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OF INTERNATIONAL LAW

2012

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*Natividad Fernández Sola**

THE EUROPEAN UNION AS A REGIONAL ORGANIZATION WITHIN THE MEANING OF THE UN CHARTER**

Abstract

Since it assumed competences in the area of security and defence, the EU has become a complete regional organization in the sense of the Chapter VIII of the UN Charter. This article explains the current situation, following the recognition of the EU's special status by the United Nations and the entry into force of the Treaty of Lisbon. The future implementation of the mutual defence clause can improve the relevance of the European role as a security actor in the global framework of the UN and add a new task to its traditional peace-keeping, crisis management, and conflict prevention operations. In addition, the EU is an important political actor in the implementation of UN Security Council (UNSC) resolutions, especially those concerning the sanctions against individuals considered as belonging to terrorist organizations. By refusing the implementation of a UNSC resolution that fails to protect human rights, the EU can contribute to the evolution of the UN Charter legal order and be a political force to be reckoned with in the Security Council. The EU orientation, as reflected in its values, including respect for international law, can both reinforce the legitimacy of some UNSC resolutions and improve the credibility and specificity of the EU as an international actor.

INTRODUCTION

Inclusion of the EU's role as a regional organization in a discussion on the limits of the United Nations (UN) Security Council's competences is justified. Not only does the EU currently have a unique international legal personality, it also develops its own Common Security and Defence Policy (CSDP) and plays an important role as a crisis management actor in the implementation of some UN peacekeeping operations.

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This article explains the EU's status within the UN, the changes introduced by the Treaty of Lisbon (ToL), and the impact of its implementation, especially of the mutual defence and solidarity clauses. It also examines the European Union's role as peacekeeper, crisis manager and crisis prevention actor, and finishes with a reference to the problems concerning the application of UN Security Council (UNSC) resolutions by the EU. Our conclusion is constructive, as the EU orientation as reflected in its values, including its respect for international law, can both reinforce the legitimacy of some UNSC resolutions and improve the credibility and specificity of the EU as an international actor.

1. LEGAL STATUS OF THE EU BEFORE UNITED NATIONS

The EU has been an observer member at the UN since 1974, and since 2011, after some diplomatic mistakes, it has had enhanced its participation rights. This status allows it to speak among representatives of major groups or before individual states, to submit proposals and amendments, the right of reply, to raise points of order, and to circulate documents. However, the EU itself does not have voting rights, but instead is represented by its 27 Member States, two of which – France and United Kingdom – are permanent veto-holding members of the Security Council.

Even if it does not have full membership, the EU is the only non-state participant party to several dozens of UN agreements, and has been actively involved as a full participant at important UN Summits.¹

As mentioned, its observer membership is held alongside the full membership of all its 27 Member States. The Treaty of the European Union (TEU) obliges the EU members participating in the SC meetings to keep the High Representative and fellow states informed of their actions, and to defend in the SC the interests and positions of the EU (Art. 34 TEU). However, their obligation to request the High Representative to be invited to present the EU's position on a UNSC agenda item does not impact on their right to form their own foreign policy (Declaration 14).²

¹ *About the EU at the UN*, available at: http://www.eu-un.europa.eu/articles/en/article_9389_en.htm (last accessed 2 May 2013).

² Declaration concerning the common foreign and security policy (annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, Council of the European Union, 6655/1/08, REV.1)

“In addition to the specific rules and procedures referred to in paragraph 1 of Article 24 of the Treaty on European Union, the Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the United Nations.”

The Conference also declares that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.”

The eventuality of the EU taking up a seat on the Security Council³, even if logical from a qualitative point of view and coherent with the development of a common European Foreign Policy, is nevertheless politically sensitive among EU members. The most clear example – but not the only one – of national reluctance is the United Kingdom, which does not want to risk giving up its permanent seat on the UNSC.

No less important than its representation within the universal organization is the coordination of EU voting within the General Assembly's six main committees and other bodies and agencies, such as the Economic and Social Council or the International Atomic Energy Agency. The high level of coordination results from more than 1,000 internal EU coordination meetings held at the UN to develop a common EU stance. The result is a common European voice, including on controversial topics such as the Middle East. The EU has also spoken with one voice at all major UN conferences held since the 1990s.⁴ This remarkable success deserves to be publicized at least as much as the particular instances of incoherence and disagreements are commented on.

The financial contribution of the EU and its Member States to the UN budget also should be taken into account, as it is the leading financial contributor, providing almost 40% of the UN budget (followed by the US at 22% and Japan at 16.6%). More than 40% of the funding for UN peacekeeping missions comes for Europe, and more than 13% of peacekeeping personnel. Later we will also point out how the EU operates its own missions to support the UN.

2. CHANGES INTRODUCED BY THE TREATY OF LISBON: UNITARIAN LEGAL PERSONALITY, MUTUAL DEFENCE CLAUSE AND SOLIDARITY CLAUSE

The basic innovation introduced by the ToL is the EU's unique international legal personality. If previously the EU already enjoyed this legal prerogative,⁵ it was shared

³ The European Parliament voted on 9 May 2011 in favor of requesting their own permanent representative at the UN Security Council. This move has been met with condemnation from some EU members, who believe that allowing the Union in is a step too far.

Members of the European Parliament have voted in favor of the idea of an EU seat within the Council as part of an overhaul of the EU's common defense, security and foreign policy, European Voice newspaper reported, RT 11.5.2011, <http://rt.com/news/eu-un-security-council-representative/>. See H. Spongenberg, *EU heading for single UN seat, UN official says*, EU Observer, 3 October 2006.

⁴ Statistics concerning increase in common votes in the General Assembly, where the EU has voted unanimously 97% of times, in http://www.unric.org/html/english/pdf/Leporello_EU-VN_e.pdf. One exception arose at the end of 2011 with the blockage by the UK of EU statements to UN committees for a symbolic reason; the opposition continues even if the blockage is not general. For an academic approach see M. O. Hosli, E. Van Kampen, F. Meijerink and K. Tennis, *Voting Cohesion in the United Nations General Assembly: the Case of the European Union*, paper presented at the ECPR Fifth Pan-European Conference, 24-26 June 2012, Porto.

⁵ N. Fernández Sola, *La subjetividad internacional de la Unión Europea*, 11 *Revista Derecho Comunitario Europeo* 85 (2002).

with the traditional one of the European Community. Apart from the confusion among third states, the previous situation generated a diverse international representation. Before the UN, the European Community was represented by the President of the Commission⁶ and, for issues dependent on the “second pillar”, by the rotating European Council President; and the coordination between them was not always perfect.

Since the entry into force of the ToL in December 2009, the European Union as a whole has taken on the role and obligations which the European Community previously exercised. Commission and Council delegations to the UN in New York have also been merged. Following the enactment of the Lisbon Treaty, the EU proposed to,⁷ and obtained from General Assembly the same representation rights (but not voting rights) as full members.

2.1 Mutual defence clause⁸

The ToL provides another innovation, this time related to the CSDP: the inclusion of a mutual defence/mutual assistance clause. According to Art. 42.7 TEU (in the wording established by the ToL):

If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation

This clause works, with respect to an attack or armed aggression from a State, in accordance with the right of self-defence recognized by Art. 51 of the UN Charter, and allows for a military response only after the attack, but not for preventive purposes. The clause implies the undoubted recognition of the EU as a regional defensive organization in the sense of Chapter VIII of the UN Charter.

However, there are two questions that the ToL does not clarify: the content of the obligations derived from this article, and the way in which the clause is to be automatically applied. It is sometimes assumed that the obligation of mutual assistance is larger than that contained in the NATO Treaty, as Member States have to give both civil and military assistance. In our opinion it is not a larger obligation, as the Washington Treaty speaks, in fact, of “necessary measures, including the use of armed force”, so theoretically other kinds of measures apart from military actions would also be possible.

⁶ The European Community inherited the EEC’s international role after the Treaty of Maastricht, and thus between 1993 and 2009 the EU was represented by the European Community at the UN.

⁷ Participation of the European Union in the work of the United Nations, Draft Resolution A/65/L.64/Rev.1, United Nations.

⁸ The following ideas come from my research: *Les clauses d’assistance mutuelle et de solidarité du traité sur l’Union européenne: contenu, délimitation et garanties politiques et juridiques*, in: *Mélanges en l’honneur du Professeur Joël Molinier*, LGDJ, Paris: 2012, pp. 203-220.

Of course, there are practical limitations to such “other measures”, as the NATO is a military organization and has not developed anything but military capabilities.

Even if some authors have considered the TEU mutual assistance clause as automatic in its application, this article argues against this interpretation, for historical and practical reasons. Historically, during the constitutional process, the mutual defence clause was considered as a flexibility clause that Member States could subscribe to or not. If we add that the use of military force is a discretionary capacity of Member States, and that some Member States declare themselves as neutral, for the sake of coherence this would infer that the clause is not of automatic application, but that each state has to decide on its own reaction to an armed attack on another Member State.

The main obligation assumed by the states pursuant to this clause is a political one. Any decision in this domain requires the unanimity of the Council and constructive abstention is open to the states. This possibility to “opt out” on a case-by-case basis reinforces our position that one Member State cannot be obliged to automatically use force as a response to an armed attack against another Member State.

Although it is difficult to imagine an application in practice, the clause can be useful for EU members not belonging to NATO and for non-European territories of European NATO members. For these reasons the European Parliament recently asked the High Representative for a rapid implementation of this clause in order to guarantee a similar level of security for all European citizens.⁹

As an obligation included in the constitutional treaty of the EU, the mutual defence clause should have some legal and political guarantees. A legal guarantee seems to us only possible if one Member State fails to adopt any kind of measure to assist a fellow state which has suffered from an armed attack, and is obligated to do so either by virtue of being a member of NATO or the EU (including civil or military assistance). On the other side, the political guarantee looks weak, as the political reaction would depend on the strength or weakness of the state being requested to provide assistance.

Several factors may create obstacles to the implementation of the clause: including institutional or structural, budgetary, and political factors. First, the need for a European Headquarter allowing for autonomous and permanent planning for operations seems clear. Second, defence budget restrictions would require major coordination between NATO and the EU of assistance offered before an armed attack. Finally, no development is possible without the will to act. European political will is essential and may promote the revision of national security and defence strategies.

2.2. Solidarity clause (art. 222 TFEU)

According to Art. 222.1 and 2 of the Treaty on the Functioning of the European Union (TFEU):

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster.

⁹ European Parliament, *Report on the EU's mutual defence and solidarity clauses: political and operational dimensions*, A7-0356/2012, 30 October 2012.

The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

- (a) - prevent the terrorist threat in the territory of the Member States;
 - protect democratic institutions and the civilian population from any terrorist attack;
 - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
 - (b) - assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.
2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

Thus, with respect to a terrorist attack, EU actions can be deployed for the following purposes: prevention of a terrorist threat, protection of democratic institutions and the civilian population, and assistance on the territory of a Member State requesting the same. In order to distinguish this clause from the mutual assistance one, it seems clear that the term “terrorist attack” refers to an armed attack not from a state, but instead from a non-state actor. (For the purpose of this paper, we leave aside the issue of assistance in the case of disasters).

The content of the obligation arising from this article is assistance to the victim of a terrorist attack. This assistance can be provided by civil or military means, but it does not imply that all Member States must be engaged in collective defence. In fact, to put one state’s civil and/or military capabilities at the disposal of another state does not imply the use of force. Such a use of force would require authorization by the UNSC, and the action could be considered as a Petersberg mission, if developed outside Member States’ territory, or a mutual assistance mission, if developed inside one Member State, but not the application of the solidarity clause. Moreover, Member States oblige themselves to coordinate their activities within the Council and to keep the European Parliament informed.

The practical implementation of the solidarity clause, already used after the terrorist attack in Madrid in March 2004, requires a unanimous decision by the Council, i.e. where constructive abstention is possible for a Member State if such a decision involves the use of military assets.

We can also look at political and legal guarantees when referring to application of the solidarity clause. Legal recourse would be possible against a state that does not provide any assistance if the victim state of a terrorist attack asked for it. From a political point of view, reciprocity is the best guarantee of fulfillment of the solidarity clause. Member States can easily perceive that they too can be victims of a terrorist attack in the future, or just need cooperation at the European level to prevent it.

The solidarity clause asks for the development of EU civil protection assets. A Council decision is needed and urgently requested by the European Parliament. In fact, the European Parliament report on mutual defence and solidarity clauses¹⁰ asked for

¹⁰ *Ibidem*.

quick implementation of the solidarity clause in order to deliver a coordinated multi-sector response when needed. It considers that the solidarity clause can provide the impetus for enhancing the EU's leverage among European citizens. In order to do that, efficient coordination is required among the multiple EU-level monitoring centers.

3. EU INVOLVEMENT IN UN CRISIS MANAGEMENT OPERATIONS

Regardless of the future directions of development with respect to the mutual assistance and solidarity clauses, the EU is already playing a major role in conflict prevention and crisis management. It acts as a mediator in controversies threatening international security, such as the Iranian and North Korean nuclear programs, or in the Middle East quartet. In these situations, the EU can play a leading role as a balance, or swing vote, among other big powers, i.e. by becoming more involved in support of one party's position. It had a special impact on the US position, for example, with respect to the Iraq war in 2003. While it was frequently said that the US was the locomotive behind the normative and institutional order embodied in the UN and reshaped in the post-cold war era, its military action against Iraq did serious damage to that order.¹¹ As a result of its actions in Iraq, the US lost its credibility as mediator in the eyes of certain Middle Eastern regional powers, even if, due to its enormous military and political power, its participation in the resolution of conflicts is essential.

At present, third generation peacekeeping operations (PKO) are performed by regional organizations with or without the express authorization of the UNSC.¹² There are also joint and hybrid UN operations with regional organizations, mainly to guarantee humanitarian assistance in internal conflicts. Regional organizations have coercive capacity or strategic authorization for the use of force based on Chapter VIII of the UN Charter.

¹¹ I. Johnstone, *US-UN Relations after Iraq: The End of the World (Order) As We Know It?*, 15(4) European Journal of International Law 813 (2004).

¹² The AU's Constitutive Act is based on the premise that sovereignty is conditional and is defined in terms of a state's willingness and capacity to provide protection to its citizens; the Constitutive Act acknowledges that the state has the principal responsibility for protecting its citizens. If a state fails to live up to these commitments, the AU has a right to intervene for human protection purposes through multilateral military force, if necessary. Article 4 (h) of the Constitutive Act declares that the Union has "the right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances: namely war crimes, genocide and crimes against humanity". In February 2003, the AU Heads of State and Government added an amendment to Article 4 (h) that extends the right to intervene to situations that pose "a serious threat to legitimate order to restore peace and stability in the Member State of the Union upon the recommendation of the Peace and Security Council". Article 4 (j) of the Constitutive Act also indicates that a member state has the right to request intervention from the Union for the restoration of peace and security. In addition, consistent with the protection mandate and in contrast to the OAU, the AU does not require the consent of a state to intervene in its internal affairs in situations where populations are at risk. In March 2005, the AU's Executive Council lent further credence to the AU's endorsement of *The Responsibility to Protect* principles. "The Ezulwini Consensus" constitutes the common African position on the UN reform.

See also T. Kabau, *The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union's Interventions*, 4(1) Goettingen Journal of International Law 49 (2012).

With the *Artemis* operation, the EU started its autonomous (i.e. without NATO) peacekeeping and crisis management operations, coercive (with the strategic authorization for the use of force by Chapter VII of the UN Charter) and outside European space. This operation had a concrete aim: supporting another international organization, normally the UN or African Union (AU).

In this vein, *EUFOR-Althea* was a 2004 stabilization operation where the EU replaced NATO, the organization that assumed the implementation of a no-fly zone obligation decided upon by UNSC resolution 816 (1992).¹³ In July 2004, the UNSC, by resolution 1551 under Chapter VII, acknowledged the substitution of NATO by the EU. Accordingly, the EU Council adopted a decision on 12 July 2004 on the deployment of *EUFOR-Althea* in Bosnia Herzegovina, with the main aim of supporting the implementation of the Dayton peace agreement.

The operation in Darfur was the second case of EU involvement in UN peacekeeping missions. This was a hybrid operation developed by the AU and the UN in Chad (UNAMID).¹⁴ The EU supporting action to the AU Mission continued until the end of December 2007, when its mandate ended and the African Union Mission in Sudan was handed over to the joint AU/UN peacekeeping operation in Darfur (UNAMID) in accordance with UN Security Council resolution 1769 (2007). A second resolution (1778, of 25 September 2007) approved a multidimensional presence in Chad and in the Republic of Central Africa. In order to provide support to the African Union and United Nations for the political and humanitarian crisis in Darfur (Sudan), the European Council on 15 October 2007 approved Common Action 2007/677/CFSP, establishing *EUFOR Chad IRCA* with Headquarters in Mont Valerien and a tactical HQ in Abeche (Chad), employing a force of maximum 3,700 troops.

Another example of EU involvement in a UN peacekeeping operation took place in the Democratic Republic of Congo (DRC). At the request of the UNSC, and using the military operation *EUFOR – RD Congo*, the EU intended to reinforce the UN Monitoring mission and the Congolese Armed Forces. On 25 April 2006, the Security Council adopted resolution 1671 (2006), authorising the temporary deployment of a EU force to support the United Nations Mission in the Democratic Republic of Congo (MONUC) during the period encompassing the elections in the country. This military operation was conducted in full agreement with the authorities of the DRC and in close coordination with them and MONUC.

Finally, *EUNAVFOR – Atalanta* is an operation initially aimed to protect the humanitarian assistance provided by the World Food Program to Somalia. Initially,

¹³ Res. 816 (1992) authorized all member states, on a national basis or through a regional organization, to adopt all necessary measures in air space over Bosnia Herzegovina to implement the obligations of a no-fly zone. UNSC Resolution 1575/2004 was the basis for *EUFOR-Althea*. The Mission was pro-grogued by UNSC resolutions 1639/2005, 1722/2006, 1785/2007, 1845/2008, 1895/2009, 1948/2010, 2019/2011 and 2074/2012, under the Chapter VII of the UN Charter.

¹⁴ The African Union/UN Hybrid operation in Darfur, referred to by its acronym UNAMID, was established on 31 July 2007 with the adoption of Security Council resolution 1769.

UNSC resolution 1816 (2008) under Chapter VII authorized states that collaborated with the Federal Transitional Government to enter into Somali territorial waters (200 miles) to combat piracy or repress, by the use of force, acts of piracy, but not to rescue people by force of arms nor use force except for self-defence. Next, UNSC resolution 1838 (2008) approved the active participation in the fight against piracy in High Sea coast off Somalia by warships and military aircraft, which implies the use of force against acts of piracy, and not only in Somalia jurisdictional waters.

As a reaction, the EU Council Decision 2008/918/CFSP approved the launch of *EUNAVFOR Operation Atalanta*.¹⁵ Its mandate includes authorization for the use of force when necessary. It has the Operational Headquarter in Northwood and a tactical Headquarter on board. Subsidiary to *Atalanta* is the training mission in Somalia (May 2010) – EUTM Somalia – to train security forces for the Federal Transitional Government (SSR operation). Recent EU missions in South Sudan (EUAVSEC South Sudan) and in Mali (EUTM Mali) develop UNSC resolutions for improving institutional building and to provide assistance, expertise, training and capacity-building support to the Malian Army and Security Forces, respectively.¹⁶

Title V of the ToL codifies EU actions in military crisis management. According to Art. 42 and 43, Petersberg Missions will guarantee peacekeeping, conflict prevention, and international security reinforcement, always in accordance with UN Charter principles.

Based on the experiences described above, we can infer the importance of the EU's role as a regional organization in close cooperation with or implementation of UNSC resolutions, acting as peacekeeper or conflict prevention and crisis management actor.

4. IMPLEMENTATION OF UNSC RESOLUTIONS. LIMITS TO SECURITY COUNCIL ACTIONS AND THE INCREASED ROLE FOR REGIONAL ORGANIZATIONS

The last question which requires analysis in order to achieve a global understanding of the EU as a regional organization refers to the implementation, at the EU level, of the UNSC resolutions as needed. The legal paradox is the EU's competence to implement coercive measures imposed by the Security Council while not being an official Member State of the UN. This situation is similar to the one which occurred under GATT after the assumption by the European Communities of exclusive trade competences.

¹⁵ Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (*Atalanta*); previously, Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.

¹⁶ Council Decision 2012/312/CFSP of 18 June 2012 on the EU Aviation Security CSDP Mission in South Sudan (EJ L 158/2012) following UNSC Resolution 1996 (2011), adopted on 8 July 2011. Council Decision 2013/34/CFSP of 17 January 2013 on a EU Military Mission to contribute to the training of the Malian Armed Forces (EUTM Mali) following UNSC Resolution 1996 (2011), adopted on 8 July 2011.

The application of UN Security Council resolutions in the security and defence field needs a CFSP common position and the approval of a regulation on the basis of the former Art. 60, 301 and 308 of the Treaty establishing European Community in order to be effective within the Union. Today, the legal basis for the adoption of such measures is Art. 215 of the TFEU.¹⁷

We will refer here to the resolutions adopted to fight terrorism. The most important resolutions from the UN Security Council adopting measures against the Taliban and banning exports of certain goods and services to Afghanistan were resolutions 1267 (1999), 1333 (2000) and 1353 (2001).¹⁸

A judicial action for annulment of the EU rules implementing the UNSC resolutions may be commenced by an individual affected by such regulations, claiming its invalidity on the basis of non-compliance with human rights requirements. This happened when M. Kadi, affected by those measures, went before the European Court of Justice (ECJ). The *Kadi* case (2008) forced the ECJ to tackle directly the issue of the efficacy within the EU of a UNSC resolution imposing sanctions on an individual supposedly connected with terrorist groups. The first judgment, by the Tribunal of First Instance (TFI),¹⁹ declared that Security Council resolutions engaged the EU, which has to adopt all necessary measures for Member States to implement them. Its argument was based on Art. 103 of the UN Charter, according to which the Charter prevails over constitutive treaties, except for *ius cogens*. This was clearly an interpretation from the international law point of view. However, the ECJ²⁰ annulled the TFI judgment and considered that fundamental rights (in this case the right to be heard, to an effective judicial review, and to respect for property) should prevail over Security Council resolutions.

Some scholars argued that this judgment goes against UNSC authority. However, it is also possible to understand it as a motivation to the Security Council to adopt mechanisms to compensate for the lack of legal protection for individuals faced with

¹⁷ Article 301 TCE referred to the adoption of economic measures against third States in order to fulfill CFSP economic sanctions; article 60 was about Council adoption of economic sanctions; and article 308 TCE was the residual competence clause. Article 215 of the ToL states that CSDP can provide, by decision, for the interruption or reduction of economic and financial relations with third countries; the Council should then adopt the necessary measures, by qualified majority; as well if the restrictive measures are against a natural or legal person.

¹⁸ EU Council approved common position 1999/727/CFSP implementing the first UNSC resolution, and common position 2001/154/CFSP and regulation 467/2001.

¹⁹ Judgment of the Court of First Instance (Second Chamber, extended composition) of 21 September 2005. *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*. Case T-315/01.

²⁰ Judgment of the Court (Grand Chamber) of 3 September 2008. *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*. This decision analyzes Common Position 2002/402/CFSP and Regulation (EC) No 881/2002, adopting measures against persons and entities included in a list drawn up by a body of the United Nations.

A final judgment was adopted by the General Court on 30 September 2010. *Yassin Abdullah Kadi v European Commission*, Case T-85/09.

restrictions on their fundamental rights.²¹ Otherwise, one should ask what would be the EU's legal position if, in implementing a UNSC resolution, it violates international law norms contained in the Charter and part of peremptory norms such as those protecting the fundamental human right to defence before the courts in legal procedures.

CONCLUSIONS

From the above-presented analysis we can conclude that the EU is today a regional organization in the sense of the chapter VIII of the UN Charter, and acting under Article 51 of the Charter, as it contributes to UN aims and to the implementation of its resolutions aiming at maintenance of international peace and security and, since the entry into force of the ToL has a right to collective defence/ mutual assistance. The Security Council frequently uses the EU for the enforcement action under its authority.

The EU role within the UN can be improved by the mutual defence clause introduced by the Treaty of Lisbon if, following the demand from the European Parliament, the High Representative adopts measures for the rapid implementation of the clause in order to be ready to react to any eventual request of a Member State.

As an enforcement agency, the EU is under the authority of the UNSC. However, we cannot deny the existence of legal and political controversies with respect to the legitimacy of Security Council actions on some occasions. In particular, following the 9/11 attacks the practice of the United States to use the United Nations to shape global norms and innovative approaches to peace and security, such as the self-defense action in Afghanistan and Security Council resolution 1373 on terrorism, has increased. For some states, this is seen not as an attempt to adapt existing norms and institutions to new threats, but rather to tear them down and start again from scratch. The obvious result is a damaged UN Charter-based legal order. But European – and American – interests are embedded in this order; hence the importance of its recovery.

By refusing the implementation of a UNSC resolution that fails to protect human rights, the EU can contribute to the recovery of the UN Charter legal order and be a political force to be reckoned with in the Security Council.

Today the EU is trying to elaborate the European Global Strategy in order to develop an external action perspective. This perspective has to do with power, influence, and the possibility for the EU to play a leading role in accordance with its values and interests. The EU's call to the attention of the Security Council issues concerning the content and procedures for implementing its resolutions imposing sanctions for terrorism can be a way to promote and reinforce its normative role as a leading actor distinct from the US, and one which acts in consistence and coherently with respect to European proclaimed values.

²¹ J.M. Pérez de Nanclares, *Unidad y pluralismo en la jurisprudencia del Tribunal de Justicia de la Unión Europea. Hacia un refuerzo de la autonomía del Derecho de la Unión Europea frente al Derecho internacional*, in: A.J. Rodrigo & C. García (eds.), *Unidad y pluralismo en el Derecho internacional público y en la comunidad internacional. Coloquio homenaje a O. Casanovas*, Tecnos, Barcelona: 2009, pp. 254-285.