European Community and Union Law and International Law

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A. Background and Overview

1 Given the broad scope of competences transferred to the European Community ('EC') and now the European Union ('EU') on the one hand, and the broad scope of contemporary international law on the other hand, the relationship between EC/EU law and international law is of considerable importance (see also European Community and Union, Party to International Agreements).

1. The Emancipation of European Community and Union Law from International Law

2 At the beginning of European integration, one core issue was to emancipate the law of the European Communities from international law (European Union, Historical Evolution). The groundbreaking decision is the 1963 European Court of Justice ('ECJ') judgment in the van Gend & Loos Case. The ECJ decided that the objective of the Treaty Establishing the European Economic Community ('EEC') ([signed 15 March 1957, entered into force 1 January 1958] 294 UNTS 17) to establish a common market ‘implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states’ and that ‘the Community constitutes a new legal order of international law’. In the 1964 Costa v ENEL Case, the ECJ further emancipated EEC law from international law by stipulating its autonomy and its primacy over the national legal systems, but also by abstaining from the denotation ‘of international law’: the ECJ considers Community law a ‘new legal order’ tout court. In Parti écologiste ‘Les Verts’ v European Parliament (1986), the ECJ went further by characterizing the EEC Treaty as a ‘basic constitutional charter’ (para. 23), thus stressing the municipal nature of Community law. The notion of ‘constitutional charter’ is later confirmed in several judgments and opinions (eg Opinion 1/91 para. 1; Weber v European Parliament [1993] para. 8; Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [Opinion of Advocate General Maduro] [2008] para. 21; Kadi Case).

3 Today, the prevailing understanding of EC law with regard to international law is that of an autonomous legal order of an internal/municipal law character with federal features (but see, for example, Pellet for whom the European legal order...
The European Treaties do not address the relationship between the two legal orders, nor the issues of incorporation and effect of international law in EC/EU law in a detailed manner. Art. 216 (2) Treaty on the Functioning of the European Union (TFEU) (Art. 300 (7) Treaty Establishing the European Community (‘EC Treaty’)), which stipulates the binding nature of international treaties for the institutions and Member States, remains the core provision on the relation between EU law and international law. Also addressed is the effect of treaties to which Member States had become parties before becoming members of the EC/EU, as well as the regional union between the Benelux countries in Art. 350 TFEU (Art. 306 ECT). According to Art. 351 TFEU (Art. 307 ECT) on pre-Community/Union agreements binding Member States, the Treaty does not preclude obligations from such treaties but obliges Member States to take all appropriate measures to eliminate possible conflicts between such treaties and Union law. Further reference to international law can be found in the → preamble[s] and general provisions of the Treaties. As early as in 1957, the preamble mentioned the principles of the → United Nations Charter. Reference to the UN Charter, to the → Helsinki Final Act (1975) (Conference on Security and Co-operation in Europe ‘Final Act’ [done 1 August 1975] (1975) 14 ILM 1292), and the Charter of Paris for a New Europe ([done and entered into force 21 November 1990] (1991) 30 ILM 190) later became part of the provisions on Common Foreign and Security Policy (Art. 11 Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts; Art. 21 TEU [Lisbon] [General Provisions on the Union’s External Action]), and respect for the principles of the UN Charter is part of the objectives of the EU according to Art. 3 (5) TEU (Lisbon). Furthermore, in the Single European Act ([signed 17 February 1986, entered into force 1 July 1987] 1754 UNTS 3) reference was made to the → European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (‘ECHR’) and the → European Social Charter. Since the Treaty of Maastricht, the ECHR is recognized in Art. F.2 (Art. 6 (2) TUE [Amsterdam]; Art. 6 (3) TEU [Lisbon]) as of relevance for the EU’s fundamental rights. According to Art. 6 (2) TEU (Lisbon), the EU shall formally accede to the ECHR (→ European Community and Union, Party to International Agreements).

5 Given the vagueness of these provisions and the dynamic nature of European integration, the ECJ and, since the start of its operation in 1989, the Court of First Instance (‘CFI’) have been playing a crucial role in determining the relationship between the two legal orders (→ European Communities, Court of Justice [ECJ] and Court of First Instance [CFI]).

B. Relationship between European Union Law and International Law

1. International Treaties

(a) Multilateral Agreements Concluded by the European Community/Union

6 In 1974, the ECJ decided in R & V Haegeman v Belgian State (para. 5) that the provisions of agreements concluded by an institution of the EEC form an integral part of Community law once they enter into force. They do not prevail over primary law, but rank between primary and secondary law. This is indicated by the wording of now Art. 218 (11) TFEU (Art. 300 (6) ECT) and has been explicitly confirmed by the ECJ (Commission of the European Communities v Federal Republic of Germany (International Dairy Arrangement)[1996] para. 52; Agrover Srl v Agenzia Dogane Circoscrizione Doganale di Genova [2007] para. 17).

(i) A priori and a posteriori Control of Compatibility of International Agreements with Primary Law

7 Art. 218 (11) TFEU (Art. 300 (6) ECT) provides for the possibility of an a priori control of the compatibility of international agreements with primary law. If the ECJ declares in an advisory opinion (→ Advisory Opinions) that an envisaged agreement is incompatible with primary law, it cannot be concluded unless the respective provision(s) of the Treaty(ies) are amended accordingly. As stated in Opinion 1/75, the court’s advisory competence relates to ‘any undertaking … which has binding force, whatever its formal designation’. The advisory opinions sometimes deal with substantial...
(iii) The Effect of International Agreements in European Union Law

Whereas the TFEU provides for explicit competence of the ECJ to determine the compatibility of international agreements with primary law prior to their conclusion, a provision on such control once an agreement has become binding for the EU is missing. As the ECJ decided in Opinion 3/94 (para. 13), an analogous application of Art. 300 (6) ECT (Art. 218 (11) TFEU) for such agreements is not admissible. But the ECJ finds the basis for its competence to exercise such judicial control in Art. 263 TFEU (Art. 230 ECT) (action for annulment) and in Art. 267 TFEU (Art. 234 ECT) (preliminary rulings) (Opinion 1/75). According to the prevailing doctrine (see Tomuschat [2004] para. 95) however, neither of the two provisions authorizes the ECJ to exercise control over the concluded agreements. Instead, control can only be exercised over the internal act of approval of an international agreement (see French Republic v Commission of the European Communities [Agreement between the Commission and the United States regarding the Application of their Competition Laws] [1994] para. 14), ie its conclusion which is regarded as an act of an EU institution ‘intended to produce legal effect vis-à-vis third parties’ in the sense of Art. 263 TFEU (Art. 230 ECT; eg Commission of the European Communities v Council of the European Communities [→ ERTA Case] [1971]; European Parliament v Council of the European Union [EEC-US Passenger Name Records Agreement] [2006]). However, any decision that this act infringes Community law leaves the international obligation unaffected (Art. 27 → Vienna Convention on the Law of Treaties [1969]).

(ii) Incorporation of International Agreements in European Union Law

The treaties remain silent on how these agreements relate to EU law. Various notions aim at framing the relationship between international and EU law. The notion of transformation suggests that the provisions laid down in EC/EU international agreements are part of a distinct legal order and change, by becoming part of the EC/EU, their legal nature. Some scholars hold in the so-called dualist tradition that the conclusion of the agreement by the Council of the European Union (‘EU Council’) according to Art. 218 (5 and 6) TFEU (Art. 300 (2) ECT) is to be regarded as a transformative act (Krück 169); others regard Art. 216 (2) TFEU (Art. 300 (7) ECT) as a general provision that transforms international agreements into EC/EU law (Peters 28–31). The notion of incorporation, as used in Haegeman, suggests that provisions of international agreements are not transformed and do not need further validation. They become part of the EU legal order, ie are incorporated, simply by entering into force for the EU. This reflects what many call a monist conception of the relationship between international and domestic law (→ International Law and Domestic [Municipal] Law). Moreover, they enjoy supremacy over secondary law and the law of the Member States. The solution to this puzzle is the recognition that the ECJ decides on the effect without addressing the monist-dualist issue, confirming that theories are of little help here. The core question is rather that of the effect of international agreements.

(iii) The Effect of International Agreements in European Union Law

In order to assure the uniform application of international agreements throughout the EU, the exclusive competence to determine the internal effect of international agreements lies with the ECJ (Hauptzollamt Mainz v CA Kuperberg & Cie KG aA [1982] para. 14). Not all provisions of international agreements are directly applicable in Union law. In order to assess if a provision of an international agreement has direct effect, the ECJ proceeds in two stages. First, it examines whether an agreement is in general capable of stipulating directly effective provisions. This is to be established by examining ‘the purpose, the spirit, the general scheme and the terms’ of the agreement (International Fruit Company v Produktschap voor Groenten en Fruit [1972] para. 20), a formula that provides the ECJ with much leeway. Secondly, it examines in an apparently technical mode whether the provision in question ‘contains a clear [unconditional] and [sufficiently] precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure’ (Meryem Demirel v Stadt Schwäbisch Gmünd [1987] para. 14; see also Kuperberg [1982] para. 23). These vague formulations help the ECJ to play an important role in international legal policy (→ European Community and Union, Actor in International Relations).

The ECJ had mostly been considered generous in qualifying provisions of international agreements as directly applicable (eg Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze [1976] para. 26 [Yaoundé Convention]; Pabst & Richarz KG v Hauptzollamt Oldenburg [1982] para. 27 [Association Agreement between the EEC and Greece]; The Queen v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd and Others [1994] para. 27 [EEC-Cyprus Association Agreement]; Amministrazione delle Finanze dello Stato v Chiquita Italia SpA [1995] para. 41 [Lomé Conventions; see also → Lomé/Cotonou Conventions]).

Yet, the ECJ famously takes a different position regarding the direct effect of provisions of the Marrakesh Agreement Establishing the World Trade Organization ([adopted 15 April 1994, entered into force 1 January 1995] 1987 UNTS 154;
International agreements or provisions of those agreements that are not directly applicable may still have some effect in the EU legal order either on the basis of the principle of consistent interpretation or based on the so-called principle of implementation (see also → Interpretation in International Law). The principle of consistent interpretation is derived from the primacy of international agreements binding the Union over secondary legislation (Art. 216 (2) TFEU [Art. 300 (7) ECT]). Accordingly, provisions of EU secondary legislation must, ‘so far as is possible, be interpreted in a manner that is consistent with those agreements’ (Commission v Germany [1996] para. 52).

The principle of implementation is applied where secondary legislation intends to implement an international agreement (Nakajima All Precision Co Ltd v Council of the European Communities [1991] para. 31). Furthermore, it also applies when secondary legislation specifically refers to an international norm (Fédération de l'Industrie de l'huilerie de la CEE [Fediol] v Commission of the European Communities [1989] para. 21). The ECJ then examines the conformity of the implementing measure or the legal measure adopted on the basis of such implementation with the international obligation (Nakajima [1991] para. 31–32). By the same token, the ECJ also has the competence to review the legality of EU measures if they refer to a provision of international law or an international agreement (Fediol [1989] para. 22). However, uncertainty reigns as to what is to be considered as a specific reference; so far, the ECJ has given no clear indication. It appears to use a rather narrow understanding as to what is to be considered as a ‘specific reference’. For example in the Intertanko Case regarding the United Nations Convention on the Law of the Sea ([concluded 10 December 1982, entered into force 16 November 1994] 1833 UNTS 397) and the 1973 International Convention for the Prevention of Pollution from Ships ([signed 2 November 1973, entered into force 2 October 1983] 1340 UNTS 184 [MARPOL Convention]), the ECJ ignored the fact that the measure to be assessed was actually implementing the two conventions (ibid paras 24–27).

(b) Mixed Agreements

The competence of the ECJ to interpret international agreements extends to mixed agreements since these have the same status within EC law as Community agreements (Demrel [1987] para. 12), as long as the decisive provision does not fall in the exclusive competence of the Member States (→ European Community, Mixed Agreements). In this respect, the jurisprudence has shifted. At first, the ECJ considered itself competent to interpret all provisions of a mixed agreement, not taking into account the exclusive competence of Member States (Hermès International v FHT Marketing Choice BV [1998] para. 29). In later (mostly WTO related) cases, the limits of the ECJ’s jurisdiction were modified to respect the Member States’ exclusive competence (Parfums Christian Dior SA v TUK Consultancy BV and Assco Geriste GmbH v Wilhelm Layher GmbH&CoKG [2000] para. 35; Commission of the European Communities v French Republic [2004] para. 25).

For matters of shared competence the ECJ has the exclusive jurisdiction for deciding on the interpretation of mixed agreements, regardless of whether the Community has exercised its competence on the relevant area by adopting secondary legislation, and irrespective of whether the treaty regime has established its own mechanisms for the resolution of disputes (Commission of the European Communities v Ireland [MOX Plant]) [2006]; → MOX Plant Arbitration and Cases).

(c) Multilateral Agreements Concluded by Member States

Agreements not concluded by the EC or the EU are not part of Union law; therefore the lawfulness of a Union instrument does not depend on its conformity with an international agreement to which the Union is not a party (The Kingdom of the Netherlands vEuropean Parliament and Council of the European Union [2001] para. 52). This rule is, however, not applied to treaties concluded by all Member States prior to the establishment of the EC/EU or prior to their membership if the respective competence has later been fully conferred to the EC/EU (see Intertanko Case para. 49). This so-called doctrine of functional succession was most notably applied to the 1947 General Agreement on Tariffs and Trade (International Fruit Company [1972] para. 18). Furthermore, the ECJ interprets EU law in the light of international obligations taken up by all Member States (see eg Defrenne v Sabena [1976] para. 20 regarding the International Labour Organization Equal Remuneration Convention [No. 100]; European Parliament v Council of the European Union [2006] para. 37 regarding the Convention on the Rights of the Child).
With regard to the pre-EC/EU agreements of the Member States, Art. 351 TFEU (Art. 307 ECT) requires the Member States not only to act towards eliminating incompatibilities between those agreements and EU law, but also, according to the ECJ, to achieve elimination. That might require denouncing the agreement, if internationally possible (Commission of the European Communities v Kingdom of Belgium [1999]). The mere fact that the Union legislator is competent to pass legislation which might potentially conflict with the existing agreement of a Member State with a third State may constitute such incompatibility, leading to an obligation to alter the international commitment (Commission of the European Communities v Kingdom of Sweden [2009] and Commission of the European Communities v Republic of Austria [2009]).

(d) Decisions of Bodies Established by International Agreements (Secondary International Law)

Decisions of organs established by an international agreement that binds the EC/EU are also regarded as an integral part of the EU legal order if these organs have been ‘entrusted with responsibility for its implementation’ and ‘are directly linked to the agreement which they implement’ (Deutsche Shell AG v Hauptzollamt Hamburg-Harburg [1993] para. 17). Accordingly, the ECJ has the competence to interpret such decisions and to decide on their direct effect (SZ Sevinc v Staatssecretaris van Justitie [1990] para. 9). Most relevant so far were the decisions of Association Councils established by Association Agreements (→ European Community, Association Agreements) according to Art. 217 TFEU (Art. 310 ECT) (Hellenic Republic v Council of the European Communities [1990]; The Queen, on the application of Ezgi Payir, Burhan Akyuz and Birol Ozturk v Secretary of State for the Home Department [2008]). The ECJ practice could be applied to decisions of similar bodies.

(e) Multilateral Agreements Concluded by the European Union under Title V and VI Treaty on European Union (Nice)

Agreements concluded by the EU under the previous Title V and VI TEU (sometimes termed Second and Third ‘Pillar’) form an integral part of the Union legal order, in analogy to the former Art. 300 (7) ECT. Yet, one should be cautious in applying general Community law principles on the effect of those treaties, given the distinctive features of the legal instruments under the former EU Treaty compared to the instruments under the EC Treaty. The effect of the international treaties concluded by the EU under the competences of those Titles cannot go beyond the effect that the respective secondary law produces. Accordingly, such treaties cannot produce direct effect in the Member States. This is implicitly confirmed in Art. 24 (7) TEU (Nice) which, in contrast to Art. 300 (7) ECT, holds that international treaties concluded by the EU ‘shall be binding [only] on the institutions of the Union’ whereas the Member States can invoke the requirements of their own constitutional procedures against their application (Art. 24 (6) TEU).

The competence of the ECJ to interpret those agreements can be conceived as running parallel to its competence to interpret the framework decisions and common actions. This has been, by analogy to Art. 35 TEU, limited to treaties concluded under Title VI TEU (Police and Judicial Cooperation in Criminal Matters). The judicial process for treaties concluded under Title V (→ European Common Foreign and Security Policy) might be open only under Art. 46 TEU in connection with Art. 47 TEU to control whether the act of conclusion of an international agreement by the EU encroaches upon the powers conferred by the ECT on the Community (see Commission of the European Communities v Council of the European Union [ECOWAS] [2008] paras 31–34).

The Lisbon Treaty has abolished the so-called ‘pillar structure’ of the EU. With regard to the pre-Lisbon legal acts and international agreements concluded on the basis of the EU Treaty their legal effect will, according to Arts 9 and 10 Protocol No 36 to the Lisbon Treaty, not change until they are repealed, annulled, or amended. Whereas the international agreements in the area of police and judicial cooperation in criminal matters concluded after the Lisbon Treaty will be treated as international agreements concluded by the former Community, this is not the case for acts and consequently agreements relating to the common foreign and security policy. According to Art. 275 TFEU, the ECJ shall not have jurisdiction with respect to those legal instruments, apart from monitoring compliance with Art. 40 TEU (Lisbon) (formerly Art. 47 TEU) and reviewing the legality of legal acts providing for restrictive measures against natural or legal persons adopted by the EU Council on the basis of Chapter 2 of Title V TEU (Lisbon).

2. Customary International Law and General Principles of International Law

Though often referring to → customary international law and → general principles of law, the ECJ has for many years avoided any explicit statement on the position and effect of rules of customary international law and of general principles of law in the EC/EU legal order. It has simply applied those norms either to delimit the competences between Member States and the EC (Van Duyn v Home Office [1974] para. 22; A Ahlström Osakeyhtiö and Others v Commission of the European Communities [Woolpulp] [1988] para. 18), as rules of interpretation (Portuguese Republic v Council of the European Union [1999] paras 34–35; → Portugal v Council Case), or as a gap-filler in the absence of explicit provisions
governing a certain aspect on which the ECJ needed to decide (Herbert Weber v Universal Ogden Services Ltd [2002] para. 31), without any statement on their legal position (see Wouters and Van Eechhoutte 168–69).

24 The ECJ states that the EC/EU is bound by general international law ‘in the exercise of its powers’ (Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp [1992] para. 9). This does not answer the question whether rules of customary international law can be invoked in order to review the legality of an EU act. In this respect the CFI and ECJ have chosen different approaches. A CFI ruling indicates that customary international law applies within EU law only indirectly by way of transformation into a ‘general principle of law common to the legal orders of the Member States’:

[T]he principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations, which, according to the case-law, forms part of the Community legal order. … Any economic operator to whom an institution has given justified hopes may rely on the principle of protection of legitimate expectations (Opel Austria GmbH v Council of the European Union [1997] paras 83, 93).

By contrast, in Racke v Hauptzollamt Mainz [1998] the ECJ accords customary international law a direct position in the EC/EU legal order. Furthermore, it acknowledges its invocability by individuals in order to review the legality of EC/EU acts. Hereby, it places those rules above secondary law (ibid paras 45–51). Yet, the ECJ limits such application of customary international law to ‘fundamental rules of customary international law’ (para. 48) and, because of the ‘complexity of the rules’, further restricts its review to the question ‘whether, by adopting the suspending [act], the [institution] made manifest errors of assessment concerning the conditions for applying those rules’ (para. 52). Accordingly, customary international law and general principles play only a minor role.

C. Special Problems

1. World Trade Organization Law

25 No other multilateral treaty has raised so much discussion as the 1994 WTO Treaty concluded by the EC and its Member States as a mixed agreement (→ Opinion 1/94). If the ECJ has in general been generous in deciding on the direct effect of international agreements and their invocability when assessing the legality of a Community measure, this has not been the case for the WTO Treaty (Portuguese Republic v Council of the European Union [1999] para. 41) and its predecessor, the 1947 GATT (International Fruit Company [1972] para. 27; Federal Republic of Germany v Council of the European Union [1994] paras 105–12). This has triggered much criticism in the legal literature. It has been argued that the ECJ’s position in the 1947 GATT and WTO Agreement cases is political and mostly influenced by an attempt to protect Community interests. The ECJ’s position is supported by an EU Council statement that the WTO Agreement ‘is not susceptible to being directly invoked in Community or Member State courts’ (Council Decision 94/800/EC of 22 December 1994, preamble, last recital).

26 The ECJ held that

in the light of their subject-matter and purpose, [the WTO agreements] do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties (Portuguese Republic v Council of the European Union [1999] para. 41).

It corroborated this conclusion with two main arguments: the negotiability of WTO obligations (ibid para. 42) and the lack of reciprocity regarding direct effect when taking into account the main trading partners (ibid paras 43–45). If the ECJ directly applied WTO rules, it would prevent the Community from making effective use of its rights under Art. 22.2 Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization [adopted 15 April 1994, entered into force 1 January 1995] 1867 UNTS 154) (ibid para. 39).

27 There are two exceptions to this line of jurisprudence. Some scholars consider GATT (General Agreement on Tariffs and Trade) rules to be directly applicable either if the Union intends to implement, with the enactment of an internal act, a particular international obligation (Nakajima [1991] para. 31), or where an internal act explicitly refers to an agreement (Fediol [1989] para. 21). This understanding has been confirmed for the WTO Agreement (Portuguese Republic v Council of the European Union [1999] para. 48; see also eg Biret International SA v Council of the European Union [2003] para. 52; Léon Van Parsys NV v Belgisch Interventie- en Restitutiebureau [BIRB] [2005] para. 40). Furthermore, the case Commission v Germany (1996) illustrates that the ECJ applies WTO rules when deciding on the legality of measures taken by Member States. The legal basis for that application is left open.
In order to assess this approach, it should be considered that the issue of direct effect of WTO law goes beyond the technical criterion of determinedness. It raises constitutional concerns relating to democratic government, legal certainty, and legal equality. Direct effect of WTO law would increase the need for international legislation, but the WTO system does not have at its disposal an institution that could serve as legislator. Another principle to be considered is legal equality. The EU legal system addresses the concern that the EU law might not be applied equally by domestic courts through various mechanisms, above all the preliminary rulings procedure according to Art. 367 TFEU (Art. 234 ECT). The WTO system, by contrast, does not provide for a similar mechanism to guarantee the equal application of WTO law in domestic courts. Moreover, the potential discrimination against domestic producers if WTO law is applied directly is to be considered (for details see von Bogdandy [2008]).

A further issue is the effect of decisions of the Dispute Settlement Body (‘DSB’; → World Trade Organization, Dispute Settlement). So far, the ECJ has denied direct effect in cases where the reasonable period of time to comply with the decision or to negotiate on compensation has not yet expired (Biret [2003] para. 62). But even the expiry of the deadline does not entail that the Community has exhausted all options for negotiations; accordingly, direct effect has been denied (Léon Van Parys NV [2005] para. 51). The ECJ invoked the lack of reciprocity as preventing domestic courts from declaring Community legislation incompatible with WTO law since this would ‘deprive the Community's legislative or executive bodies of the discretion which the equivalent bodies of the Community’s commercial partners enjoy’ (Léon Van Parys NV [2005] para. 53). Furthermore, the ECJ denied Community's liability towards economic operators suffering damages caused by retaliatory measures imposed upon the exporters due to the Community's failure to bring its measures into conformity with its obligations under the WTO agreements within the time-limit laid down by the DSB (FIAMM and FIAMM Technologies v Council of the European Union and Commission of the European Communities [2008] para. 188). By contrast, Advocate General Maduro suggested that economic operators in such cases should have the right to compensation on the basis of the principle of objective liability (ibid para. 63; von Bogdandy [2005] 65).

2. European Convention for the Protection of Human Rights and Fundamental Freedoms

Although the EU is not a contracting party of the ECHR so far, its guarantees and the jurisprudence of the → European Court of Human Rights (ECtHR) are the main reference for the ‘fundamental human rights enshrined in the general principles of Community law’ (Stauder v City of Ulm, Sozialamt [1969] para. 7; see also Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities [1974] para. 13; Ordre des barreaux francophones et germanophone and Others v Conseil des ministres [2007] para. 29). Despite explicit reference in Art. 6 (3) TEU (Lisbon) (Art. 6 (2) TEU [Amsterdam]) and discussions on the functional succession of the Union to the ECHR, the prevailing position in the legal doctrine and jurisprudence of the ECJ and CFI is that the ECHR is not a part of the EU legal order, and thus that the ECJ cannot apply the ECHR directly when reviewing the legality of Union and Member State measures. Legally, it remains a subsidiary tool for the determination of EU law, to which the ECJ and CFI however often refer (Opinion 2/94 para. 33; see also Mayr-Melnhof Kartongesellschaft mbH v Commission of the European Communities [1998] paras 311–12).

Just as the ECJ considers the ECHR as not forming part of the EU legal order but as an interpretative tool of significant importance, the ECtHR also held that while ‘acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party’, Member States' responsibility under the ECHR continues after the transfer of their competences to international organizations (Matthews v United Kingdom [1999] para. 32). The ECtHR, however, limits its review of such acts to cases where the protection of human rights has been manifestly deficient. In principle, it assumes that the fundamental rights protection by the ECJ is comparable to that under the ECHR (Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirket v Ireland [2005] paras 149–56; → Bosphorus Case).

According to Art. 6 (2) TEU Lisbon, it is envisaged for the EU to accede to the ECHR. This will resolve the question as to the position of the ECHR within the EU legal order (see also → European Constitutional Treaty, Development of). Furthermore, the → Charter of Fundamental Rights of the European Union (2000) will become formally binding on the EU and the Member States upon the entry into force of the Lisbon Treaty. This will further clarify the position of the ECHR in the EU legal order since Art. 52 (3) of the Charter establishes that for the rights which correspond to those guaranteed by the ECHR that their ‘meaning and scope … shall be the same as those laid down by the said Convention’. The latter does not, according to the same provision, prevent the EU to provide more extensive protection than that accorded under the ECHR.

3. United Nations Charter

The implementation of UN Security Council measures under Chapter VII UN Charter by the EC/EU brought the doctrinal question as to the relationship between the UN Charter and EC/EU legal order into the limelight, and has provoked a rich discussion if, and to what extent, the EC/EU is bound by the UN Charter and secondary UN law. This is particularly
the case for UN Security Council resolutions, especially those affecting individuals. A crucial issue is the competence of the ECJ in this field.

34 For a long time, the EC has not been considered to be bound by the UN Charter and UN Security Council measures. Yet, since the EU Member States are members of the UN, the Community institutions were supposed ‘to take into account’ UN law. Accordingly, EU measures that implement UN Security Council resolutions, such as → economic sanctions, demonstrate the will of the Member States to fulfil their obligations under the UN Charter also via the EC/EU law (implied in Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and Others [1996]; confirmed in The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England [1997] paras 27–30). If the Member States take recourse to EU law to implement their obligations, these measures need to be compatible with the EU law while acting in accordance with their international obligations.

35 In decisions on economic sanctions against individuals, the CFI extended the doctrine of functional succession to the UN Charter (Yusuf v Council of the European Union [2005] para. 250; see also Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities [2005]; Chafiq Ayadi v Council of the European Union [2006]) even though the Member States had not fully conferred their powers related to the UN Charter upon the EC (Yusuf [2005] para. 125). In addition to functional succession, the CFI also based its argument on Art. 307 ECT (ibid para. 235). Art. 307 ECT (Art. 352 TFEU), however, does not oblige the Union to implement obligations of Member States according to such agreements but only disburdens the Member States of EU responsibility for infringements of UN law whereas Member States can limit the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles. This corresponds to the state of development of international law and the sometimes debatable legitimacy of international legal acts.

36 As decided in the Kadi and Al Barakaat International Foundation v Council and Commission [2008] judgment (→ Kadi Case), the ECJ can judge Community implementing measures on their compatibility with EU primary law (see also Advocate General Opinion of 16 January 2008). This indirectly strengthens European fundamental rights and the European rule of law against measures of international organizations. At the same time, the autonomy of the ‘Treaty as an autonomous legal system’ (Kadi [2008] para. 316) vis-à-vis the international legal order is asserted. In the academic responses to the judgment much criticism was raised regarding these points (see the contributions in [2008] 5 IOLR 323–79).

D. Assessment

37 The complex relationship between European Union law and international law is but an element of the complexity of the external dimension of European integration. Some of this complexity might simply be due to the contorted evolution of the law of European integration from an international treaty to an autonomous legal order; the law of an important international actor: it would be surprising if all elements of that legal development fitted neatly together.

38 Some observers criticize a certain reticence of the EU’s institutions towards international law. Yet, every developed domestic legal system can limit the effect of a norm of international law in cases of conflict with its constitutional principles. There should always be the possibility, at least in liberal democracies, to legally limit the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles. This corresponds to the state of development of international law and the sometimes debatable legitimacy of international legal acts.

39 Nevertheless, those who assert that the ECJ has a rather instrumental understanding of international law have a point. The ECJ uses international law certainly more as an argument to enforce Member States’ Union obligations than to submit measures of the EU institutions to scrutiny. Moreover, the ECJ has mostly attributed direct effect to international obligations of agreements where the EC or the EU has been the politically hegemonic force and has therefore had political control over the obligation, whereas it has denied direct effect in other constellations, in particular WTO law and the United Nations Convention on the Law of the Sea. Perhaps the ECJ sees the EU as an emerging superpower, and superpowers often have a rather instrumental understanding of international law (→ Superpowers and Great Powers). Such an understanding would sit uncomfortably with the professed support of international law, pointedly expressed in Art. 21 (2) TEU according to the Lisbon Treaty:

The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.
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