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## United Nations Resolutions in the European Union legal system

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*« 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 shall contribute to peace, security (...) as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter »*<sup>1</sup>. The European Union plays an active role at the international scene and therefore shall not be insulated from international law. The development of European Union's external relations and the extension of its powers resulting of their transference from the Member States explain the larger dimension the foreign affairs arena has nowadays within the European Union.

The principles and rules of international law are binding the European Union and it is European primary law itself that foresees that the European Union has an active contribution to the observance and the development of international law. The only specific reference within the sources of international law is made with regard to the United Nations Charter, to which all European Union Member States are Parties. The Treaty does not make any reference to other instruments of international law but this does not mean that they are not binding the European Union but that it recognizes the importance of the Charter.

However, while contributing to the observance and development of international law, *“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”*. As a result, the European Union protects its values and principles namely its fundamental rights and the rule of law. This means that the European Union shall contribute to the protection of its citizens in its external relations and, consequently, when international law is at stake inside its legal order. Such a protection implies the *“respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, values on which the European Union is founded”*.

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<sup>1</sup> Article 3(5) of the Treaty on the European Union.

Nevertheless, the Treaty does not provide any further information on the relationship between European Union law and international law. European Union primary law does not explain how international law is a source of law and rights within European legal order. The Treaty does not determine the reception and the position of international law acts in the European Union legal system. Contrary to many Member States Constitutions that provide a solution for the penetration of international law in its domestic legal orders and define its position within the hierarchy of rules, European Union ‘constitutional’ primary law does not refer to this issue, not even to the international law deriving from the Charter of the United Nations that is itself specifically mentioned in the Treaty.

In the silence of the Treaties, the position of the United Nations Resolutions in the European Union legal system has been determined by the European Court of Justice in its decisions, namely those regarding the freezing of assets of individuals listed for the ‘smart sanctions’ in the counter terrorism measures. In an analogy with the Court’s jurisprudence on the European Convention on Human Rights within the European Union legal system in the latest decades, the European Court of Justice has already provided further information on the position of United Nations Resolutions in the European Union legal system, regarding its statute and its effects within the European Union legal order. With regard to this collection of case law, it is possible to understand that United Nations Resolutions have a limited penetration in the European Union legal order (I) and to conclude that the European Court of Justice provides an extended (indirect) review of the United Nations Resolutions in the European legal system (II).

## **I. A limited penetration of United Nations Resolutions in the European Union legal order**

The European Union is not a Member of the United Nations Organization. Although all of its Member States are Parties to the world's largest multilateral organization and two of them are Permanent Members of the Security Council (United Kingdom and France), the European Union only has a statute of an observer within the United Nations. Since its Member States have transferred some of its competences to the European level, they are exercised by the European Union. The Lisbon Treaty provides that "*The Union's action on the international scene shall be guided by the (...) respect for the principles of the United Nations Charter and international law*"<sup>2</sup>. As a result, European Union must respect international law in the exercise of its powers<sup>3</sup> and, consequently, European law must be interpreted, and its scope limited, in the light of the relevant rules of international law<sup>4</sup>.

The obligation to respect general international law had been referred by the Court of Justice in early decisions regarding the conformity of European Union law with the international law on the treaties, with sea law, with customary international law or with international responsibility. European Union is bound by general international law including international law issued by the United Nations: However, the effects of United Nations resolutions within the European Union legal system were only more recently determined. In its *Kadi* decision<sup>5</sup>, the Court of Justice has ruled on the statute and effects of the United Nations Resolutions in the European legal order. The jurisdiction of Luxembourg has cleared the relationship between United Nations Resolutions and the European Union law from the internal perspective of the European legal order. Such decision reflects that the international legal order is "relevant"<sup>6</sup> in the European Union legal order and therefore it has to be given a statute within European Union legal order.

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<sup>2</sup> Article 21(1) of the Treaty on the European Union.

<sup>3</sup> CJEU, *Poulsen and Diva Navigation*, C-286/90, 24 November 1992, paragraph 9.

<sup>4</sup> CJEU, *Racke*, 16 June 1998, C-162/95, paragraph 158.

<sup>5</sup> CJEU, *Kadi*, 2 September 2008, C-405/05P.

<sup>6</sup> The notion of relevance is borrowed from Santi Romano : The existence, the substance and the efficiency of a legal order has to comply with the conditions required by the other legal order : that legal order is only valid for the other through a entitlement given by this one, in SANTI ROMANO, « L'ordre juridique », Dalloz, 2<sup>ème</sup> édition, Paris, 2002, pp. 119 -122.

However, the “relevant” international law in the European Union legal system is determined by European Union legal order itself<sup>7</sup>. It is within the European legal order that such position is defined and that the Court decided which international law is binding the European Union. In what concerns United Nations Resolutions<sup>8</sup>, the European Union is bound by these acts precisely because it accepts them within its internal legal order. With all its Member States being Members to the United Nations, the European Union is bound by the United Nations resolutions, because Member States have transferred to the European Union competences that can no longer be exercised (only) at the national level. However, the European Union is only bound by international law within the limits of the competences that have been transferred and because the Treaty allows such acts to become source of European Union law. In this sense, there is an acceptance by the Treaty of United Nations Resolutions (A). By conditioning the penetration of the United Nations Resolutions in the European Union legal order by its internal acceptance, the European Union has re-stated the autonomy of its legal order (no longer only toward the domestic legal order of its Member States but) toward the international law (B). By enhancing the European Union Constitutional Charter<sup>9</sup> and its constitutional foundations<sup>10</sup>, in a dualistic inspiration toward the international law<sup>11</sup> that puts the fundamental rights and other European Union constitutional principles in the top of the hierarchy of EU law sources, the Court of Justice considers that the “new order of international law”<sup>12</sup> is independent of the international legal order where it was created and of the legal orders of its Member States that have created it.

### **A. The acceptance of United Nations Resolutions by the Treaty**

The European Union “*as such is not directly bound by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter. The reason is that the Community is not a member of the United Nations, or an*

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<sup>7</sup> The fact that the European Union is a subject of international law with legal personality does not explain, in our point of view, why it is bound by the UN Resolutions. Legal personality is a pre-condition for the European Union to be bound by UN Resolutions but it does not give itself the grounds for that.

<sup>8</sup> Further research on the statute of general international law in the the European Union legal order has shown that international law is binding on the EU because it allows it.

<sup>9</sup> CJEU, *Les Verts*, 23 April 1986, 294/83.

<sup>10</sup> CJEU, *Kadi*, para. 285.

<sup>11</sup> But through a monist inspiration toward its Member States. This difference of approach reflects a serious concern about the preservation of European Union’s legal order autonomy.

<sup>12</sup> CJEU, *Van Gend en Loos*, 5 February 1963, 26/62.

*addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law*<sup>13</sup>.

*i)The European Union is bound by United Nations Resolutions because of its Member States*

The European Union “*must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it*”<sup>14</sup>. Although the Court of Justice has not explored why the European Union is bound by United Nations Resolutions and more broadly by general international law, the General Court had considered that there is in the field of United Nations Charter a succession of the European Union to its Member States in so far as the powers necessary for the performance of the Member States’ obligations under the Charter of the United Nations have been transferred to the European Union. Since by this transfer, Member States could not withdraw from their obligations to third countries under that Charter<sup>15</sup>, the principle of sincere cooperation foresees that “*the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*”<sup>16</sup>. This implies a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from that Charter<sup>17</sup>.

In conclusion, European Union is bound by United Nations Resolutions not because it has succeeded its Member States in its obligations<sup>18</sup> but because it has to act in order to cooperate with the obligations of this Member States at the international level in the areas of competence that were transferred within the respect of the principle of sincere cooperation. The European Union may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfill those obligations<sup>19</sup>.

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<sup>13</sup> CJEU, *Dorsch Consult*, 15 June 2000, C-237/98, para. 74.

<sup>14</sup> GCEU, *Kadi*, 21 septembre 2005, T-315/01, para. 193.

<sup>15</sup> CJEU, *International Fruit*, 12 December 1972, 21/72 to 24/72.

<sup>16</sup> Article 4(3) of the Treaty on the European Union.

<sup>17</sup> CJEU, *Burgoa*, 14 October 1980, 812/79.

<sup>18</sup> The situation is different from the one resulting from the GATT as the European Union an exclusive power from Member States in the field of Common Trade Policy. As for the United Nations Resolutions, European Union and Member States share powers in the field of security and peace.

<sup>19</sup> GCEU, *Kadi*, para. 204.

ii) *The European Union is bound by United Nations Resolutions because the Treaty allows*

The agreements concluded by the Member States prior to their accession are to be binding on the institutions of the European Union and on Member States. It means that the agreements concluded previously by the Member States are binding the European Union and the Member States. The limit to which the European Union is bound is determined by the powers transferred by the Member States.

By virtue of the Treaty<sup>20</sup>, applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary European law<sup>21</sup>. Such primacy at the level of European Union law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part<sup>22</sup>. In this context, the Charter of the United Nations was not considered different from any other international agreement by the Court of Justice in what concerns the relationship between the European legal order and international law.

It is because the European legal order allows and when it does, that international law becomes a source of European law. *“The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community”*<sup>23</sup>. The European Courts determine the effect of international obligations within the Community legal order by reference to the conditions set by European law<sup>24</sup>.

In this dualistic approach, the Court of Justice of the European Union preserves European law by means of defending European Union legal order autonomy toward international legal order (B).

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<sup>20</sup> Ex-article 300, 7 of the Treaty on the European Community.

<sup>21</sup> CJEU, *Intertanko*, C-308/06, 3 June 2008, para. 42.

<sup>22</sup> CJEU, *Kadi*, para.306 -308.

<sup>23</sup> Conclusions AG to *Kadi*, 16 January 2008, para. 24.

<sup>24</sup> Conclusions AG to *Kadi*, para. 23.

## **B. The protection of the external dimension of EU autonomy**

*“Although the Court takes great care to respect the obligations that are incumbent on the Community by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty”<sup>25</sup>. Therefore, an “international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy” of the European legal system.*

The European Union’s autonomy was first assessed by the Court of Justice to justify the primacy of European law over the national law of the Member State<sup>26</sup>: *“By contrast with ordinary international treaties, the (...) Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply »<sup>27</sup>.*

Today, the assessment of this autonomy serves also to justify the treatment United Nations Resolutions are given in European Union legal order. There are some core European values that can never be affected by international rules. These core European values can be identified as the constitutional foundations of the European Union. And these constitutional foundations are distinct from those of international law. In the same sense, they are autonomous and cform the basis for the arguments of EU legal order’s autonomy toward international law in what refers to its effects within the first’s legal order.

Such autonomy is ensured by the European jurisdiction that has an exclusive jurisdiction conferred by the Treaty<sup>28</sup>. The jurisdiction of the Court of Justice, moreover, forms part of the constitutional foundations of the European Union and these constitutional foundations cannot be affected by any international agreement<sup>29</sup> even by the Charter of the United Nations. The Court acts like a Constitutional Court and assures that no external rule resulting from international affect European Union’s constitutional foundations.

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<sup>25</sup> Conclusions AG to *Kadi*, para. 24.

<sup>26</sup> D. SIMON, *Le système juridique communautaire* », 3<sup>ème</sup> édition, PUF Droit, 2001.

<sup>27</sup> CJEU, *Costa Enel*, 6 July 1964, 6/64, para. 593.

<sup>28</sup> Article 19 of the Treaty on the European Union.

<sup>29</sup> CJEU, *Kadi*, para. 281 and 285 ; CJEU, *Opinion 1/91*, 14 December 1991, para. 35 and 71; CJEU, *Commission v. Ireland*, 30 May 2006, C-459/03, para. 123.

*i) The EU is a “new legal order”, beholden to the legal order of public international law*

The European Union legal order forms a “*new legal order*”, established by the Treaties, beholden to, but distinct from the existing legal order of public international law<sup>30</sup>. However, this (today not so) new legal order is independent from the international legal order ruling the Treaties where it is founded. The Treaties have created a municipal legal order of transnational dimensions, of which it forms its “*basic constitutional charter*”<sup>31</sup>, which is different from international law.

However, hereinafter, the autonomy of the European Union legal order serves to justify not only the primacy of EU law over Member States national law (in a monist basis) as it was the case in the Costa case but also to preserve the respect of European Union (primary) law in its relationship with international law. And within this relationship, the effects produced in international law are different from those produced in European law. The consequences within the European legal order remain limited to this legal order and are not extended to international law. This demonstrates the autonomy of European legal order from any other legal order.

If it demonstrates the autonomy of one legal order from the other, this does not imply that European law ignores international law. Indeed, European Union is committed to respect international law and to contribute to its development in its external relations. Therefore, European Union must respect international law in the exercise of its powers<sup>32</sup> and European Union secondary law can be affected if contrary to international law<sup>33</sup>. However, the position international law holds within its internal sphere might vary and it is determined by the domestic legal order itself.

In this sense, the Court of Justice of the European Union has made a selective and strategic use of international law in its case law regarding general international law, oriented by the preservation of the EU’s autonomy. Actually, the autonomy itself allows for more liberty for selecting international law binding the European Union. Furthermore, it allows for modulating the treatment given to sources resulting from international law such as customary

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<sup>30</sup> CJEU, *Van Gend en Loos*.

<sup>31</sup> CJEU, *Les Verts*.

<sup>32</sup> CJEU, *Poulsen*.

<sup>33</sup> CJEU, *International Fruit*.

international law<sup>34</sup>, the WTO rules and decisions<sup>35</sup>, the international agreements on human rights<sup>36</sup> and the international courts decisions<sup>37</sup>. In this context, it is possible to establish an analogy with the relationship with the European Convention on Human Rights legal order and the treatment of European Court on Human Rights decisions by considering that since international law is binding European Union law with the European Union not being a Member, while it is subject to the jurisdiction and interpretation of the Court of Justice.

*ii) International law shall not affect EU « constitutional principles »*

The ‘constitutionalisation’ of the European legal order is ‘completed’<sup>38</sup> by the declaration that no obligation under international law “*can prejudice the principles of the (...) Treaty*”<sup>39</sup>. Not only is European legal order independent from international legal order but also there are some constitutional principles within the European Union legal order that can never be affected by international law and not even by United Nations Resolutions or the United Nations Charter. Since no exception is foreseen in the Treaty that could allow such acts to not respect the constitutional foundations, these are absolute principles that have to be respected.

This means that even former article 307 EC (currently 351 FEU) that provides that Member States “rights and obligations” under preexisting international treaties “shall not be affected by the provisions of this treaty” cannot derogate from the constitutional principles upon which the Union is built<sup>40</sup>. These constitutional principles are at the top of the hierarchy can not be derogated by international law which is understood, therefore, to be in a lower rank than the constitutional foundations.

There are constitutional restraints that govern European Union action and that consist the foundations of this new legal order autonomous beholden from the international legal order.

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<sup>34</sup> CJEU, *Racke*.

<sup>35</sup> CJEU, *Nakajima*, 7 May 1991, 69/89; CJEU, *Fediol*, 22 June 1989, 70/87; CJEU, *FIAMM*, 9 September 2008, C-120/06P.

<sup>36</sup> CJEU, *Dynamic Medien*, 14 February 2008, C-244/06; CJEU, *Aydin Salahadin*, 2 March 2010, C-175/08 ; CJEU, *BolBol*, 17 June 2010, C-31/09; CJEU, *Rottmann*, 2 March 2010, C-135/08; CJEU, *Bressol*, 13 April 2010, C-73/08; CJEU, *TNT Express*, 4 May 2010, C-533/08.

<sup>37</sup> See all the jurisprudence on the statute of the European Convention on Human Rights within the EU legal order.

<sup>38</sup> D. HALBERSTAM, E. STEIN, « The United Nations, the European Union and the King of Sweden : Economic Sanctions and Individual Rights in a Plural World Order », University of Michigan, Law School, Working Paper n.º 134, December 2008, p. 34.

<sup>39</sup> CJEU, *Kadi*, para. 285.

<sup>40</sup> CJEU, *Kadi*, para. 303; Conclusions AG to *Kadi*, para. 31.

Such foundations are a limitation within the European Union legal order<sup>41</sup> and result in a selective approach by the European Court of Justice. Furthermore their respect is assured by the European Court of Justice that in the case of European Union acts implementing United Nations Resolutions exercises an extended judicial review<sup>42</sup> (II).

## II. An extended judicial review by the Court of Justice

The European Union is based on the rule of law, inasmuch as “*neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions*”<sup>43</sup>. Therefore, the Court of Justice has the power for a judicial review of every European Union act with the respect to the rule of law and the constitutional principles enshrined in the Treaty themselves (A).

Due to the silence of the Treaties and in result of their powers, the European Union Courts are the sole arbiter of the effects of general international law in European Union law<sup>44</sup>. The legal effects of a ruling by the European Court of Justice remain confined to the municipal legal order of the European Union (B). The legal consequences within the international legal order remain to be determined by the rules of public international law. And event if “*it is true that the restrictions which the general principles of European law impose on the actions of the institutions may inconvenience the European Union and its Member States in their dealings on the international stage, the application of these principles by the Court of Justice is without prejudice to the application of international rules on State responsibility or to the rule enunciated in Article 103 of the UN Charter*”<sup>45</sup>.

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<sup>41</sup> CJEU, Opinion 2/94, 28 March 1996.

<sup>42</sup> Only in the case of UN Resolutions does the ECJ provides a judicial review since such acts have been transposed in EU law and therefore the review only concerns EU acts. For general international law, there is no transposition of its rules and therefore no judicial review is provided. To this ECJ only makes an ‘*interpretation in the light of*’.

<sup>43</sup> CJEU, *Kadi*, para. 281; CJEU, *Les Verts*, para. 23.

<sup>44</sup> K. S. ZIEGLER, «International Law and EU Law: Between asymmetric Constitutionalisation and Fragmentation», University of Oxford, Legal Research Paper Series, November 2011, p. 286.

<sup>45</sup> CJEU, *Kadi*, para. 39.

## **A. The power of Court of Justice judicial to review every internal act**

The Court of Justice provides judicial review of the conformity of the European Union acts to the basic constitutional charter. The founding Treaties have established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of such acts<sup>46</sup>. The Court is therefore enabled to review the validity of European Union internal acts and to declare if such acts are contrary to European law.

The fact that such internal acts concern the implementation at the European Union internal level of an external act does not preclude the review by the Court of Justice. Furthermore, not even the fact that at the external stage might exist an equivalent protection of the fundamental principles, such as the fundamental rights, and a similar access to a jurisdiction seems to provide immunity for a review by the European Court with reference to European Union fundamental rights of such internal acts implementing UN resolutions.

### *i) The denial of immunity to European Union acts implementing United Nations Resolutions*

The Court of Justice does not consider “*to be a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations*”<sup>47</sup>. Actually, such immunity of jurisdiction for European Union acts implementing United Nations Resolutions, does not find a basis in the Treaty<sup>48</sup> and is therefore subject to a judicial review like every other European Union acts even if they are implementing at the internal level an international measure such as the United Nations Resolutions under Chapter VII.

Such immunity could not either be justified under the consideration since the Treaty does not provide a derogation due to the nature of such measures<sup>49</sup> or to the fact that they result from engagements prior to the Treaties within the scope of former 307 CE (currently 315 FEU). Nevertheless, contrary to the Court of Justice, the General Court in its decision object of

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<sup>46</sup> CJEU, *Kadi*, para. 281; CJEU, *Les Verts*, para. 23.

<sup>47</sup> CJEU, *Kadi*, para. 299.

<sup>48</sup> CJEU, *Kadi*, para. 300.

<sup>49</sup> CJEU, *Kadi*, para. 305.

appeal to the Court of Justice, had considered that such European Union acts implementing United Nations Resolutions would not be subject to a judicial review since that would imply an indirect review of the international act in which they are grounded<sup>50</sup>. The lower jurisdiction had considered that such risk of annulment of a European Union act that concerns the strict implementation of a United Nations resolution would justify the limitation of jurisdiction of the Court and therefore that immunity should be granted<sup>51</sup>. The General Court has nevertheless, accepted on exceptional grounds a judicial review based on the conformity of European Union acts to *jus cogens*...<sup>52</sup>

### *ii) The rejection of a Solange/Bosphorus approach to United Nations Resolutions*

An immunity grounded on an ‘equivalent protection’ granted at the international level, similar to the Solange approach of the German Constitutional Court<sup>53</sup> or to the Bosphorus approach of the European Court on Human Rights<sup>54</sup> is excluded by the European Union Court of Justice. To the Court, “*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 generalized immunity from jurisdiction within the internal legal order of the Community*”<sup>55</sup>. Furthermore, such immunity constitutes a significant derogation from the scheme of judicial protection of fundamental rights laid down by the Treaty, and it appears unjustified because that re-examination procedure does not offer the guarantees of judicial protection<sup>56</sup>.

The European Court of Justice does not clarify if such immunity would be granted in case an equivalent protection could be found at the international level. Such a solution would have the merits of conciliating the relationship between the two different legal orders with reference to the notion of relevance described above and of articulating the several interferences between different European, European Court on Human Rights and national jurisdictions, in a

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<sup>50</sup> GCEU, *Kadi*, para 215.

<sup>51</sup> GCEU, *Kadi*, para 218.

<sup>52</sup> GCEU, *Kadi*, para 226.

<sup>53</sup> BVerfGE, Solange I, 29 May 1974, 37, 271 2 BvL 52/71.

<sup>54</sup> ECHR, *Bosphorus*, 30 June 2005, App. No. 45036/98.

<sup>55</sup> CJEU, *Kadi*, para.321.

<sup>56</sup> CJEU, *Kadi*, para. 322.

pluralistic world of legal orders<sup>57</sup>. As a consequence, the effects of such an extended judicial review (B) could be different.

### **B. A judicial review with effects only within the EU legal order**

The European Union Courts must, in accordance with the powers conferred by the Treaties, ensure the review, and in principle the full review, of the lawfulness of all European Union acts in the light of the of the general principles of European law, including the review of European Union measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations<sup>58</sup>.

*“Any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law”*<sup>59</sup> since European Union legal order is autonomous from the international legal order. However, such a review might result in an annulment of the European Union acts in the internal level that is not without effects to the European Union legal order and Member States and might encounter some repercussions at the international level.

*i)The effects of an annulment of European Union acts implementing United Nations Resolutions in the European Union legal order*

Judicial review of a European Union act by the European Court is assured within the structure and objectives of the European Union<sup>60</sup>. The review of European Union acts is made in the light of its conformity with European law. The effects of a judicial decision are limited to the internal legal order of the European Union. In one hand, it means that an annulled European Union act has to be replaced by a new act that respects European Union law: in the case such European Union act is a strict implementation of a United Nations Resolution, it might lead to an action of the European Union institutions and Member States in order to assure the conformity of the European Union acts with European Union standards. In the other hand, it

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<sup>57</sup> M. DELMAS-MARTY, «Le pluralisme ordonné », Les forces imaginantes du droit, Collection La couleur des idées, Éditions du Seuil, 2006.

<sup>58</sup> CJEU, *Kadi*, para. 326.

<sup>59</sup> CJEU, *Kadi*, para. 288.

<sup>60</sup> CJEU, *Internationale Handelsgesellschaft*, 17 December 1970, 11/70.

implies that the consequences at the international level will continue to be determined by international law<sup>61</sup> and that the primacy of international acts at the international level would not be challenged<sup>62</sup> by a domestic decision as the one pronounced by the Court of Justice of the European Union.

*ii) The rejection of a direct review of United Nations resolutions with no consequences at the international level?*

A European Union contested act implementing United Nations Resolutions cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an action falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter<sup>63</sup>.

However, an annulment of such act is not without repercussions at the international level. As an example, an annulment might lead to the international responsibility of European Union Member States and the burden of choosing between the European Union obligations with which they have to comply according to its primacy determined by European Union law itself over national law and the United Nations engagements which primacy is determined by their national law and whose position in the domestic legal orders is not homogeneous. Furthermore, Member States will be encountering such conflicting obligations, in a procedure to which they have previously contributed at the national level within the United Nations Organisation and in which after they are asked to comply with a different standard of principles and procedural guarantees...

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<sup>61</sup> CJEU, *Kadi*, para. 288 ; Conclusions AG to *Kadi*, para. 39.

<sup>62</sup> CJEU, *Germany v. Council*, 10 March 1998, C-122/95, para. 288-289

<sup>63</sup> CJEU, *Kadi*, para. 314.

The review by the Court of the validity of any European Union measure in the light of fundamental rights must be considered to be the expression, in an Union based on the rule of law, of a constitutional guarantee stemming from the Treaty as an autonomous legal system which is not to be prejudiced by an international agreement<sup>64</sup>. This Treaty has its origins in international law but grounded the foundations of a new legal order, the European Union legal order that has grown up and emancipated from its “parents”.

This emancipation resulted in the autonomy of the new established order. As an autonomous and independent order, the European Union conditions the acceptance of international rules inside its legal order based on domestic law. As such, international law is not directly binding the European Union. It depends on its openness and permission. As a constitutional order, the European Union limits the reception international law and conditions the penetration of this foreign order to criteria posed by its own.

However, unlike other Constitutional and international Courts<sup>65</sup>, the Court of Justice of the European Union does not grant a immunity to internal acts deriving from an obligation of international law. The European Union exercises an extended judicial review in order to check and balance the compliance of such international norms with the European law. This results in a necessary indirect review of international law in order to ensure legality within the European Union legal order.

Such an extended judicial review has negative repercussions inside the European Union legal order since the Member States find themselves between two conflicting obligations if such international rules do not comply with European Union law. Non compliance also might have repercussions for the European Union at the international stage, in case a review is accepted in the future by the European Court of Justice.

Nevertheless, time will show if positive repercussions will result from such a treatment of United Nations resolutions inside European Union legal system. Perhaps, it might be in the long term positive for the development of international legal order and the United Nations – in a similarity with the decisions of Constitutional Courts regarding the European Union...

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<sup>64</sup> CJEU, *Kadi*, para. 316.

<sup>65</sup> German Constitutional Court, *Solange I*; CEDH, *Behrami*, 15 November 2006, App. n.º 71412/01 et 78166/01.

### Note on the author

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