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The Conseil Constitutionnel's Jurisprudence on 'Limitations of Sovereignty'

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I 'DROIT DES RELATIONS INTERNATIONALES' AND 'FOREIGN RELATIONS LAW'

In French doctrine, the term 'droit des relations internationales' (literally translated as 'Foreign Relations Law') is not 'used to encompass the domestic law of each nation that governs how that nation interacts with the rest of the world'.[1] As a distinctive field, French 'Relations Internationales'[2] studies in a nonexclusively-legal way the interactions and communications between nations and other actors and social groups across the borders, that is, all the relations (*stricto sensu* international or *lato sensu* international including transnational ones) presenting a foreign element. Thus, political, economic and sociological considerations are taken into account in order to apprehend the international legal order. Foreign relations *law* (*droit* des relations internationals) can consequently seem ambiguous in French and therefore is often used as a synonym of public international law (droit international public). As a matter of fact, a great number of French students that are enrolled in a course 'Droit des relations internationales' in first year of law school actually study public international law. Few French law schools teach foreign relations as a distinctive discipline and even fewer have a research center specially dedicated to it.[3] As far as French foreign relations handbooks are concerned, they propose mostly three different approaches, that can also be combined between

[1] Curtis Bradley, 'What Is Foreign Relations Law?', in Curtis Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (New York: Oxford University Press, 2019), pp. 3–20.

[2] For an analysis about 'Relations Internationales' as a separate, distinctive and autonomous field in French doctrine, see Julian Fernandez, *Relations internationales*, 2nd ed. (Paris: Dalloz, 2019), pp. 1–27.

[3] Fernandez, *Relations internationales*, pp. 24–27.

https://doi.org/10.1017/9781108942713.009 Published online by Cambridge University Press

them: a theoretical/doctrinal/political science approach; an historical approach; or an institutional/normative/juridical approach.[4]

Nevertheless, notwithstanding the semantics, that is, even without naming this particular field 'Foreign Relations Law' and without considering it as autonomous, the French doctrine does study 'how French law (i.e. constitutional law, statutory law, administrative regulations, and judicial decisions) interacts with the rest of the world', as well as 'the role of domestic courts in applying international law and in adjudicating cases that implicate governmental interests'.[5] In this sense, the French approach, as far as interaction between domestic law and international law is concerned, is one of a monist state that places its constitution on the summit of the hierarchy of norms and attributes to international law a supra-legislative but infra-constitutional authority (article 55 of the French Constitution 1958).

However, in a perspective where 'Foreign Relations Law' is meant to be studied as a distinctive and *a fortiori* autonomous field, this assertion is far too simplistic to truly apprehend the articulation of the French legal order with the international one. This interaction is rather complex and cannot be fully understood unless all aspects of French domestic law and more importantly French case law (in the sense of jurisprudence, since there is no *stare decisis*/binding precedent rule in French law) relative to international law have been studied. Indeed, not only the French courts jurisprudence affine, enrich or even alter the written French norms concerning domestic law/international law interaction, but also the approaches adopted by the three French Supreme Courts (Cour de Cassation, Conseil d'Etat and Conseil Constitutionnel, which is not hierarchically superior to the other two) are not always identical or even harmonized and may thus govern the relation domestic law/international law in different ways.

This chapter will focus on the Conseil Constitutionnel and its role in controlling the executive as far as the adoption of international treaties is concerned. The Conseil Constitutionnel's jurisprudence on 'limitations of sovereignty'[6] is a very interesting one and, notwithstanding its numerous

[4] Fernandez, *Relations internationales*, p. 15.

[5] Bradley, 'What Is Foreign Relations Law?', p. 9.

[6] By 'limitations of sovereignty' doctrine this contribution refers to the doctrine of the Constitutional Council relative to the international treaties that 'jeopardize the essential conditions for the exercise of national sovereignty' and thus cannot be ratified without prior amendment of the Constitution. The term 'limitation of sovereignty' doctrine is chosen here for convenience reasons and because the whole doctrine takes as a starting point paragraph 15 of the Constitution Preamble 1946 which refers to accepted limitations to France's sovereignty. But the exact term would rather be a doctrine on 'essential conditions for the exercise of national sovereignty.'

ambiguities and grey areas, clearly reflects the strong role that the French Constitutional Council wishes to play in foreign relations law.

In its first section, this paper focuses on the role of the French Constitutional Council with regard to the review of international treaties before their ratification. Its second section offers insights on the 'limitations of sovereignty' doctrine and its criticism, whereas the third section proposes several illustrations of the Conseil Constitutionnel's jurisprudence concerning the compatibility between international treaties and the French Constitution. In its final section, this article suggests a critical assessment of this jurisprudence and argues that with the 'limitations of sovereignty' doctrine the Constitutional Council has achieved great power and discretion and has thus indirectly acquired an important role influencing the way the executive conducts its foreign relations.

II THE ROLE OF THE CONSTITUTIONAL COUNCIL IN THE CONSTITUTIONALITY REVIEW OF INTERNATIONAL TREATIES BEFORE THEIR RATIFICATION

The French Constitutional Council was created by the Fifth Republic's Constitution adopted on October 4, 1958. Initially conceived by General de Gaulle as a rather weak mechanism, feared by him because of the American precedent of what was considered as the risk of a 'judges' government', it developed an extensive and rich jurisprudence, which, combined with several constitutional modifications over the years, increased its powers and importance in the French legal order. The general growing of the Constitutional Council's role and the expansion of the possibilities of its referral also influenced its jurisprudence concerning interactions between domestic law and international treaty law.

The French Constitutional Council rules on whether proposed international treaties are in conformity with the French Constitution. This review is possible after the international treaty has been approved by the Parliament[7] and before it is ratified by the President of the French Republic. It takes place on a referral from the President of the Republic, the Prime Minister, the President of one or the other Houses (National Assembly or Senate), or from sixty Members of the National Assembly or sixty Senators. If the Council

[7] According to article 53 of the Constitution, peace treaties, trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament.

asserts that the international undertaking reviewed contains a clause contrary to the Constitution, the authorization to ratify the treaty or otherwise approve the undertaking involved may be given only after amending the Constitution (article 54 of the French Constitution). According to article 61 of the Constitution, referral of certain acts and bills to the Council before their coming into force for it to rule on their conformity with the Constitution is compulsory. This is the case, amongst others, for the government bills that provide for authorization to ratify an international treaty which, although not contrary to the Constitution, would affect the functioning of the institutions.

Thus, the Constitutional Council exercises an *a priori* review on international treaties, which is compulsory in some cases and just a possibility for the President of Republic, the Prime Minister, the President of one or the other of the Houses or for sixty Members of the National Assembly or sixty Senators in all the others. This is called 'contrôle de constitutionnalité'. The Council does not however exercise a 'contrôle de conventionnalité' meaning that it does not review the conformity of French law and administrative regulations with international law (treaties, other undertakings, unilateral acts and customary law). Indeed, in its 1975 *IVG* decision,[8] the Constitutional Council asserted that such a review belongs to the administrative and judicial courts (notably Conseil d'Etat and Cour de Cassation), since international law was not a part of the French Constitution and 'bloc de constitutionnalité' (this 'constitutionality block' is composed of the Constitution 1958, its preamble, the French Declaration of Human and Civic Rights, the Preamble of the Constitution 1946 of the Fourth Republic and the Charter for the Environment 2004).

[8] Decision no. 74–54 DC – *Voluntary Interruption of Pregnancy Act*, pts. 3–7:

> 3. While these provisions confer upon treaties, in accordance with their terms, an authority superior to that of statutes, they neither require nor imply that this principle must be honored within the framework of constitutional review as provided by article 61.
>
> 4. Decisions made under article 61 of the Constitution are unconditional and final, as is clear from article 62, which prohibits the promulgation or implementation of any provision declared unconstitutional; on the other hand, the prevalence of treaties over statutes, stated as a general rule by article 55, is both relative and contingent, being restricted to the ambit of the treaty and subject to reciprocity, which itself depends on the behavior of the signatory state or states and on the time at which it is to be assessed;
>
> 5. A statute that is inconsistent with a treaty is not ipso facto unconstitutional;
>
> 6. Review of the rule stated in article 55 cannot be effected as part of a review pursuant to article 61, because the two reviews are different in kind;
>
> 7. It is therefore not for the Constitutional Council, when a referral is made to it under article 61 of the Constitution, to consider the consistency of a statute with the provisions of a treaty or an international agreement.

The Constitutional Council thus limits itself to the constitutional review of international treaties. In the 1975 Voluntary Interruption of Pregnancy Act decision, the Council asserted that '[a]rticle 61 of the Constitution does not confer on the Constitutional Council a general or particular discretion identical with that of Parliament, but simply empowers it to rule on the constitutionality of statutes referred to it'. However, when one studies the Council's case law as regards treaties and international agreements, one realizes that its 'discretion' is far more important than what the letter of the Constitution and the 1975 assertion suggest.

The 'limitations of sovereignty' doctrine has indeed allowed the Council to develop its own foreign relations law approach regarding international undertakings by France and to enjoy an important margin of appreciation while doing so. The result is that the Constitutional Council can prevent the organs in charge of France's foreign relations from undertaking some international engagements considered by it as incompatible with 'national sovereignty'. If the executive, with the agreement of the Parliament whenever necessary, insists on adopting an international treaty deemed by the Council as incompatible with national sovereignty, a modification of the Constitution will be necessary before ratification of the treaty. And indeed, as will be shown in Section IV, several examples exist where such amendments have taken place after an incompatibility decision rendered by the Constitutional Council. However, this possibility does not imply that the normativity and hierarchical position of the French Constitution is lesser than in other countries, since, in theory at least, the Constitution remains on the summit of the norms' hierarchy and its interaction with international law derives from the Constitution itself and not from international law norms. It does however highlight the power of the Constitutional Council, that can thus have an influence on the conduct of foreign relations by the executive. Also, the mere fact that amending the Constitution is envisaged in order to ratify a treaty or otherwise approve the undertaking involved, points out how important international cooperation is for the French legal order. This is also reminded in paragraph 14 of the preamble of the Constitution 1946 (which, as stated above, is actually a part of the 'bloc de constitutionnalité' used by the Council to review the constitutional conformity of law and treaties), stipulating: 'The French Republic, faithful to its traditions, shall respect the rules of public international law. It shall undertake no war aimed at conquest, nor shall it ever employ force against the freedom of any people.'

III BRIEF PRESENTATION OF THE 'LIMITATIONS OF SOVEREIGNTY' DOCTRINE AND ITS CRITICISM

The very notion of sovereignty in its external, international meaning (i.e. the fact that France as a sovereign state is not submitted to any authority

superior to it and that it is only bound by undertakings that it accepted explicitly, implicitly or tacitly) is absent from the Constitution 1958, which, in article 3, only refers to internal sovereignty in these terms: 'National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum'.[9] However, paragraph 15 of the preamble of the Constitution 1946 refers to external sovereignty in the following terms: 'Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organization and preservation of peace', thus reminding, even if it is in a somewhat inept way, the famous *Lotus* and *Wimbledon* PCIJ dicta on the right to enter into international engagements being an attribute of state sovereignty.[10] Thus, this paragraph proclaims France's sovereign right to undertake international engagements.

As part of its *a priori* review of international treaties based on article 54 of the Constitution, the Constitutional Council developed a doctrine on the respect of the 'essential conditions for exercise of national sovereignty' which indirectly refers to external sovereignty[11] although explicitly

[9] See also article 3 of the French Declaration of Human and Civic Rights (also part of the constitutionality block): 'The principle of any sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it.'

[10] *Case of the S.S. 'Wimbledon'*, Judgment, Series A No. 1, p. 25: 'The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.' And *Case of the S.S. 'Lotus'*, Judgment, Series A No. 10, p. 18: 'The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.'

[11] N.B. the ideas put forward in Section III of this contribution are largely inspired by an article of an important representative of the French voluntarist doctrine of international law: Jean Combacau, 'La souveraineté internationale de l'Etat dans la jurisprudence du Conseil constitutionnel français' (2001) 9 *Cahiers du conseil constitutionnel* (dossier: souveraineté de l'Etat et hiérarchie des Normes) (www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/la-souverainete-internationale-de-l-etat-dans-la-jurisprudence-du-conseil-constitutionnel-francais, accessed September 30, 2020); see also, in a similar vein, Andrea Hamann, 'Sur un "sentiment" de souveraineté' (2018) 21 *Jus Politicum*, 187–213 (http://juspoliticum.com/article/Sur-un-sentiment-de-souverainete-1259.html, accessed September 30, 2020); see also, Alain Pellet, 'Le Conseil constitutionnel, la souveraineté et les traités – À propos de la décision du Conseil constitutionnel du 31 décembre 1997 (Traité d'Amsterdam)' (1998) 4 *Cahiers du Conseil constitutionnel* 113 et seqq. (www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil-constitutionnel/cahier-n-4/le-conseil-constitutionnel-la-souverainete-et-les-traites-a-propos-de-la-

invoking 'national' sovereignty in order to limit the executive's power to conclude international treaties when intolerable 'limitations of sovereignty' were found. The phrase – even though directly inspired by the *Lotus* dictum – is without any doubt improper. In international law, a state that transfers or limits some of its powers undertaking an international engagement does not '*limit*' its sovereignty (which is not apt to be limited) but rather *exercises* it by concluding a treaty.[12] Thus, the actual question to which the Constitutional Council answers with the 'limitations of sovereignty doctrine' is the following one: are the limitations of powers and of liberty of action (and not of sovereignty) or even the transfers of competencies undertaken by the state in its international engagement compatible with its Constitution?

The inopportune confusion caused by this 'limitation of sovereignty' expression is due to the fact that the Council refers to 'national sovereignty' in a twofold and indistinctive manner creating an erroneous amalgam between external and internal sovereignty, although the two concepts ought to be completely and carefully separated.[13] Thus, instead of clarifying the signification of paragraph 15 of the Preamble 1946, the Council, in its effort to distinguish between the 'limitations of sovereignty' that are compatible with the Constitution and those that are not, creates a rather confusing and obscure doctrine.[14] The confusion was even more important in the early beginnings of this case law. Indeed, in Decision no. 76–71 DC – *Election of the Assembly of the Communities*

decision-du-conseil-constitutionnel-du-31-decembre-1997-traite-d-amsterdam.52845.html, accessed September 30, 2020). François Luchaire, 'La souveraineté extérieure dans la Constitution française et la jurisprudence du Conseil constitutionnel', in Dominique Maillard Desgrées du Loû (ed.), *Les évolutions de la souveraineté* (Paris: Montchrestien, 2006), pp. 119–25.

[12] Combacau, 'La souveraineté internationale de l'Etat dans la jurisprudence du Conseil constitutionnel français':

> *Selon cette conception, formelle et non substantielle, de la souveraineté au sens du droit international, on ne peut donc dire d'un État qu'il consent à des limitations de souveraineté à telle ou telle condition, mais qu'il considère comme compatibles avec sa souveraineté les limitations de sa liberté d'action, pour autant qu'elles respectent les conditions en cause : soit que ces traités modifient, par renonciation totale ou partielle, l'étendue du champ de la compétence internationale dont il jouissait, à titre exclusif ou concurremment avec d'autres États, ou portent atteinte à son monopole dans les domaines où elle était exclusive; soit qu'ils réduisent les pouvoirs qui lui étaient internationalement reconnus dans le cadre de cette compétence.*

[13] Combacau, 'La souveraineté internationale de l'Etat dans la jurisprudence du Conseil constitutionnel français'.

[14] Combacau, 'La souveraineté internationale de l'Etat dans la jurisprudence du Conseil constitutionnel français'.

by direct universal suffrage,[15] the Council distinguished between authorized 'limitations of sovereignty' and unauthorized 'transfers of sovereignty'. This unclear distinction has, fortunately, been abandoned in the case law thereafter.

IV PANORAMA OF THE CONSEIL CONSTITUTIONNEL'S JURISPRUDENCE AS TO WHICH INTERNATIONAL ENGAGEMENTS ARE NOT COMPATIBLE WITH THE FRENCH CONSTITUTION[16]

In a 1985 decision[17] about the ratification of the Sixth Protocol of the European Convention on Human Rights, the Council seemed to identify three elements as 'essential conditions for the exercise of national sovereignty', the contrariety to which would render an international treaty incompatible with the French Constitution. Firstly, to ensure the respect of the institutions; secondly, to ensure the continuity of the life of the nation; and, thirdly, to guarantee the rights and freedoms of citizens. At the time, French doctrine considered these elements to be the actual content of 'national sovereignty',[18] the limitations to which would not be tolerated. Thus, it may have seemed clear that if an international treaty limited one or more of these three 'essential conditions', it could not be undertaken without prior constitutional amendment. However, the Council showed no constancy in

[15] Decision no. 76–71 DC, December 30, 1976 – *Décision du Conseil des communautés européennes relative à l'élection de l'Assemblée des Communautés au suffrage universel direct*, pt. 1.

[16] The decisions presented in this section can be found in English in the French Constitutional Council's site: www.conseil-constitutionnel.fr/en/selection-of-dc-decisions, accessed September 30, 2020.

[17] Decision no. 85–188 DC, May 22, 1985 – *Protocole n° 6 additionnel à la Convention Européenne de sauvegarde des Droits de l'homme et des libertés fondamentales concernant l'abolition de la peine de mort, signé par la France le 28 avril 1983*, pt. 2 : 'cet engagement n'est pas incompatible avec le devoir pour l'État d'assurer le respect des institutions de la République, la continuité de la vie de la nation et la garantie des droits et libertés des citoyens'.

[18] Louis Favoreu, 'La décision du 22 mai 1985 du Conseil constitutionnel relative au Protocole no 6 additionnel à la Convention européenne des droits de l'homme' (1985) 31 *Annuaire français de droit international* 868 at 873 (www.persee.fr/doc/afdi_0066–3085_1985_num_31_1_2696, accessed September 30, 2020); see also Lucie Laithier, 'Observations sous Cons. const., 9 avril 1992, no 92–308 DC, Traité sur l'Union européenne ("Maastricht I")', in Alain Pellet and Alina Miron (eds.), *Les grandes décisions de la jurisprudence française de droit international public* (Paris: Dalloz, 2015), pp. 216 at 220–21, paras. 7 et 9; Pellet, 'Le Conseil constitutionnel, la souveraineté et les traités: À propos de la décision du Conseil constitutionnel du 31 décembre 1997 (Traité d'Amsterdam)', 113 at 117–18.

repeating these elements – and *a fortiori* clarifying their content – in the numerous decisions that followed.

Subsequently, the most important Constitutional Council's decisions resorting to the doctrine of 'limitations of sovereignty' in order to prevent the ratification of an international treaty without previous amendment of the Constitution were, and this does not come as a surprise, relative to the European Union treaties.[19] The most topical decisions in this regard will be briefly presented hereafter.

In Decision 92–308 DC – *Treaty on European Union (Maastricht I)*, the Council asserted:

> It follows from these various institutional provisions [i.e. article 3 of the French Declaration, paragraphs 14 and 15 of the 1946 Preamble and article 53 of the 1958 Constitution] that respect for national sovereignty does not preclude France, acting in accordance with the Preamble to the 1946 Constitution, from concluding international agreements relating to participation in the establishment or development of a permanent international organization enjoying legal personality and decision-making powers on the basis of transfers of powers decided on by the Member States, subject to reciprocity. However, should an international agreement entered into to this end involve a clause conflicting with the Constitution *or jeopardizing the essential conditions for the exercise of national sovereignty*, authorization to ratify would require prior amendment of the Constitution.[20]

Thus, the 'pure' unconstitutionality of a clause is presented as a distinct hypothesis from the jeopardy of the essential conditions for the exercise of national sovereignty. The Council concludes that the authorization to ratify the Treaty on European Union requires a constitutional amendment because it creates situations (concerning the establishment of Union citizenship with right to vote in municipal elections; the single monetary and exchange-rate policy and measures relating to the entry and movement of persons) in which the essential conditions for the exercise of national sovereignty were

[19] Besides the decisions analyzed thereafter see also Decision no. 70–39 DC, 19 June 1970 – *Traité portant modification de certaines dispositions budgétaires [. . .] et décision du Conseil des Communautés européennes [. . .] relative au remplacement des contributions des États membres par des ressources propres aux Communautés*; Decision no. 76–71 DC, 30 December 1976 – *Décision du Conseil des communautés européennes relative à l'élection de l'Assemblée des Communautés au suffrage universel direct*; Decision no. 91–294 DC, 25 July 1991 – *Loi autorisant l'approbation de la convention d'application de l'accord de Schengen*.

[20] Decision no. 92–308 DC – *Treaty on European Union (Maastricht I)*, pts. 12 and 13 (emphasis added).

jeopardized. As a result, the Constitution 1958 was amended and articles 88–1 and 88–2 were added.[21]

[21] As a matter of fact, every revision of the European Union treaties between 1992 and 2007 lead to a revision of the French Constitution. Title XV bearing the title 'On the European Union' and added to the French Constitution after the 1992 Decision counts nowadays the following seven articles:

> Article 88–1
>
> The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.
>
> Article 88–2
>
> Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions on the European Union.
>
> Article 88–3
>
> Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither hold the office of Mayor or Deputy Mayor nor participate in the designation of Senate electors or in the election of Senators. An Institutional Act passed in identical terms by the two Houses shall determine the manner of implementation of this article.
>
> Article 88–4
>
> The government shall lay before the National Assembly and the Senate drafts of European legislative acts as well as other drafts of or proposals for acts of the European Union as soon as they have been transmitted to the council of the European Union.
>
> In the manner laid down by the rules of procedure of each House, European resolutions may be passed, even if Parliament is not in session, on the drafts or proposals referred to in the preceding paragraph, as well as on any document issuing from a European Union Institution.
>
> A committee in charge of European affairs shall be set up in each parliamentary assembly.
>
> Article 88–5
>
> Any government bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the president of the republic.
>
> Notwithstanding the foregoing, by passing a motion adopted in identical terms in each House by a three-fifths majority, Parliament may authorize the passing of the bill according to the procedure provided for in paragraph three of article 89.
>
> [Article 88–5 is not applicable to accessions that result from an Intergovernmental Conference whose meeting was decided by the European Council before July 1, 2004.]
>
> Article 88–6
>
> The National Assembly or the Senate may issue a reasoned opinion as to the conformity of a draft proposal for a European Act with the principle of subsidiarity. Said opinion shall be addressed by the President of the House involved to the Presidents of the European Parliament, the Council of the European Union and the European Commission. The Government shall be informed of said opinion.
>
> Each House may institute proceedings before the Court of Justice of the European Union against a European Act for non-compliance with the principle of subsidiarity.

The exact same reasoning is followed in Decision no. 97–394 DC – *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related instruments*.[22] This time, the 'limitations of national sovereignty' that resulted in the impossibility to ratify the treaty without prior constitutional amendment concerned the transfers of powers to the community in matters of asylum, immigration and the crossing of internal and external frontiers.

In Decision no. 2004–505 DC – *Treaty establishing a Constitution for Europe*, the henceforth classic phrase is enriched: 'When however commitments entered into for such purposes contain a clause running counter to the Constitution, *call into question constitutionally guaranteed rights and freedoms or adversely affect the fundamental conditions of the exercising of national sovereignty*, authorization to ratify such measures shall require a prior revision of the Constitution.'[23] The Council concludes that neither the assertion of 'primacy' of the European Union law, nor the title of the new Treaty or the Charter of Fundamental Rights of the European Union require a revision of the French Constitution, but that other clauses of the Constitution for Europe 'which transfer to the European Union powers affecting the essential conditions of the exercise of national sovereignty in areas or on terms other than those provided for in the Treaties referred to in article 88–2' do. This is notably so with the subsidiarity principle, with the ordinary legislative procedure, with the simplified revision procedures of the Treaty of European Union, with the new powers vested in national parliaments in the framework of the Union, and more generally with

> any provisions of the Treaty which, in a matter inherent to the exercise of national sovereignty and already coming under the competences of the Union or the Community, modify the applicable rules of decision-making, either by replacing the unanimous vote by a qualified majority vote in the

> Such proceedings shall be referred to the Court of Justice of the European Union by the Government.
>
> For the purpose of the foregoing, resolutions may be passed, even if Parliament is not in session, in the manner set down by the Rules of Procedure of each House for the tabling and discussion thereof.
>
> Article 88–7
>
> Parliament may, by the passing of a motion in identical terms by the National Assembly and the Senate, oppose any modification of the rules governing the passing of Acts of the European Union in cases provided for under the simplified revision procedure for treaties or under judicial cooperation on civil matters, as set forth in the Treaty on European Union and the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on December 13, 2007.

[22] Decision no. 97–394 DC – *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related instruments*, pt. 6.

[23] Decision no. 2004–505 DC – *Treaty establishing a Constitution for Europe*, pt. 7 (emphasis added).

> Council, thus depriving France of any power to oppose such a decision, or by conferring decision-making powers on the European Parliament, which is not an emanation of national sovereignty, or by depriving France of any power of acting on its own initiative.[24]

In Decision no. 2007–560 DC – *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, the Council recalls the same compatibility clause as in 2004[25] and repeats thereafter the exact same reasoning given the similarities between the Lisbon Treaty and the aborted Constitution for Europe. However, in this 2007 decision the Council takes a step further in distinguishing European Union law and international law. Not only does it refer to article 88–1 of the Constitution as revised since the Treaty of Maastricht (indeed, since 1992, referral to article 88–1 was added to paragraphs 14 and 15 of the Preamble 1946), but also points out that 'while confirming the place of the Constitution at the summit of the domestic legal order, these constitutional provisions enable France to participate in the creation and development of a permanent European organization vested with a separate legal personality and decision-taking powers by reason of the transfer of powers agreed to by the Member States'.[26] As a matter of fact, between 1992 and 2007, the shift towards the recognition of the autonomy of the European Union legal order is subtle but clear. Whereas, for instance, in the 1997 decision, the Council still referred to an *international organization* ('in accordance with the Preamble to the 1946 Constitution, concluding international agreements for participation in the establishment or development of a permanent international organization'), in 2004, there is a referral to '[enable France to participate in the creation and development of] a *permanent European organization*', (emphasis added) and, in 2007, the balance between the place of the Constitution at the summit of the domestic legal order and the participation of France to the European Union is clearly stated. Thus, the Council takes an unambiguous position as far as the interaction between French constitutional law and European Union law is concerned. After having clarified this relation, the Council recalls once again that if 'undertakings entered into for this purpose contain a clause running counter to the Constitution' its revision is necessary.

[24] Decision no. 2004–505 DC – *Treaty establishing a Constitution for Europe*, pts. 24 and 29.
[25] Decision no. 2007–560 DC – *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, pt. 9.
[26] Decision no. 2007–560 DC – *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, pt. 8.

The same remarks apply to Decision no. 2012–653 DC – *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*,[27] which follows an identical reasoning. However, in this decision, the Council considers that the provisions on the 'fiscal compact' and the other provisions of the Treaty are not unconstitutional. Nevertheless, this conclusion is subject to certain conditions enumerated by the Council in paragraphs 21, 28 and 30 of the decision,[28] the non-satisfaction of which would render the Treaty unconstitutional, since it is only under these conditions that the Treaty provisions 'will not infringe the essential conditions for the exercise of national sovereignty'.

Finally, Decision no. 2017–749 DC – *Comprehensive Economic and Trade Agreement between Canada*, on the one hand, and the European Union and its Member States, on the other, concerns a particular case, namely an EU *mixed agreement*: an agreement that must be signed and entered into force both by the

[27] Decision no. 2012–653 DC – *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, pts. 8–10.

[28] § 21: Considering that the Constitution lays down the prerogatives of the Government and Parliament in the elaboration and enactment of finance laws and social security financing laws; that the principle that finance laws are to be enacted annually results from articles 34 and 47 of the Constitution and applies with respect to the calendar year; that the direct introduction of provisions of binding force and permanent character mandating compliance with rules on balanced public finances requires that these constitutional provisions be amended; that consequently, *if France chooses to give effect to the rules laid down in paragraph 1 of article 3 through provisions of binding force and permanent character, authorization to ratify the Treaty may only be granted after the Constitution has been amended* (emphasis added).

§ 28: Considering that according to the above, *if in order to comply with the commitment stated in paragraph 1 of article 3, France chooses to adopt an institutional act having the effect required under paragraph 2, in line with the second alternative stated in the first phrase of paragraph 2 of article 3, authorization to ratify the treaty may only be granted after the Constitution has been amended* (emphasis added).

§ 30: Considering that paragraph 2 of article 3 does not require that the Constitution be amended in advance, the provisions of article 8 do not have the effect of enabling the Court of Justice of the European Union to assess within this framework whether the provisions of the Constitution are compatible with the terms of this Treaty; that accordingly, *if France decides to give effect to the rules laid down in paragraph 1 of article 3 of the Treaty in accordance with the procedures stated in the second alternative in the first sentence of paragraph 2 of article 3, article 8 will not infringe the essential conditions for the exercise of national sovereignty* (emphasis added).

European Union and by each of its Member States. The Council, while following its case law on limitations of sovereignty, has thus to innovate. It asserts that

> it is its responsibility to distinguish between, on the one hand, *the stipulations of this agreement that relate to the exclusive competence of the European union pursuant to the commitments previously agreed to by France* that led to the transfer of competence agreed to by Member States, and on the other, *the stipulations of this agreement that relate to the competence shared between the European Union and the Member States or competence belonging only to Member States*. In regard to stipulations of the agreement relating to shared competence between the European Union and the Member States or a competence belonging only to Member States, it is up to the Constitutional Council, as is established in paragraph 11, to *determine if these stipulations contain a clause that is unconstitutional, calls into question the rights and freedoms guaranteed by the Constitution or runs contrary to the essential conditions for the exercise of national sovereignty*.[29]

But, as far as the previously transferred exclusive EU competence is concerned, the Council adds a condition relative this time to 'the constitutional identity of France', known from its doctrine concerning the transposition of EU Directives:

> However, if the stipulations of the agreement establish exclusive competence of the European Union, the Constitutional Council *is only asked to determine if authorization to ratify this agreement requires a constitutional review, to establish that they do not call into question a rule or a principle inherent to the constitutional identity of France*. If this is not called into question, it is up to the judge of the European Union to oversee the compatibility of the agreement with European Union law.[30]

The Council carefully examines the provisions of the Treaty, especially those relative to shared competences (the threshold to consider that a principle inherent to the constitutional identity of France is infringed being much higher), and concludes that the Comprehensive Economic and Trade Agreement between Canada, on the one hand, and the European Union and its Member States, on the other, does not contain unconstitutional clauses.

Besides the European Union treaties, and notwithstanding the gradual distinction operated by the Constitutional Council between public international law and European Union law, the doctrine of 'limitations of sovereignty' has been applied *mutatis mutandis* in other international treaties

[29] Decision no. 2017–749 DC – *Comprehensive Economic and Trade Agreement between Canada*, pts. 12 and 13 (emphasis added).

[30] Decision no. 2017–749 DC – *Comprehensive Economic and Trade Agreement between Canada*, pt. 14 (emphasis added).

signed by France.[31] Decision no. 98–408 DC – *Treaty laying down the Statute of the International Criminal Court* constitutes the most important example of an incompatibility ruling having resulted in the amendment of the French Constitution in order for an international treaty to be ratified. In this case, the incompatibility clause is formulated a little bit differently: 'Where an international agreement contains a clause *that is contrary to the Constitution or jeopardizes the rights and freedoms secured by the Constitution*, the authorization to ratify it requires revision of the Constitution.'[32] Instead of adding 'jeopardizes the rights and freedoms secured by the Constitution' to 'jeopardizing the essential conditions for the exercise of national sovereignty' like in the 2004, 2007 and 2012 decisions, the Council replaces the latter by the former. However, the reasoning and result are the same. After having found the incompatibility of several clauses of the Statute of the International Criminal Court in regards with specific articles of the French Constitution (provisions on the criminal responsibility of the holders of certain official status are contrary to the special constitutional rules governing liability of the President of the Republic, Members of the Parliament and of the Government),[33] the Council goes on to examine more generally the 'respect of the essential conditions for exercise of national sovereignty' (under a section of the decision that bears this title). The review concerns the principle of complementarity between the International Criminal Court and the national courts, the international cooperation, judicial assistance and the Prosecutor's powers, as well as the enforcement of sentences passed by the International Criminal Court. The Council finds that

> under the Statute, the International Criminal Court could be validly seized on the grounds of an amnesty statute or internal rules on limitation; in such a case, France, even if a State were neither unwilling nor unable to act, might be required to arrest and surrender to the Court a person accused of conduct covered by an amnesty or limitation period in French law; this would violate the essential conditions for the exercise of national sovereignty.[34]

[31] See for instance Decision no. 85–188 DC – *Protocole n° 6 additionnel à la Convention Européenne de sauvegarde des Droits de l'homme et des libertés fondamentales concernant l'abolition de la peine de mort, signé par la France le 28 avril 1983*; Decision no. 78–93 DC 29 April 1978 – *Loi autorisant l'augmentation de la quote-part de la France au Fonds monétaire international*; Decision no. 2005–524/525 DC, 13 December 2005 – *Engagements internationaux relatifs à l'abolition de la peine de mort*.

[32] Decision no. 98–408 DC – *Treaty laying down the Statute of the International Criminal Court*, pt. 12 (emphasis added).

[33] Articles 26, 68 and 68–1 of the Constitution 1958.

[34] Decision no. 98–408 DC, 22 January 1999 – *Treaty laying down the Statute of the International Criminal Court*, pt. 34.

It also finds that 'the power conferred on the Prosecutor to carry out these measures without the presence of the competent French legal authorities is liable to violate the essential conditions for the exercise of national sovereignty'.[35] Thus, authorization to ratify the treaty laying down the Statute of the International Criminal Court required amendment of the French Constitution.

What is interesting in this decision is the clear dichotomy between contrariety to the Constitution per se (its articles or the constitutional principles) and incompatibility with the 'respect of the essential conditions for exercise of national sovereignty'. Contrary to previous decisions on European Treaties, the Constitutional Council does not explicitly conclude here that limitation of the essential conditions for exercise of national sovereignty is *as such* unconstitutional, but rather dresses two different hypotheses that both result in the necessity of Constitution amendment.[36] Thus, the respect of the essential conditions for exercise of national sovereignty becomes an autonomous basis of review, alongside the 'bloc de constitutionnalité'. When such a 'general' infringement is asserted by the Constitutional Council, the necessary amendment of the Constitution cannot aim at this or that article (since no precise article is identified by the Council). In such a case, the only amendment leading to the possibility to ratify the international treaty is to add in the Constitution a habilitation clause (such as article 88–1 after the 1992 Decision or article 53–2 after the 1998 Decision)[37] authorizing such an undertaking as compatible with national sovereignty.[38]

Such a mechanism raises once again the question of the actual normativity of the French Constitution and of its true interaction with international (or even foreign relations) law. It is of course clear that, in theory, still nothing changes as far as the supremacy of the French Constitution in the French legal order is concerned. The mere fact that the international treaty cannot be ratified without previous amendment of the Constitution goes to show that the latter prevails normatively over the former. However, when a Constitution is over and over again amended in order for international treaties to be ratified and *a fortiori* when some of the modifications at hand consist in a simple

[35] Decision no. 98–408 DC, 22 January 1999 – *Treaty laying down the Statute of the International Criminal Court*, pt. 38.

[36] See also Combacau, 'La souveraineté internationale de l'Etat dans la jurisprudence du Conseil constitutionnel français'.

[37] 'The Republic may recognize the jurisdiction of the International Criminal Court as provided for by the Treaty signed on 18 July 1998', added to the Constitution by the Constitutional Law of June 28, 1999.

[38] For a more theoretical analysis see Combacau, 'La souveraineté internationale de l'Etat dans la jurisprudence du Conseil constitutionnel français'.

addition of a habilitation clause, it cannot be denied that such a Constitution seems less 'rigid' than the ones that leave no place to that kind of amendments. The theoretical place of the French Constitution in the hierarchy of norms may be the same as in other constitutional countries, but its actual normative density can be questioned, since the executive, the Parliament and the Constitutional Council can all influence the outcome of a constitutional amendment through their conduct of foreign relations.

V CRITICAL ASSESSMENT OF THE CONSEIL CONSTITUTIONNEL'S DIFFERENT DECISIONS THAT APPLIED THE 'LIMITATION OF SOVEREIGNTY' DOCTRINE

What is striking in this panorama of the Constitutional Council's case law – other than the relative 'hypocrisy' of the assertion concerning the absolute primacy of a Constitution that is revised as and when the ratification of a new international treaty needs it – is the rather arbitrary way in which the Council decides which limitations of sovereignty are tolerable and which are not, at least as far as the substantial content of 'national sovereignty' is concerned. Indeed, the review of those few decisions does not allow to predict for the future which international treaties will be considered by the Council as respecting the essential conditions for the exercise of national sovereignty. It does not allow either to dress an inventory of different substantial criteria (other than purely material/formal ones) taken into account by the Council in order to decide or to provide some guidelines as to how it will exercise its control power.[39] Notwithstanding the constancy of the reasoning itself, the actual arguments and results are essentially built on a case by case basis.

Concerning the actual determination of what 'national sovereignty' entails and which are the 'essential conditions' for its exercise, the only decision that tried to identify some elements was the 1985 one, as seen above. However, not only the three elements put forward in that case by the Constitutional Council did not survive in the subsequent decisions, but also and foremost the deliberation minutes of the 1985 decision indicate that there was no real intention to define 'national sovereignty' by those three elements invoked.[40] The consequence is a rather confusing case law as to why one international treaty is

[39] See also Combacau, 'La souveraineté internationale de l'Etat dans la jurisprudence du Conseil constitutionnel français'.

[40] Hamann, 'Sur un "sentiment" de souveraineté', 207, II. B.

considered to infringe the *essential* (?) conditions for the exercise of *national sovereignty* (?), whereas another international treaty is not. The consultation of several deliberation minutes (henceforth available for the earlier decisions) reinforce this impression of obscurity and arbitrariness.[41] As a matter of fact, the doctrine of 'essential conditions for the exercise of national sovereignty' is only a partial and incomplete one at best.

The only common factor that can be identified throughout the different decisions (besides the 'reciprocity' criterium invoked again and again by the Council, but also found in paragraph 15 of the Preamble 1946) is *material* concerning the *conditions* of the international engagement.[42] In short, if France maintains a certain liberty of action (for instance, to denounce the treaty even if the treaty does not actually contain a denunciation clause[43] or to invoke an exception derogatory clause in case of urgency or necessity) and if the Constitutional Council is able to review any future undertaking going further than the previous ones, then it seems that the essential conditions for the exercise of national sovereignty are respected.

However, if the Council seems to have a clear course of action as to the *material* conditions of powers' exercise that the treaty must satisfy, there is little indication (besides the mere listing of the spheres enumerated in the different decisions up to today) as to the domains in which the treaties can intervene in order for the undertaking to respect the essential conditions for the exercise of national sovereignty. Certainly, the Council asserts that 'the international agreements entered into by the authorities of the French Republic may not

[41] See analysis and long critical assessment in Hamann, 'Sur un "sentiment" de souveraineté', 207, II. B. According to the author:

> The confusion by the Council between two concepts that are alien to each other, as well as its ignorance of the singularity of State sovereignty in its international law meaning, inevitably lead to issues of State sovereignty to be measured against a famous tool of its own fabric, the 'essential conditions for exercising national sovereignty'. As an operative tool for review, this concept is consequently inadequate – and can only be inadequate, as the minutes of the Council's deliberations reveal today, given that the fate of these 'essential conditions for exercising national sovereignty' was but an accident, the product of a mistake which became 'jurisprudence constante'.

[42] Hamann, 'Sur un "sentiment" de souveraineté', 207, II.B for the distinction between material/formal elements and substantial elements.

[43] See the apparent contradiction between Decision no. 85–188 DC, 22 May 1985 – *Protocole n° 6 additionnel à la Convention Européenne de sauvegarde des Droits de l'homme et des libertés fondamentales concernant l'abolition de la peine de mort, signé par la France le 28 avril 1983*, pt. 1; Decision no. 91–294 DC, 25 July 1991 – *Loi autorisant l'approbation de la convention d'application de l'accord de Schengen*, pt. 58; Decision no. 2005–524/525 DC, 13 December 2005 – *Engagements internationaux relatifs à l'abolition de la peine de mort,* pt. 5; Decision no. 2017–749 DC – *Comprehensive Economic and Trade Agreement between Canada*, pt. 69.

adversely affect the exercise by the state of the powers that are at the core of its national sovereignty'.[44] It also refers to 'arrangements which deprive the Member States of their own powers in a matter which is vital to the exercise of national sovereignty'.[45] Still, no clear list of which those matters are is given nor the criteria to identify those matters are laid down. In other words, the 'national sovereignty' in its *substantial* meaning is not really defined by the Constitutional Council (as it is not defined by paragraph 15 of the Preamble 1946 either), although this same Council establishes itself in its case law as the 'national sovereignty's' guarantor.

Thus, the executive branch has no real guidance as to which international treaties are likely to be deemed respectful of the essential conditions for the exercise of national sovereignty by the Council and which are not. If it is free to conduct foreign relations as it wishes, and if the French legal order encourages international cooperation, the executive is never immune from a Conseil Constitutionnel's incompatibility decision resulting in a long process of a prior Constitution amendment in order for the treaty in question to be ratified. Of course, when the *a priori* constitutional review is not compulsory, referral to the Council will depend on the will of the executive (President of Republic and Prime Minister) or of the legislative (President of one or the other of the Houses or sixty Members of the National Assembly or sixty Senators). Thus, the possible interference of the Constitutional Council in the conduct of foreign relations is not without limits and its role remains closely linked to the one of the executive and the legislative branches. Still, it is clear that the Council conserves great power and discretion as to its review and its possibility to weigh upon the ratification process of the most important international treaties. In other words, its position in the management of France's foreign relations is rather significant.

[44] Decision no. 92–308 DC, 9 April 1992 – *Treaty on European Union (Maastricht I)*, pt. 49.
[45] Decision no. 92–308 DC, 9 April 1992 – *Treaty on European Union (Maastricht I)*, pt. 43.