

The pluralism of international legal orders

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Abstract

The Court jurisprudence concerning the hierarchical relationship between the UN and EU legal orders had an evolution from the constitutional vision of international space seen as a horizontal and segregated one, in which the EU is an independent and separate “municipal” legal order existing alongside of other constitutional systems, towards the path of soft constitutionalism recognizing no the existence of a hierarchy between different legal international orders, but only the existence of communication and conflict resolution through political processes of ad-hoc negotiations and pragmatic adjustments between different legal orders [1], and furthermore, towards a pluralistic perspective emphasizing the plurality of diverse normative international systems allowing their mutual influence and gradual approximation and preventing any control to each others [2].

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Chapter I. Introductory Considerations Concerning the Status of United Nations (UN) Legal Order and Its Relevance in European Union (EU) Legal Order

The pluralism on international legal orders was largely debated in the case of implementation of Security Council resolution within EU legal orders.

Somebody could rightly be wondering why this process would be relevant and why it is important for EU as long as EU is not an UN member. Indeed, according to Article 4 of UN Charter, only states could be UN members: “1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council”.

However, the EU is affected by these sanctions from at least four points of view, such as:

1. A part of Security Council (SC) sanctions, mandatory for EU member states, hit the Common Commercial Policy (CCP) which is in the exclusive competence of EU;

2. The main aim for creating European Community by its founders was to maintain international/European peace and security, the Security Council having the international peace maintaining/restoring as its primary responsibility – concurrent competences;
3. Sometimes, the measures for maintaining peace and security are more efficient when their implementation is made at EU level.
4. These sanctions could lead to European law distortions, European Court of Justice being competent to assure the uniformity of EU law and the compliance of EU member states with.

We'll analyze separately each point from those aforementioned.

European Common Commercial Policy governs the trade between Member States and third countries, and therefore, to allow the Member States to implement individually economic sanctions falling within European Community Treaty (EC Treaty), such as the commercial embargo, transportation, and other trade sanctions, may cause distortion of the Common Commercial Policy and, in some cases, to affect the primacy of EU law through different implementations of sanctions at national level, such as we will show in the next paragraphs.

Moreover, the sanctions of economic embargo imposed by SC resolutions related to the restrictions of goods, services, flight bans, economic embargoes, etc. were introduced through the common expressions such as: "it is prohibited to, knowingly and intentionally, sell, supply, export or send, directly or indirectly..." [3]. Thus, such measures could be interpreted as measures having equivalent effect to the export quota, restrictions on selling goods, etc, forbidden by Art. 28 EC Treaty (Art. 34 TFEU [4]).

In *Kadi*, the Court of First Instance (CFI) held that, if economic sanctions are imposed unilaterally by each Member State, the multiplication of ways of sanctions' national implementation might affect the common market, interstate trade, especially the movement of capital and payments and the right of establishment. They could create distortions of competition, as much as any differences between state sanctions' application could bring advantages or disadvantages for the competitive position of certain economic operators [5].

In order to avoid such distortions, European Court of Justice (ECJ) stated in *CentroCom* judgment, that national measures have to respect Common Commercial Policy (CCP, cf. Art. 133 European Community Treaty-EC Treaty hereafter- and Art 207 TFEU), and any national restrictive measures hitting CCP are not tolerated even they pursue a foreign policy or security objective [6].

This objective is also clear in the Preamble of Council Regulation 881/2002 on measures against Usama bin Laden, Al Qaeda and the Taliban, which also states that " (4) These measures fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned" [7].

Pieter Jan Kuijper showed in his article "Implementation of the Security Council Binding Resolutions by the EU/EC" that currently, the common commercial policy has become too common and liberalization of capital movements and current payments too complete for allowing Member States to take separate or even coordinated measures under Art. 297 and 307 EC Treaty (Art 347, respective 351 TFEU) [8].

Finally, the victims of sanctions brought, sometimes, their applications before national courts challenging the Council Regulations implementing such sanctions within Community (*Bosphorus* [9], *Yussuf* [10], etc), and national courts felt necessary to rule before ECJ a preliminary question concerning the application of Council Regulation implementing those sanctions.

Chapter II. Structural Limitations of EU Legal Order under United Nations Charter

The evolution of ECJ case-law showed that the regulation implementing SC sanctions within the EU could enjoy neither immunity in the sense that they cannot be reviewed by the Court, nor by the presumption of validity according to the principle of "equivalence" of systems of human rights protection stated by European Court of Human Rights (ECtHR) [11].

During the hearing on the admissibility in *Bosphorus* from September 2001, the ECtHR made a comprehensive reference to the link between the principle of direct effect of EU law and the principle of state liability showing that it cannot be fully

accepted any responsibility of States under the Convention on the grounds that their actions are justified by the need to meet the obligations incumbent upon them under international law of IO in which they are members (referring to the European Union, but this rationale is available for States' action within UN) [12].

In another case, *Yussuf Al Barakaat*, the Court of First Instance (CFI) considered itself to be not competent for reviewing directly the legality of Security Council resolutions, because there is a legal basis neither in international law nor in the EU law for such judicial control [13]. Moreover, it deemed necessary to interpret the EU law in a manner consistent with the obligations of Member States under the UN Charter, because of the principle of state responsibility aforementioned. However, the CFI held that the SC resolutions could be scrutinized indirectly in terms of their complying with *jus cogens* norms of human rights, general mandatory, the fulfillment of those norms being in the exclusive responsibility of States (though it is doubtful if human rights fulfillment remained within the domains reserved to States, being well-known that Security Council considered the human rights infringement as a threat to international peace in some cases, such as Somalia, Rwanda, Yugoslavia, etc).

Jus cogens norms of human rights were understood by CFI in the case aforementioned as a body of high-value rules, binding on all subjects of international law, including UN bodies and on which no derogation is possible. In this regard, the Court recalled that Article 53 of the Vienna Convention on the Law of Treaties provides that a treaty (such as United Nations Charter is) is void if it conflicts with a peremptory norm of *jus cogens*. In the same case, the Court held that, in accordance with Art. 24 (2) of the UN Charter, the Security Council must act, carrying out its powers for maintaining international peace and security, in accordance with the purposes and principles of the United Nations. As such, the Court concluded that the sanctionary powers of the Security Council fulfilling its primary responsibility of peace maintaining, must be exercised in accordance with the purposes and principles of the United Nations, particularly, and with the international law, general speaking. Concluding, the CFI stated that the binding power of Security Council resolutions is experiencing a limitation in terms of their compliance with international norms of *jus cogens*.

If the SC resolutions overcome this limitation, the Court stressed that Security Council resolutions are binding neither for Member States, nor for the EU [14]. Indeed, there is a difficult chosen of EU Member States between the fulfillment of ECJ decision and their obligations under UN Charter.

More, the ECJ agreed in Kadi case with the Council arguments that economic and financial coercion resulting during the process of implementation of SC binding resolutions, is an express and legitimate purpose of EC Treaty, even if the object is very marginally related to the main objectives of the treaty (those of the free movement of capital or ensuring that competition is not distorted in internal market) [15].

However, ECJ held that the EU is based on the “rule of law”, and consequently, neither its Member States, nor its institutions could impede the judicial review by ECJ of the conformity of the EU institutions’ acts in accordance with the basic constitutional Treaties establishing a complete system of legal remedies, even they are implementing SC sanctions. Moreover, it stated that the allocation of powers, and consequently, the autonomy of the Community legal system cannot be affected by an international agreement such as UN Charter is, the observance of the aforementioned being ensured by the Court by virtue of its exclusive jurisdiction conferred by Article 220 EC [16].

Further, the ECJ followed the AG Maduro opinion that the fundamental rights form an integral part of the general principles of law whose observance the Court ensures, drawing its inspiration from the constitutional traditions common to the Member States (during the Kadi judgment, the Charter of Fundamental Rights was not mandatory because of the lack of Lisbon Treaty ratification), and from the guidelines supplied by international instruments for the human rights protection on which the Member States have collaborated or to which they are signatories (especially, the Human Rights Convention adopted in 1950 by the Council of Europe) [17].

Concluding, ECJ stated that the obligations imposed by an international agreement such as UN Charter is, cannot prejudice the constitutional principles of the EC Treaty (TFEU after Lisbon Summit) including the principle of respecting fundamental rights which is a condition of the EC acts’ lawfulness; being for the Court to review it in the framework of legal remedies established by the Treaty [18].

In this context, ECJ deemed that the review of the validity of any EU act by the Court in the light of fundamental human rights should be considered the expression of the constitutional guarantee of the autonomy of EU legal system, which is not to be prejudiced by an international agreement in an European Community based on the “rule of law” [19]. This power of judicial review of the ECJ is not affected by the existent remedy of the re-examination procedure before the Sanctions Committee within United Nations system. This diplomatic remedy cannot give rise to the generalized immunity of regulations implementing SC resolutions, from ECJ jurisdiction within the EU internal legal order, being rather diplomatic and intergovernmental procedure than a judicial one. Such immunity would be an unjustified derogation from the judicial protection of EU fundamental rights laid down by the EC Treaty, because this re-examination procedure does not offer the guarantees of judicial protection, the persons or entities concerned having no real opportunity of asserting their rights before the Sanctions Committee taking its decisions by consensus, each of its members having the right of veto [20]. It seems from the aforementioned that ECJ considered EU human rights’ system as limiting the effect of SC resolution in its area of jurisdiction.

In its judgment of *Ayadi*, the ECJ held that it is in the exclusive competence of Member States to ensure an effective legal remedy for the EU citizens and assimilated persons when the EU judiciary is not accessible to them. It was, thus, in the exclusive competence of States to protect their nationals through diplomatic channels to UN Sanctions Committee. Saying that, the *Ayadi* judgment was the first which called for a “appropriate” or “equivalent” substitute such as diplomatic protection before Sanctions Committee, instead of an effective judicial protection within the EU, raising the question of the effectiveness of such protection. The ECJ rationale could be challenged in the sense if diplomatic protection before the Sanctions Committee may give a right to appeal, at least before the national courts, not to mention the European ones, in order to be “equivalent” to the judicial remedy [21].

Probably therefore, ECJ abandoned this thesis in *Kadi* judgment suggesting that the general immunity from jurisdiction for Security Council measures is inappropriate: “the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made

to it, cannot give rise to generalised immunity from jurisdiction” [22], because such immunity could not be justified in the case of the Sanctions Committee procedure lacking sufficient guarantees of judicial protection.

In Hassan, the ECJ referred also to the exclusive competence of states to ensure an effective protection of fundamental rights of their nationals raising a broader debate on the different standards of protection of human rights in different national legal systems [23], while in Mujaheddeen and Sison, the Court of First Instance (CFI) established that the Council Regulation implementing SC sanctions was no valid, invoking rather procedural considerations than substantial ones (the persons concerned have not been notified of the reasons relating with the decision taken against them, etc.) [24].

The Court proceedings in both cases above mentioned were based more on procedural grounds than substantial; they did not clarify whether judicial review against charges of terrorism is possible in terms of the substantive law or what is the solution to be adopted in cases of conflictual norm between EU law and Security Council resolutions.

Chapter III. EU Legal Order is autonomous in the context of international customary law

Although the ECJ has a rich case law concerning the principle of judicial review reflecting the principle of international law enshrined in Art 6, 13 of Human Rights Convention, the question arising is if, however, there are also structural limitations imposed on the principle of judicial review by general international law or by the European Community Treaty itself.

In International Fruit Company case, the ECJ argued that, for challenging the rule of international law before the national courts and, possibly, submitting a question to the European Court, that rule must have direct effect in national order being able to give the individual rights that can be enforced by national courts [25].

How could we verify the fulfillment of this requirement of direct effect in the case of international customary law?

The General Advocate deemed in *Racke v. Hauptzollamt Mainz* that the applicability of this condition in the case of customary international law could be interpreted in the same way as in the case of the direct effect of international agreements. In this context, the Advocate General argued that the customary laws of treaties, including the doctrine *rebus sic stantibus*, concerns more the relations between states and international organizations than among individuals. He distinguished between the law of treaties and other rules of international law conferring rights on individuals as well as humanitarian law, and concluded that the nature and purpose of the customary law of treaties does not lead to a direct effect. Therefore, he considered that a condition which the Court must consider when examining the direct effect of these rules is if the rules of international law, being even a customary origin, contain clear, precise and unconditioned rules. Therefore, if EU acts implementing SC sanctions affect human rights, even of customary origin, the direct effect should be considered (human rights are clear and precise rules). Thereby, the Advocate General opined to maintain a balance between the lack of control of political discretion in the exercise of EU institutions' legislative powers and the need to protect the right of judicial review in situations *ultra vires* affecting human rights under customary law. The Court held that, since customary international law is part of the EU legal order, challenging the validity of the EU regulations affecting individual rights under customary international law cannot be prohibited [26].

The ECJ judicial review of the hardship provisions adopted by SC or left to UN Member States' discretion to be adopted even on the customary basis, should be limited to the cases where there was a manifest error of understanding concerning the conditions for their application (error in law). However, the ECJ ruled in *Bosphorus* that the preliminary reference procedure prevents the development of legal arguments based solely on international law without any reference to EU law [27].

In *Ebony Maritime*, the Court extended its jurisdiction beyond the international customary rules against a ship flowing on the high seas. According to international customary law, it wouldn't have been subject to other jurisdictions, excepting the jurisdiction of the flag under the ship is located, but the Court considered its jurisdiction on the strength of the SC resolutions imposing sanctions, considering that the aim of

those sanctions could be achieved applying them to the vessel wherever it is, and humanitarian exceptions under the SC resolutions are not related to the place of vessels [28]. On the contrary, in Poulsen and Diva Navigation, the Court used the international customary law of the sea as mean of interpretation of fisheries law of the EU [29].

Concluding, it seems that during the debates concerning the conflict which may arise between the Security Council resolutions implemented by Council regulations and the human rights' norms of customary origin, the Court limited the power of the judicial review principle of SC resolutions' implementation considering, firstly, that the states act under powers circumscribed to the purpose of these resolutions and have no autonomous discretion. This implies, in particular, that the states could neither directly alter the content of those resolutions when they are implemented by national laws nor to build a mechanism giving rise to their deterioration against or using the direct effect of EU Regulations. Secondly, the enforcement of SC sanctions is achieved through judicial review of Council regulations implementing them and the compliance of regulations with those resolutions, which require rather an interpretative role of the Court. However, in Yussuf Al Barakaat, the Court held that if the direct effect of those resolutions affects the jus cogens norms of human rights, their binding effect can be neglected, giving a prove of its decident role in this area. It remained at the discretion of the Member States to comply with a judicial decision which let empty the ultra vires resolutions of SC or to apply the SC resolutions as belonging to a higher legal order. Further, in Kadi, the ECJ extended this rationale to all human rights norms recognized by EU law, such as we will show below.

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[11] In terms of the Court of Human Rights, the measures taken by States in accordance with the legal obligations incumbent upon them under constituent treaties of IO are justified as long as those IO protect the fundamental rights regarding both the substantial guarantees offered and the mechanisms for monitoring them, in such a way which could be considered at least "equivalent" to that provided by the Convention (the "equivalent protection" of human rights was held and explained by the German courts in Solange cases and by the ECHR in *M. & Co.*). By "equivalent", ECtHR understood "comparable", but not "identical", the latter being contrary to the interests of cooperation sought by the States. According to ECtHR, such a "equivalence" could not be final being likely to be revised, taking into account any subsequent change in the protection system of fundamental human rights.

If we consider that such "equivalence" is available for another international organization, the ECtHR established the statutory presumption that Member State to the Human Rights Convention (Convention) has complied with the Convention standards while they fulfilled the legal obligations stemming from their quality of membership of international organization concerned. However, such presumption could be rejected if the circumstances of the particular case proved that the protection of human rights provided by Convention was, clearly, deficient.

This theory was challenged by the concurrent opinions of Judges Rozakis, Tulkens, Traja, Botoucharova, Garlicki and Zagrebelsky in *Bosphorus* showing that, even assuming that such "equivalent protection" between human rights systems of the UN, the Council of Europe and, respective, EU – this finding is likely to be revised taking into account any change in the system of protection of fundamental rights - it cannot, generally, endorse the idea that an abstract evaluation of the EU human rights system would lead to its "equivalence" to that of the Convention system, abiding the presumption of legality. This presumption of legality of acts of States within those two organizations would determine, in fact, their immunity from any judiciary scrutiny, because it is difficult to reject this legal presumption on the grounds that the protection of the rights provided by Convention was manifestly deficient. The expression "manifestly deficient" appears to establish a relatively low threshold of human rights standards, which is in contrast with the rest of ECtHR jurisprudence. Moreover, this reasoning seems to accept that EU law could be authorized on behalf of "equivalent protection" (but not identical) to have lower standards, less stringent than those of the European Convention on Human Rights, which would give rise to the double standards of appreciation (more details in Henry G. Schermers, Denis F. Waelbroeck: *Judicial Protection in the European Union*, Kluwer Law International, Netherlands, 2001, p. 173 or Wojciech Sadurski, Adam W. Czarnota, Martin Krygier: *Spreading Democracy and the Rule of Law?: The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-communist Legal Orders*, Springer Publishing Company, UK, 2006: p. 39)

[12] *Supra* note 9

[13] *Supra* note 10, para. 272

[14] *Supra* note 10, paras. 277-281

[15] Available on http://blogeuropa.eu/wp-content/2008/02/cnc_c_402_05_kadi_def.pdf (last accession 26.05.2015), paras. 143-146

[16] *Ibidem*, paras. 281-282

[17] *Ibidem*, para. 283

[18] *Ibidem*, para. 285

[19] *Ibidem*, para. 316

[20] *Ibidem*, para. 323

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