Social Science Review
Volume 3, Issue 1, June 2017
ISSN 2518-6825

"Conflicts between Treaties, Vienna Convention 1969, Doctrine and Practice"

Phd. Fjorda Shqarri
University of Tirana
Faculty of Law
Department of Public Law

Abstract

Conflicts between treaties are one of the biggest problems of the treaty law, which is not solved completely, leaving open the discussion among the methods and procedures to deal with this issue. This paper aims to analyze by the perspective of a qualitative methodology the prescriptions of Vienna Convention 1969 about this questions and the practice followed by states in case of conflicts between two or more treaties.

Conclusion: The conflicts between treaties are now the most important issue of treaty law and the practice in this area is not defined and unified, so the question is not solved and we can't say that we have a proper solution of all possible conflict of the future, but we can definitively say that states and the solutions given by them are a very crucial point in this direction.

Keywords: conflicts between treaties, treaty, state party

The implementation of treaties is one of the most important parts of treaty law, as it realizes in practice what the parties have signed and ratified on paper. The Vienna Convention 1969 "On the law of treaties between states" has foresees the lack of retroactive power of a treaty, implying that the rights and obligations of a treaty start at the moment of coming into force, regardless of how these questions were solved before its entry into force. International law itself belongs to "soft law" and does not have a proper authorized body to create mandatory norms for all the subjects of this law. Adding to this fact the principle of sovereignty and the freedom of states to enter in relations with each other, we come to the conclusion that this right is characterized by continuous fragmentation, which is an obstacle for the creation of a unique bloc of norms in this area. Continuous increase in the number of bilateral treaties and multilateral treaties, which are often not coordinated between them, create an unwanted effect in the implementation of the treaties, which is called collision or conflict between treaties and consequently serves as a source to increase the number of disputes between subjects of international law. States or international organizations participating in the negotiations for the conclusion of a treaty that are aware of the rights and obligations taken in other treaties before, usually try to avoid potential conflicts with previous or future treaties by providing a special provision called "Conflict norm". Provisions of such nature are different because this depends on the will of the parties but also by the nature of the treaty itself. There are some kind of provisions called "complementary provisions" which explain that they do not prejudice rights and obligations taken by states in other treaties before. Another type are the provisions that oblige parties to the new treaty to give up on previous conflicting treaties, or provisions that prohibit the states to conclude future treaties which may conflict with the treaty in question.

European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in article 17 provides that "This Convention shall not prejudice the provisions of domestic law or any international agreement which provide greater protection for persons deprived of their liberty. 2 Nothing in this Convention shall be construed as limiting or derogating from the competence of the organs of the European Convention on Human Rights or from the obligations assumed by the Parties under that Convention…" This article regulates relations with previous treaties by providing that it does not infringe previous treaties provisions which are more extended leaving it clear that it prevail over those more closer. Meanwhile, it also regulates the report with the ECHR which provides that it prevails in any case of possible conflict.

In the North Atlantic Treaty there is an obstacle for the states parties to bind to other treaties which may conflict with it "*Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty*."

In the United Nation Convention on the Law of Sea 1982 is provided that "*1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958. 2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention. 3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the 141 enjoyment by other States Parties of their rights or the performance of their obligations under this Convention. 4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides. 5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention….*"

However, the provisions which foresee the relationship of a treaty to those of previous or following can solve some of the possible conflicts, but despite this we cannot say that eliminates the possibility of conflicts in the way final and forever. Suffice it to recall the fact that some treaties do not they have such predictions, leaving their status unresolved in relation to them preexisting and non-existent treaties.

It is known that the negotiation and conclusion of the treaties take place at different times, and persons who are part of the working groups in these cases may be different, reducing the chances of avoiding conflicts over what the treaties link may already be in force for a state.[1] On the other hand, a conflict between the norms of Treaties can take different directions and can be treated as a change in the way of interpretation between the parties or can be deleted after the concept of modification or amendment of treaties. This problem is also disciplined by the Vienna Convention in its Article 30[2] but according to doctrinal studies cannot be said to have been successful and has avoid ambiguities in this regard. The Convention states in the title of this Article that applies to treaties of the same content creating two problems: first: how will it be possible to note that treaties have the same content, since the convention don't find any procedure or correct way, which means that this will create a new problem beyond the initial problem. By using some rules of conciliatory interpretation and principles of international law, the organs of international dispute resolutions have tried to solve them on an ad hoc case basis; Secondly:

---

[1] Jan Klabbers, Beyond Vienna Convention : Conflicting treaty provisions, fq. 195, në The law of Treaties beyond Vienna Convention, ed by Enzzo Cannizzaro, Oxford University Press, 2011

[2] 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs. 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. 4. When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

The biggest problem in conflicts between treaties appears in cases when we have treaties that have different content and they conflict between each other only in certain provisions, putting state parties in difficulties on which of them to implement while implementing one means to violate the other.[3] The Convention states that in the case of conflicts of treaties concluded between UN states and the UN Charter itself, the latter will always have priority, as set out in Article 103 "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". This prediction seems to determine once again the hierarchical status of the Charter in relation to all other agreements and is dealt with by doctrine as a principle that override the treaty law itself and refer to it as a norm of customary law and since Article 103 itself is compulsory and incomprehensible, approaches one more standards of jus cogens.[4]

The conflict of a treaty with a jus cogens norm, under Article 53, has a sanction Nullity of the treaty "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

There is no provision of nullity in the UN Charter regarding treaties which violate Article 103 or the Charter itself, and it is presumed that the treaties concluded in these terms will end up according the articles for the termination of the treaty. [5]

Article 30/2 defines exactly the "norm of conflict" abovementioned and states that in cases where the treaty itself stipulates that it does not contradict or is compatible with another treaty, then the latter will prevail. This provision can be applied very well in cases where the parties accept the treaty's priority of the later treaty[6] but the problem may arise if the parties disagree regarding the prevalence of the subsequent treaty, even if they have stipulate before that it does not conflict with the previous treaties.

While the next paragraph addresses the relation between treaties which have the same state parties and the same content and coexist with each other[7] explaining that in this case the previous treaty applies only to those provisions that comply with the subsequent treaty, applying the rule lex posteriori derogat priori. If the parties to the later treaty are not the same as those of the previous treaty, the convention suggests that the parties that are part of both treaties apply the later treaty, and between a party that is only part of the previous treaty and a party to a later treaty shall apply the provisions of the previous treaty.

At first glance it looks like this paragraph solves all the problems regarding treaties with different parties, but it is not so, because if we analyze this provision we will understand that this can be very useful for agreement of technical nature or for agreements that detail or are concluded on the basis of previous treaties , but when the issue comes to treaties that create rights and obligations the situations is more complicated because it is very difficult to make a split between the rights and obligations arising from each treaty and which ones should be implemented. If we return once again to the negotiations for drafting and concluding the Vienna Convention we see that for Article 30 and especially for paragraph 4 there has been many debates that mainly were focused on the issue of sharing obligations that produce treaties by their very nature in obligations of reciprocal and non reciprocal character.[8]

According to Frizmaurice, obligations are reciprocal when applied mutually between the parties to the treaty, while non - reciprocal obligations are those which are not enforced in reciprocal and direct way between each of the parties to the treaty and these will be divided into two groups.

---

[3] Bennedetto Conforti, Consistency among treaty obligations, fq188, në The law of Treaties beyond Vienna Convention, ed by Enzzo Cannizzaro, Oxford University Press, 2011

[4] Ibid

[5] Ali Sadat-Akhavi, Methods of Resolving Conflicts Between Treaties, fq. 61, Martinus Njuhoff Publishers

[6] M. Fitzmaurice, Elias Olufemi, Contemprorary issues on the law of treaties, fq 321

[7] Mark Villiger, Comentary of Vienna convention, fq 406

[8] Jan Klabbers, Beyond Vienna Convention : Conflicting treaty provisions, pg. 195, në The law of Treaties beyond Vienna Convention, ed by Enzzo Cannizzaro, Oxford University Press, 2011

The first partition includes non-reciprocal subordinated obligations, which though ate not applied reciprocally between the parties, the enforcement of the obligations arising out of the treaty by each party is indispensable for the creation of certain standards and for the very existence of the treaty.[9] For example, treaties of disarmament which, although not producing reciprocal obligations, the implementation by all parties is indispensable to realize the object and purpose of the treaties. The second group would be non-reciprocal integral obligations, which are obligations that do not apply mutually between the parties and the lack of enforcement by one of the parties do not create problems in the existence of the treaty between the other parties.[10] Obligations like this could be the ones that derive from human rights treaties. According to Frizmaurice this division would be very important to establish relationships between treaties and to apply the provisions of the convention that will resolve conflicts between them.

This idea was strongly opposed by Sir Humpey Waldock, according to whom not in it all cases of non-enforcement of mutual obligations make the treaty inescapable and there are even cases where only some parties want to review the treaty and establish new agreements, but that does not mean they have no interest in the previous treaty which includes more state parties than the new treaty. It seems that this idea was supported in the drafting of Article 30 however we cannot say that they were not considered Frizmaurice's ideas for articles 40 and 41 of the convention, though not mentioned expressly.

If it were considered the separation into reciprocal and non-reciprocal obligations, perhaps Article 30 could be clearer and would find a wider application because during its drafting it would have been best evidenced that paragraph 4 could be implemented very good for mutual obligations, but when it comes to non-reciprocal obligations it can't be implemented. This is so because they are not implemented directly and in a reciprocal way between the parties, and the mutual control would be lacking, so each of them will implement the treaty provisions that are more favorable by creating confusion in the implementation of the treaty. As we mentioned above, the most important problem presented by Article 30 is the lack of a solution for treaties that have different parties and different content and their particular provisions may conflict. Except the case of jus cogens norms and article 103 of the UN Charter, the rest of the treaties are acts that do not have a hierarchical relation between them and the evaluation is done only in the horizontal plan. In this regard, for a state party will be difficult to clarify which provision will prevail and which should be applied when it is part of two treaties which have different or opposite predictions for the same issue.

The first suggestion is the use of the principle that lex a priori has prevalence, as in the first paragraph of the Vienna Convention regarding treaties having the same content. This rule cannot become an axiom of resolving such conflicts, because the later treaty may be more important for the parties or more advantageous to them. On the other hand, the very conclusion that a previous treaty conflicts with the new one is not always clear and it may happen that this is revealed after a long time after the treaty's conclusion. Use of lex a priori in resolving conflicts between treaties can prevent the development of international law which by its very nature is developed and changes very fast, so we cannot say that it's the most efficient solution.

The second suggestion is the use of the lex posteriori derogat priori principle, which is also used by Article 30 of the Convention but in the case of treaties with different content, presents difficulties in implementation because not always the treaties are of the same importance to the states. This principle may be appropriate when we have bilateral agreements, because it is presumed that the parties are clear that they will not enforce provisions of the previous treaty that conflict with the later, but for multilateral treaties where the parties to the previous treaty are not identical to those of the previous treaty, this principle can not be applied.

The third suggestion is the use of the principal lex specialis prevailing over lex Generalis, but the problem lies in determining which will be lex specialis and which will be lex Generalis? The doctrine suggests different ways to determine this, for example, getting started by the number of parties to a treaty or by the importance of the treaty's content, however there is nothing well-defined in this regard. So EU treaty norms can be general in comparison to bilateral agreements between states but we can't say that they are less important,

[9] Yearbook of ILC 1958, vol II, pg. 27

[10] M. Fitzmaurice, Elias Olufemi, Contemprorary issues on the law of treaties, as mentioned before

while we are seeing these rates in relation to the provisions of the United Nations Charter will be called those lex specialis or general? Therefore, this rule can not be applied in any case.

As we discussed above, we conclude that the conflicts between treaties with different parties and with different content do not have a standard and well- defined solution, so we think that in this case the solution can only be given by the will of the parties expressed in the choice of the treaty that will have prevalence in implementation. Certainly, this choice can often lead to breaches of treaties and launch of the mechanisms that charge responsible offenders, but this is not a question of the treaty law.

The lack of the efficiency of Article 30 does not produces only conflicts between treaties as we have discussed above, but it also creates another problem: overlapping of treaties and their parallel implementation. So we can face the situation when we have two treaties that deal with similar issues and apply simultaneously like the case of the ECHR and the European Charter of Human Rights, which has brought a overlapping of competences between the ECJ and the ECHR regarding the respect human rights.

The European Convention is a corpus of norms created for the special purpose of the protection of the individual's fundamental rights and freedoms, while the European Union is created as a union of economic connotation and then political one. An interesting case concerning the relationship between treaties is the case of EU legislation and the report it has with the UN charter and its provisions. The UN Charter (as discussed above) in Article 103 prohibits the conclusion of treaties by State patrties, which may conflict with this Charter. On the other hand, article 351 itself (Ex Article 307) of the EU treaty states that treaties do not affect the rights and obligations acquired by member states from the treaties concluded between them and third countries before 1 January 1958, or before their EU membership.

In a brief analysis we can conclude that the EU itself respects The UN Charter and applies it as long as its member states are also part of UN and as far as possible this implementation and keeping in mind that their intentions are different. The problem arises at the moment that the obligations of the obliging nature of the UN may conflict or go in different directions with the projections of EU treaties, which ordinances will prevail over others? This issue has been made of particularly in the case of individual sanctions of the Security Council 's Resolutions which should be implemented even within the EU and the Kadi's case is one of the the most important issues in this regard.[11]

Following the September 11, 2001 terrorist attacks, the Security Council adopted the resolution 1267 (1999), which would establish the Sanctions Committee which would identify the financial and financial assets of the people who financed the Taliban and terrorism and to take measures for their freezing, as well as Resolution 1333 (2000) according to which this The Committee would draw up a list of names of persons involved in these issues and that would be subject to these sanctions.

In order to implement the Security Council Resolution, the Council approved the Regulation 881/2002 on the basis of Articles 60, 30 and 308 of the Treaty of Establishment of The European Community. This Regulation provided all funds and Financial assets belonging to persons included in the Schedule of the Annex 1 of the Sanctions Committee, to be freeze immediately.[12]

Yasin Abdullah Kadi and Al-Barakaad International Fuondation were on the list drafted by the Sanctions Committee and on the basis of this Regulation became subject of the sanctions and their financial assets were frozen.[13] Under these circumstances they were directed to The First Instance Court, claiming the annulment of Regulation 881/2002 pretending that it violated their fundamental rights, particularly the right to property, the right to be heard and the right for a due process of juridical review. The First Instance Court stated that could not review the legality of Community acts that came under the Security Council resolutions because indirectly it would also examine the legality of the resolution itself and "it will be in contravention with the obligations that the Member States have taken in the framework of the UN Charter and in particular Articles 25, 48 and 103 ".

[11] C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council of the European Union, 3 C.M.L.R. 41 (2008)

[12] Regulation 881/2002 of Council, Art.2(1)

[13] A. Posch, The Kadi case :Rethinking about the relationship between the EU Law and International Law?, Kolumbia journal of european law online, Vol 15, 2009, pg.2

It reasoned that it could indirectly examine the compatibility of this resolution with jus cogens, but as long as there were no such offenses the court decided not to solve this case.

Under such conditions Kadi and Al-Barakaad IF turned to the Court European Court of Justice to challenge the FIC decision and to against Regulation 881/202. Unlike the FIC, the ECJ reasoned that "it has jurisdiction to review all community acts that affect the fundamental rights and freedoms that are part of the general principles of community law, including acts that emerge to give effect to the Security Council resolutions within Chapter VII of the The UN Charter. "

According to the court, the EU legal system is autonomous and can not be ruled by any international agreement, whatever it is, and that in cases when the court examines the validity of such acts, it does not examine the legality of the international law itself. In that case, she justifies, even if the FIC has reached the conclusion that this regulation is inconsistent with Community law, it will not had influenced the supremacy of this resolution in terms of international law.

The ECJ emphasizes that such a regulation that has brought the freezing of financial assets is contrary to the fundamental rights of the persons concerned, as the Council does not notified and did not justify or justify the taking of such measures and on the other hand has not given the opportunity to be heard, unjustifiably violating the right to The property of Kadi and Al - Barakaat. The ECJ decided to annulated Regulation 881/2002 of The Council on the basis of this reasoning.

This decision is one of the most discussed regarding the relation of the UN Charter's with the community acts and EU law in general, and yet it does not provide a definitive solution in this regard. From what we discussed, we can conclude that the ECJ itself does not deny entirely the supremacy of the Charter of UN and Security Council resolutions, as it itself says it can not review their legality, but on the other hand when it states that it has the right to review the legitimacy of acts that give effect to UN resolutions within the EU, seems ECJ trickle to create an autonomous system, which runs parallel to international law and that cooperation between these two systems can only be achieved if the resolution should take in consideration the implementation of the rights and freedoms ensured within the EU space.

In my opinion a common balance must be achieved after because the UN itself is aimed at maintaining peace and security while the EU is an organization with a sui generis character with connotation mainly economic and political can achieve a consensus on the points in which overlapping or opposing the UN charter and community law. So in the matter related to common security and the fight against terrorism, I think we need to find appropriate means of implementing SC resolutions while respecting the rights and the freedoms on the basis of which the general principles of the EU are up and having in mind a balance of the importance of the interest protected by each of these legal acts.

As a conclusion the conflicts between treaties are one of the most crucial issues of treaty law that is not solved in a definitive way, which can lead to conflicts between states and breach of treaties. The Vienna convention does not give a clear and efficient solution in this area and the only manner of regulating this issue is the will of state parties.

Bibliography

Alastair R. Mowbray , Cases and Materials on the European Convention on Human Rights, Oxford University Press, 2ed, 2007, ISBN – 978-0-19-920674-2

Anthony Arnull, Damian Chalmers, The oxford handbook of european union law, Oxford University Press, 2015, ISBN- 978-0-19-967264-6

Anthony Aust, Handbook of International Law, Cambridge University Press, 2ed, New York 2010

Bennedetto Conforti, Diritto Internazionale, Editoriale Scientifica, 7ed, Giugno 2006

Enzo Cannizzaro, The law of treaties beyond the Vienna Convention, Oxford University Press, 2011

Jan Klabber, Staddling the Fence : The EU and international law, në The oxford handbook of european union law, edited by Anthony Arnull, Damian Chalmers, Oxford University Press, 2015, ISBN- 978-0-19-967264-6

Jan Klabber, Treaty Conflict and the European Union, Cmbridge University Press, 2009, ISBN- 978-0-521-72884-3

Malcolm Shaw, International law, Cambridge University Press, 6 ed, 2008, ISBN 978-0- 521-72814-0

Malgosia Fitzmaurice, A. Quast, The law of treaties - Section A: Introduction to the law of treaties, University of London Press, 2007

Malgosia Fitzmaurice, Olufemi Elias, Contemporary Issues in the Law of Treaties, Eleven International Publishing, Netherlands 2005, ISBN- 90-77596-06-2

Malgosia Fitzmaurice, Olufemi Elias, Panos Merkouris, Treaty interpretation and Vienna Convention on the law of treaties : 30 years on, Martinus Nijhoff Publishers, Leiden/Boston 2010

Martin Dixon, Robert Mçorquordale & Sarah Williams, Cases and materials on internacional law, 5 ed, Oxford University Press, 2011

Mark Villiger, Commentary of Vienna Convention on the law of treaties 1969, Martinus Nijhoff Publisher

Peter Hipold, the Eu law and UN Law in conflict : the Kadi Case, eds. A.von Bogdandy and R. Wolfrum, Max Planc Yearbook of UN Law, Vol 13, 2009

Philip Leach, Taking a Case to the European Court of Human Rights, Oxford University Press, 3rd ed. 2011

Albert Posch, The Kadi case :Rethinking about the relatonship between the EU Law and International Law?, Kolumbia journal of european law online, Vol 15, 2009