Legal Theories for Explaining Legal Basis of Application for Security Council Resolutions within EU, and Their Critics

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Abstract:

The United Nations (UN) and European Union (EU) have as the common aim, the international peace restoration/maintaining, they could act together or separately, and sometimes complementary, for achieving this goal. Therefore, Security Council (SC) sanctions could be applied separately by EU Member States or solely by the EU, or concomitantly by the EU and its Member States.

Keywords: resolution, United Nations, European Union, Security Council

1. Preliminary consideration.

According to Article 47 Treaty on the Functioning of the European Union (TFEU), the European Union (EU) has legal personality being bound by international law insofar as it has legal capacity to have rights and obligations under international law. Consequently, it meets the objective criteria for being a subject of international law and it is, from the perspective of the EU founders and members, able to reach international transactions/treaties. Therefore, international customary law and general principles apply to the EU, while treaties only apply to it as far as EU is signatory party to them.

Security Council (SC) Resolutions are binding upon all EU Member States as contracting UN parties, but the EU itself is not a contracting party of UN Charter, and therefore, it is not bound by the measures taken by an UN body, such as the Security Council is. The Member States are allowed to implement their obligations under such Resolutions within the international agencies in which they are members, and consequently, within the EU considering it as an "international agency" in the sense of Article 48(2) of the Charter. Even so, it does not mean that the EU is bound itself to implement UN obligations.

2. The first theory explanations.

Trying to accredit the idea that EU is directly bound by SC Resolutions under Chapter VII of United Nations (UN) Charter, the first theory shows that, being an international organization endowed with legal personality, EU is also bound by general principles of international law, and consequently, EU is bound by UN Charter as long as it codifies general principles of public international law (which are enclosed in Chapter I of UN Charter entitled "Purposes and Principles"). Sebastian Bohr agreed to this theory in his article "Sanctions by the United Nations Security Council and the European Community" showing that the Articles (Art.) 5 and 234(2) of the Treaty of Rome had required the loyalty of Community institutions to international law, but neither this duty, nor the argument of codification of general international law principles in UN Charter cannot be interpreted as legal basis for considering that EU bears international obligations under UN Charter, because it could comply with general international law principles in virtue of customary international law, but not because they are enshrined in the Charter [1].

The theory of "virtual inheritance".

This theory was reminded by ECJ in *International Fruit* concerning the succession in GATT [2]. This theory deems that EU has de facto powers (competences) delegated by its Member States in certain areas, and consequently, it is the successor *ad subrogatio* of their rights and obligations in areas concerned being directly bound by such obligations, including the application of the SC resolutions in accordance with Art 301 of European Community (EC) Treaty (or Art 215 TFEU).

This theory could be criticized in the sense that it defends the exclusive competence of the Union to fulfill the obligations of its Member States under UN Charter, due to the substitution in their rights and obligations.

This fact could be hardly accepted whereas Article 25 of UN Charter is preexisting to Article 307 EC Treaty (Art 351 TFEU), and the latter seems not to disturb
the pre-existing treaties. According to the article aforementioned, Member States
(MS) must respect the pre-existing obligations arising from treaties with third
countries concluded before 1 January 1958 or, for acceding States, before the date
of their accession, but MS have to eliminate any inconsistencies and to adopt a
common attitude when doing so: "The rights and obligations arising from agreements
concluded before 1 January 1958 or, for acceding States, before the date of their
accession, between one or more Member States on the one hand, and one or more
third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude".

We could deduce from the aforementioned provisions that Article 307 (Art 351 TFEU) only has introduced the obligation for EU members to consult each other, but has not deprived them by their power to implement SC resolutions. Moreover, if a lex potest would try to deprive EU Members by their powers to implement SC resolutions, it will be a "dead letter" as long as Article 103 of Charter has imposed the prevalence of UN Charter obligations in the case of a conflictual norm between its dispositions and another treaty. The same, Article 297 EC Treaty (Art 347 TFEU) referring to measures taken by the SC under Chapter VII of UN Charter, calls Member States to consult each other without restricting their powers: "(Member States) shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security". This ratio is normal as long as EU is responsible for failing to implement Security Council resolutions neither before Security Council, nor before international courts, but solely the Member States are [3].

3. The third theory.

Supporting the direct obligations of the Union under the UN Charter, the third theory is the theory of the constitutional character of UN Charter.

In this regard, we recall that UN Charter was adopted on the basis of general international law at that time, and was signed on June 26, 1945, in San Francisco, when the President Harry S. Truman compared it with all national constitutions which have a conventional character and in which several delegations had expressed different views.

This statement triggered a strong debate whether the Charter could be more than an international treaty, in the sense of a World Constitution which would correspond better to its place and its importance in the international legal order. The term "constitution" has emerged in international law in order to give rise and describe an international organization (IO), being usually, a new legal person bearing rights and obligations in the international area (World Health Organization's Constitution, International Labor Organization (ILO) Constitution, etc.). Used in this context, the term "constitution" is understood as "constituent instrument" with paramount importance in relations between the new organization and its members or others IO. Therefore, Wolfgang Friedmann considered that all IO "constituent instruments" form the so-called international "constitutional" law, which is a new branch of international law endowed with the comparative study of different "constitutions" of intergovernmental organizations. In this approach, UN Charter is the constituent instrument of the United Nations which, after almost all states have joined to it, became the world community, and inherently, the Charter could be called "World Constitution".

Such as Professor Pernice stressed in his article "The Treaty of Lisbon: Multilevel Constitutionalism in Action" [4], a constitution should reflect three functions of government: executive, legislative, judicial. Some authors found the germs of these functions in UN Charter: for example, the Security Council has the power to issue binding decisions under Ch. VII of the Charter being considered as a genuine legislative (law-maker) in the area limited *rationae materiae* to international peace maintaining/restoration, while International Court of Justice (ICJ) has the judicial power to control the legality of UN bodies' actions in some special requirements of UN Charter.

Moreover, Professor Verdross deemed as being primary rules of a constitution, all those rules on which the international community of states is constituted, such as the principle of consensualism. Based on this doctrine, the UN Charter could not be considered a "constitution of the world community" because it was built on the primary rules, but not composed by them. Later, the Charter has been described as including the rules of general international law, which would enclose the primary rules, such as the general legal principle "pacta sunt servanda" However, when a State ratifies the Charter, he believes unquestionably as being valid "pacta sunt servanda" (the Charter is binding on the parties). Other primary rules of the UN Charter concern the prohibition of the use of force, the obligation to respect human rights, etc [5].

The critics of this theory concern the consensual character of the international constitutional law. Constitutional law has not sanctions enclosed within its norms, being founded on consensual acceptation of its character. When the constitutionality of UN Charter is denied, such as in the cases brought before ECJ where SC resolutions were challenged (*Kadi* [6], *Hassan* [7], *Ayadi* [8], etc) the Charter is lacking its consensual constitutional character, especially when European Court of Justice (ECJ) stressed the autonomy and, even separate regime of European legal order (*Kadi* Appeal [9] on which we will turn again in the next paragraphs).

4. The fourth theory trying to justify the direct effect of UN Charter obligations on EU.

This theory is based on complementary competences between UN and EU in international security's field.

Such as we showed already in the introductory chapter, the EU and UN share some powers in international security's field. In this regard, Vera Gowlland Debbas showed in her book "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" that "concurrent jurisdiction of political and judicial organs is made possible by the constituent instruments themselves" [10], concluding that the SC does not have exclusive competence in international security field.

Indeed, in the Preamble of EC Treaty, the aim of EU is, according to its founders' view, the promotion of peace, European values, and well-being of its people:

"INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts..."

As a consequence, EU is a regional organization promoting peace in accordance with Art 33 and the Chapter VIII of UN Charter.

The United Nations also promote, as the principal aim, the international peace and security in accordance with Article 1 of Charter. In this field, Security Council has

the primary responsibility to decide what binding measures could be adopted for maintaining and restore peace and security in accordance with Article 24 of the Charter:

"1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

Because the UN and EU have as the common aim, the international peace restoration/maintaining, they could act together or separately, and sometimes complementary, for achieving this goal.

5. The fifth argument supporting that EU is bound responsible internationally for the failure of its Member States to fulfill their obligations under UN Charter.

This theory is justifying on the grounds that the EU Member States have not free choices of their action in regard of. Therefore, EU should act to perform those obligations.

This theory is sensitive as long as the Draft Articles of UN International Law Commission (ILC) concerning the International Responsibility of International Organizations has not mandatory force and there is not, at least for the moment, an international jurisprudence crystallized in the sense of.

European Court of Human Rights (ECtHR) itself was prudent in showing the international responsibility of EU for the action of Ireland concerning the infringement of human rights during the application of the Council Regulation 990/93 within EU territory (*Bosphorus* case), stating only that Ireland was without free political will in implementing the aforementioned regulation and, therefore, without being international responsible [11].

Sixthly, the internal law of EU system was considered as being able to determine the status of foreign law - in our case the UN law - in EU legal order analogous to national legal systems. The obligations under SC Resolutions are reflected in EU internal law because, through conflictual norms, the latter controls the influence and impact of the foreign law within the EU legal system. (the so-called "bridge model" according to Paul Kirchhof [12]).

This theory is dubitative as much as the EU law is analogous to domestic legal order as far as it is valid in the sense of its conformity with EU fundamental rights' system.

Moreover, in this theory, the interrelations of the legal systems are treated as a network, where the courts are competent only to control the law of their legal systems, and consequently, in this rational, ECJ cannot control SC resolutions and their conformity with EU human rights system. However, ECJ stated in its *dicta* of *Kadi* Case, that EU and UN are separate legal orders and SC resolutions should comply with EU human rights system, which is the competence of the ECJ to assert [13].

6. Conclusions.

It seems that, until the accession of the EU to the UN (difficult to imagine, but inciting), the EU is not bound by SC Resolutions, at least, under *pacta sunt servanda* principle (EU is not a signatory party to UN Charter).

In this regard, the EU and UN have some concurrent competences in the area of SC economic sanctions because these sanctions interfere with the sector reserved exclusively to the EU - the common commercial policy and single market - such as we already showed Moreover, Lisbon Treaty provided increased powers in relation to foreign security policy, and EU could play an important role in international security field, at least, at regional level, its actions being more efficient in the larger UN context than acting alone (in fact, it is synonym with changing its character from a regional organization to an universal one). As such, it is not impossible to speculate that EU could join to UN ratifying a revised UN Charter taking into account the similarities in their fields of action. Until then, however, these speculations are only possible scenarios ...

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- [3] EU could not be kept responsible for failing to implement Security Council Resolutions because it is neither an UN member, nor an addressee of Art 2(6) of UN Charter. It cannot be responsible before other international courts because of the lack of hierarchy in international law.
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- [13] Paul Kirchhof was judge at the German Federal Constitutional Court drafting the Maastricht decision. The "bridge model" qualifies the EC/EU not as a federal state, but something less and transitory— a "Staatenverbund" (cited in Isabelle Ley: Legal Protection Against the UN-Security Council Between European and International Law: A Kafkaesque Situation?, German Law Journal, vol. 8, 2007, pp. 279-294, p. 288

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Links:

European Court of Justice – <u>www.curia.europa.eu</u>

European Union Law - www.eur-lex.europa.eu

European Court of Human Rights – www.echr.coe.int

International Court of Justice – www. www.icj-cij.org

List of abbreviations:

- United Nations UN
- Security Council SC

- European Community EC European Union EU
- Common Commercial Policy CCP
- Court of First Instance CFI
- European Court of Justice ECJ
- Treaty on the Functioning of the European Union TFEU
- International Organizations IO
- International Labor Organization ILO