

# Lesson 9

## LEGAL INSTRUMENTS AND DOMESTIC IMPLEMENTATION

International Institutional Law  
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# CATEGORIES OF LEGAL INSTRUMENTS

## 1. Law-making instruments

Laying down more or less general and abstract rules of general application, binding upon all subjects of a given legal system or on abstract categories of subjects (e.g. regulations of the EU)

## 2. Administrative acts

Apply the law to certain configurations of facts (e.g. decisions of the EU)

## 3. Decisions regulating the functioning of the organizations

e.g. making of the budget, elections of internal organs

## 4. Soft law acts

Non binding resolutions aiming at influencing behavior without creating legal obligations

## 5. Measures adopted by MSs of the organization?

e.g. Summit Heads of States and Heads of governments

# 1. Law-making instruments

Three theories to justify it:

## 1. The treaty analogy

By voting in favor of a resolution, States assume the obligation to enforce it

PCIJ, *Railway traffic case*, Lithuania v. Poland, 1931

Problems:

- a) How to explain binding character of resolutions adopted by a majority vote?
- b) The treaty analogy theory come close to denying the separate existence of the IO, as an autonomous subject of international law

# 1. Law-making instruments

## 2. Delegation of powers

MSs delegated some legislative powers to the IO

Art. 92 of the Dutch Constitution: “Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty”

Art. 11 of the Italian Constitution: “Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends”.

# 1. Law-making instruments

## **3. International legislation**

The consent of States is not always necessary, as it may be overruled for the sake of the interests of mankind

# 1. Law-making instruments

## Examples

### **1. International Civil Aviation Organization (ICAO)**

art. 12 of the Chicago Convention grants the IO with the power to establish rules regulating aircraft flying over the high seas

### **2. WHO**

Art. 21 of the constituent treaty allows it to enact, for instance, quarantine regulations, which become binding unless a State opts-out

# 1. Law-making instruments

## 3. Security Council law-making resolutions?

- a) Adapting a treaty regime (eg. Resolution 1483(2003) on rebuilding of Iraq; resolution 2240(2015) on smuggling in the Mediterranean sea)
- b) Extending a legal regime (e.g. resolution 1373 (2001) – after September 11<sup>th</sup>, general rules on the fight against terrorism, extending rules of 1999 Convention for the Suppression of the Financing of Terrorism also to non-parties)
- c) Attaching binding character to resolutions adopted by other Organizations (e.g. Resolution 1540 (2004) – attaching binding character to standards adopted by IAEA (International Atomic Energy Agency))

**Limits?**

# 1. Law-making instruments

## Sponsoring the conclusion of International Conventions

### Techniques

- 1) Drafting by IO's organs + ratification by MSs  
(eg. 1966 UN Covenants)
- 2) Drafting by IO's organs + opting-out procedures
- 3) Drafting by IO's organs + opting-out procedures + provisional application
- 4) Drafting by IO's organs + Peer-pressure  
(eg ILO Conventions)



## 2. Administrative acts

Example:

UN Security Council resolutions under Chapter VII

- 1) May produce legal effects on 1 or more States
- 2) May produce legal effects on individuals

# 3. Decisions regulating the functioning of the organization

e.g. UN General Assembly

Art. 17(1) UN Charter: consider and approve budget

Art. 17(2): Apportion the budget

Art. 4: Admission of new members

Art. 5 and 19: suspension of members

Art. 97: appointment of Secretary-General

Art. 8 and 10 ICJ Statute: election of judges

# 4. Soft-law

e.g. resolutions, recommendations, opinions...

Acts aiming to influence behavior of addressees

## What legal effects?

### **1) Agreement in simplified form?**

May only involve those that voted the resolution

Undermines the very idea of the IO enjoying separate legal personality

### **2) Authoritative interpretation of the constituent treaty?**

But where do organs of the IO derive their power to interpret the constituent treaty from?

What about MSs who voted against a given resolution?

### **3) They are declarative of international law?**

But where do IOs derive their power to declare international law from?

# 4. Soft law

## 4) Evidence of *opinio iuris*

Still requires State practice to become a customary rule

How to consider the opinion of those who abstained or voted against?

## 5) Estoppel

Those that voted in favor are precluded from practicing the opposite

## 6) “Legalizing effect” of resolutions of the UN General Assembly

A State who voted in favor of a given resolution may enforce that resolution in respect of a State who also voted in favor, even when doing so would run counter of an obligation stemming from a treaty concluded between the 2 States

# Legal acts of the EU

## 1) Regulations

“A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”. Art. 288 TFEU

## 2) Directives

“A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” Art. 288 TFEU

## 3) Decisions

“A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.” Art. 288 TFEU

# Legal acts of the EU

## **4) And 5) Recommendations and opinions**

“Recommendations and opinions shall have no binding force”.

Art. 288 TFEU

## **6) Other acts (e.g. codes of conduct, guidelines, resolutions)**

ECJ looks at the content, rather than at the designation of these acts, to ascertain whether they create legal obligations

# Adopting procedures

- 1) Unanimity
- 2) Consensus
- 3) Simple majority (majority of voting and present)
- 4) Absolute majority (majority of members)
- 5) Qualified majority (e.g. 2/3 of Members, or Members representing a certain percentage of the population of Members States, or majority including positive vote of certain members)

# Adopting procedures

Qualified majority within the EU

## a) pre-negotiated distribution of votes

The system proved cumbersome, as it required renegotiations whenever a new member entered the Union

## b) Double majority

55% of Members, comprising at least 15 of them  
+ representing 65% of the population of the  
Union



# Validity of acts

## Grounds of invalidity

### 1) Lack of competence

The IO, or the organ which adopted the act,  
acted *ultra vires*

### 2) Infringement of procedural requirements

### 3) Infringement of the constituent treaty

### 4) Violation of international law

# Validity of acts

Who is entitled to review the validity of the legal acts of an IO?

- **Judicial body of the Organization**

e.g. ECJ questioning the validity of an act of the institutions of the EU

ICJ questioning the validity of an act of the Security Council

- **National courts of member States?**

It depends on how the relationship between the domestic legal order and the international legal order is seen

- **May the judicial body of an IO question the validity of an act adopted by another IO?**

e.g. CJEU and UN anti-terrorism measures (Kadi case)

# Validity of acts

## Consequences of invalidity

1) Retroactive

2) Without retroactive effects

To preserve the position of third parties that have acted in good faith on the basis of the invalid decision

3) Partial invalidity

Presupposes severability of provisions

4) Effect of acceptance, acquiescence, estoppel

# Domestic implementation

- Monism v. Dualism
- Self-executing acts/non self-executing acts
  - EU Regulations

““A regulation shall have general application. It shall be binding in its entirety and **directly applicable** in all Member States”. Art. 288 TFEU

- EU Directives

“A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, **but shall leave to the national authorities the choice of form and methods.**” Art. 288 TFEU

- SC Resolutions?

Listing/delisting of suspected terrorists

# Application of EU Law in Member States – The Italian case

- 1) Application of EU Treaties (execution order adopted by Law)
- 2) Direct applicability of EU regulations and decisions
- 3) Implementation of EU rules that are not directly applicable
  - 1) Directives
  - 2) Non self-executing provisions included in Regulations
  - 3) CoJ judgments

**require specific legislation**

# Application of EU Law in Member States – The Italian case

## a) Initial practice: ad hoc implementation

**Problem:** Slowness of Italian law-making procedures often resulted in the State failing to respect deadline for the implementation of EU directives

### **Possible solutions:**

- Concentrate all implementing legislation in a single normative act
- Delegate to the Government the adoption of implementing legislation

# Application of EU Law in Member States – The Italian case

**b) La Pergola Law (n. 86/1989), subsequently amended by the Buttiglione Law (n. 11/2005):** provide for the adoption of a law implementing EU rules on an annual basis (annual “legge comunitaria”)

# Application of EU Law in Member States – The Italian case

- c) Law n. 234/2012: two different annual laws**
- **Legge di delegazione europea** (1 semester, 2 semester)
  - **Legge europea**

**N.B.** It is for the Italian Regions to implement EU rules falling within their scope of competence, but if a Region fails to act, the Central government may step in in order to avoid an infringement action



# Constitutional guarantees for the respect of acts of certain IOs

Art 11 IC. “Italy ... agrees, on conditions of equality with other states, to the limitations of sovereignty necessary to create an order that ensures peace and justice among Nations; it promotes and encourages international organisations having such ends in view”.

- The UN
- The EU
- The ICC

**Counter limits:** core principles of the Constitution

# Ensuring compliance with legal obligations stemming from legal instruments of an IO

- **When the addressees of decisions of the IO are the MSs**
  - a) Enforcement at the international level (e.g. infringement procedure before the EU Court of Justice)
  - b) Enforcement at the domestic level (e.g. reparation for injuries suffered by an individual due to the fact that a MS has not implemented an EU directive which recognised a right to that individual – ECJ, *Francovich case*, 1991)
- **When the addressees of decisions are individuals**
  - a) Sanctions at the international level (e.g. The European Commission has strong competition law enforcement powers)
  - b) Sanctions at the domestic level