinacy, sustainability, its epistemic quality, and fairness.<sup>110</sup> These criteria sound increasingly similar to the general good-governance vocabulary within the EU.<sup>111</sup> Taken

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<sup>105</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Analysis of Options to Move Beyond 20% Greenhouse gas Emission Reductions and Assessing the Risk of Carbon Leakage*, COM (2010) 265 final (May 26, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0265:FIN:EN:PDF>.

<sup>106</sup> *Id.* at 2.

<sup>107</sup> Joanne Scott, *Can the EU Deliver on Citizens Expectations in the Fight Against Climate Change?*, in *EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZEN* 189, 189 (Michael Dougan, Niamh Nic Shuibhne & Eleanor Spaventa eds., 2012).

<sup>108</sup> *Id.*

<sup>109</sup> See Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, in *THE HARVARD KENNEDY SCHOOL: THE HARVARD PROJECT ON INTERNATIONAL CLIMATE AGREEMENTS 3* (Discussion paper 10-33, Jan. 2010), available at [http://belfercenter.ksg.harvard.edu/files/Keohane\\_Victor\\_Final\\_2.pdf](http://belfercenter.ksg.harvard.edu/files/Keohane_Victor_Final_2.pdf); Joanne Scott & Lavanya Rajamani, *EU Climate Change Unilateralism*, 23 *EUR. J. INT'L L.* 469 (2012).

<sup>110</sup> Keohane & Victor, *supra* note 107, at 3.

<sup>111</sup> See of course *Commission White Paper on European Governance*, COM (2001) 428 (July 25, 2001), available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0428en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf)

seriously, such an approach would require of the EU to produce a more developed narrative about what it is doing and why as well as explaining the normative basis underpinning its increasingly numerous trade supported policy demands.<sup>112</sup>

## F. Conclusion

This paper has attempted to conceptualize the question of the EU as a promoter of global values. The paper further discussed how this aspiration appears to form part of a more general debate on the future of Europe.

Indeed, if there are difficulties determining exactly what EU constitutionalism means within the EU legal architecture,<sup>113</sup> the debate is bound to become even more challenging on the global stage.

Firstly, the article set out to discuss what the EU values are (starting with the Treaty definitions) and secondly, how these values are promoted globally. The intention was to use the recent *ETS* case, where Article 3(5) of the TEU was giving freestanding value and as being crucial to the understanding of the relationship with international law and hence move on to discuss the normative framework for such a conceptualization. The paper assessed the EU's function as a promoter of values by looking at the broader normative and constitutional implications of such promotion, whilst trying to trace it in the context of global constitutionalism. In doing so, the paper took a step back: while acknowledging the importance of a discussion on the existence of the different strands of EU constitutionalism and why it matters, the paper suggested that the focus lie elsewhere, namely, the need for increased legitimacy and accountability, which remain a burning topic in the contemporary EU integration of policy and law. Therefore, the paper cautiously asked to what extent the debate is really about ensuring good global governance in its widest sense. In addition, the paper argued that it is exactly in this context that global constitutionalism could make a valid contribution as an aid for visualizing the need for such a discussion. While the search for the meaning and purpose of the EU, and its action on the global scale, is an ongoing process, naming that process and the problems it causes is part of the journey.

Finally, the paper tentatively looked at the feasibility of the EU becoming a successful actor on the global scene. In doing so, the paper focused on the environment and global security regulation by asking some difficult questions. Specifically it asked to what extent is the EU not active enough in safeguarding and promoting its values? Conversely, should the EU safeguard its own integrity with regard to the external sphere? It was argued that the protection of the environment offers an example of a

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<sup>112</sup> Scott, *supra* note 105.

<sup>113</sup> See, e.g., ARMIN VON BOGDANDY & JÜRGEN BAST, *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* (2nd ed. 2010).

legitimate application of EU externalities as part of the “common global good,” whereas, the EU’s security mission offers a much more delicate example of the EU as a norm importer.

While it might not seem to be a daunting conclusion to point out that the protection of the environment is an area that merits EU “imperialism,” since the EU cannot fight global climate change on its own—especially as the international forum has failed to act—other areas are more complex. Thus, security is an area where the EU should consider shielding itself by being firmer in its commitment to legality and the protection of human rights.

The EU promises to deliver justice. Such an internal and external aspiration can only be achieved if the values that the EU seeks to export are adequately incorporated locally.<sup>114</sup> Perhaps less is (sometimes) more at the global level as well.

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<sup>114</sup> See Nicolaïdis & Howse, *supra* note 34.