UN SANCTIONS IN EU AND NATIONAL LAW: THE *CENTRO-COM* CASE

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I. INTRODUCTION

INTERNATIONAL sanctions, understood as coercive means imposed by the United Nations, or by States, individually or collectively, against a country responsible for violating fundamental rules of international law, have been extensively analysed in the legal literature.[1] A survey of such literature shows that particular emphasis has been put on the nature of sanctions, their status in international law and the very controversial issue of the legality of their adoption either by regional organisations, or by a State *motu proprio*, unilaterally.

The following analysis is intended to be confined to the specific legal problem of the simultaneous co-existence of three normative levels, represented by the sanctions measures enacted by UN Security Council resolutions[2]and the implementing legislation of, respectively, the European Union and its member States.[3] The problem arises as,

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1. See J. Castañeda, *Legal Effects of United Nations Resolutions* (1969); J. Combacau, *Le pouvoir de sanction de l'ONU—Etude théorique de la coercition non militaire* (1974); M. P. Doxey, *Economic Sanctions and International Enforcement* (1980) and *International Sanctions in Contemporary Perspective* (1987); V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law—United Nations Actions in the Rhodesian Question* (1990); F. Francioni, "Sanzioni internazionali", in *Enciclopedia Giuridica Treccani* (1992); L. F. Damrosch (Ed.), *Enforcing Restraint—Collective Intervention in Internal Conflicts* (1993); C. Focarelli, *Le contromisure nel diritto internazionale* (1994); D. Cortright and G. A. Lopez, (Eds), *Economic Sanctions: Panacea or Peace-building in a Post-Cold War World*? (1995).

2. Such power is provided for in Art.41 of the UN charter, which reads: "The Security council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relation." Despite the ambiguous wording of the provision (the verb "to call upon" seems to refer to voluntary measures), it is unanimously acknowledged that the legal rules flowing from those resolutions are of a binding nature, that is, the UN member States are under a legal obligation to comply with them.

3. The resulting legal framework can subsequently be described as a pyramid: at the top we find the UN Security Council resolutions; the sides and the basis are constituted, respectively, by the EC and member States' implementing legislation.

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nowadays, compliance with UN sanctions by EU members is (or, at least, should be) necessarily affected by the regulations which the Council of Ministers adopts in order to guarantee a *uniform application* within the Community territory.

Indeed, a very interesting and unprecedented (but now established) practice has emerged in the EC/EU context with respect to the implementation of UN embargoes of the 1990s and a particular institutional machinery (see *infra* sections II.A–II.B) has been set up for that purpose. However, EC legislation has not had the same impact within the different national legal orders.

To understand this it is worth recalling that—according to Article 25 of the UN Charter[4]—States have the obligation to implement sanctions measures adopted pursuant to Article 41, which obligation they actually perform according to their specific national constitutional requirements.

In this regard, we know that different countries show different attitudes with respect to the implementation of international law in their municipal law. These attitudes are traditionally expressed in the distinction between *monist* and *dualist* systems.[5]

The United Kingdom and Italy can reasonably be considered among the most notable examples of dualist legal systems. Accordingly, they are comparable in so far as the practice of implementation of UN sanctions is concerned: in principle, they in fact comply with the obligations arising from the sanctions decisions through the adoption of statutes and/or statutory instruments reproducing verbatim the measures therein enshrined (see further *infra* Part III). This kind of practice is the clear reflection of the dualist idea that international norms have no legal effect and are unenforceable without, and prior to, their incorporation, which allows them to become part of the law of the land.

The drawbacks of that system of compliance are well known: first, and as a matter of principle, domestic courts are bound to apply the national implementing rules regardless of potential inconsistencies with the international ones.[6] In such latter cases, the State will of course be

4. "The members of the United Nations agree to accept and carry out the decisions of the Security council in accordance with the present Charter."

5. A system is said to be monist when it conforms with the idea that international law is automatically part of, and superior to, domestic law, or dualist when it does not grant legal force to international rules, unless they are transformed into national ones through the constitutional legislative machinery.

6. This is true in principle and by way of approximation: actually, the international origin of domestic norms plays an important role, since dualist countries have recognised the existence of an interpretative rule according to which those domestic norms must be construed, as far as possible (that is, with the exclusion of irreparable incompatibilities), so as not to be in conflict with the international norms they purport to transform. For a clear assertion of this principle in British case-law, see *Garland* v. *British Rail Engineering Ltd* [1983] 2 A C. 751.

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internationally responsible, but that will not prevent the embargo measures (as well as a treaty provision or a customary norm) from being violated within the legal order. Secondly, the international norms themselves do not enjoy a special rank in the member State's hierarchy of legal norms. As a matter of fact, their rank corresponds with that of the implementing instrument and hence they are subject to common legal principles governing the conflict between norms; in particular, they can be superseded by a later instrument having the same force ("*lex posterior derogat priori*") or, *a fortiori*, by a superior one.[7]

However, it appears that the distinction between monist and dualist systems can be regarded as less intense and relevant with respect to the domestic legislation implementing UN sanctions resolutions. The latter are in fact unanimously acknowledged as non self-executing international rules, namely, as provisions capable of becoming part of municipal law only *once and if* member States enact specific legislation aiming at providing the legal order with the necessary supplementing norms.[8]

The existing literature on the distinction between self-executing and non self-executing rules is very extensive, and that reflects the complexity of the issue.[9] Nonetheless, in our context, we can sufficiently consider that the sanctions resolutions are regarded by States as non self-executing, primarily because criminal provisions have to be established for the prosecution and punishment of violations that occur. However, the same feature is also often ascribed to the *content* of UN sanctions, thereby underlining either their vagueness and indeterminacy, or their inability to give rise to rights directly enforceable by individuals before domestic courts.

These different views simply mirror the overall confusion affecting the identification of the precise nature of self-executing norms. However, the point to be made here is that even countries commonly labelled as

7. But see B. Conforti, *Diritto Internazionale* (1997), pp.312–316, who holds that a "principle of speciality" operates, according to which international conventional rules can be superseded by later domestic norms having the same rank only if the legislator expressly declares the double intention to derogate from the international rules in themselves and from the (national) implementing legislation "ordering" their execution ("*ordine di esecuzione*"). Such thesis can be adapted to a large number of national legal systems, even though originally formulated with respect to the Italian one.

8. However, according to Conforti, *idem*, pp.318–21, UN resolutions adopted under Art.41 of the Charter are to be considered *directly applicable* within internal legal orders, since the State's execution of the UN Charter would express acceptance of the organisation's binding powers.

9. Particularly noteworthy, in recent times, C. M. Vazquez, "The Four Doctrines of Self-Executing Treaties" (1995) 89 A.J.I.L 95. In the Italian literature see particularly Conforti, *idem*, pp.298–302; and the acute and still pertinent observations by L. Condorelli, *Il giudice italiano e i trattati internazionali. Gli accordi self-executing e non self-executing nell'ottica della giurisprudenza* (1974).

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monist-inclined, for instance the United States or France,[10] enact specific and detailed legislation in order to give effect to the sanctions measures.

Is the lesser relevance of the distinction between monist and dualist systems in that respect reflected in judicial practice? It has been argued that, since the European Court of Justice[11] has applied the UN resolutions only as a consequence of their incorporation into European law through a Community act (and not as being "part of the law of the land"), "the long doctrinal dispute between the dualists and the monists ... did not really play a role" in the judicial cases related to the UN sanctions.[12] By contrast, we will try to demonstrate how conflicts between UN sanctions, EC rules and national measures are more likely to emerge from the methods of implementation and principles of interpretation adopted by *dualist* countries and how this situation inevitably affects the outcome of judicial proceedings.[13]

The main focus of our analysis will be on the interplay and relationships between the three types of norms. We will particularly try to identify what the function of the European Court is with respect to domestic rules expressly adopted to implement UN embargo measures. The question is whether the Court is competent to declare such rules incompatible with Community law: if the answer is in the positive, we have to acknowledge that the Court itself can exercise some kind of power of review over UN

10. On the US practice, see C. Joyner, "Sanctions, Compliance and International Law: Reflections on the UN Experience against Iraq" (1991–92) 32 Virginia J.I.L. 1. On the French one, see F. Naud, "L'Embargo: Une Valse à Trois Temps. Nations Unies, Union Européenne et Etats Membres" (1997) R.M.C. n.404, pp.25–33.

11. The ECJ cases referred to in the main text are: Case C–124/95, *Regina* v. *HM Treasury and Bank of England, ex p. Centro-Com Srl* [1997] E.C.R. I–81, [1997] 3 W.L.R. 239 (which includes the Report for the Hearing); Case C–177/95, *Ebony Maritime SA and Loten Navigation Co. Ltd* v. *Prefetto della Provincia di Brindisi and Others* [1997] E.C.R. I–1111 (for the Italian version of the these two cases, see; [1997] R.D.I. 797–815); Case C–84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS* v. *Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] E.C.R. I–3953.

12. I. Canor, "Can Two walk together, except They Be Agreed? The Relationship Between International Law and European Law: the Incorporation of United Nations Sanctions against Yugoslavia into European Community Law through the Perspective of the European Court of Justice" (1998) 35 C.M.L.Rev. 137, 150, n.46.

13. Consider the following exemplary assertion made by the English Divisional Court in the first stage of the *Centro-Com* case: "Section 1 of the 1946 UN Act [which is the authority for all UK sanctions legislation—see *infra* Part IV] ... is the medium by which that international obligation [to allow humanitarian exports] may *become part of United Kingdom law*. We say may become because Section 1 is an enabling provision. It empowers, *but does not oblige*, the United Kingdom Government to take measures in support of United Nations sanctions. Moreover, it is a *wide enabling power, leaving much to the discretion of the Government*": *R.* v. *HM Treasury and the Bank of England, ex p. Centro–Com Srl* [1994] 1 C.M.L.R. 109, 124–125, para.39 (emphasis added).

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sanctions[14] The point is neatly made in the key argument advanced by the United Kingdom in the *Centro-Com* case (see further *infra* Part IV), namely, that its contested national measure fully conformed with the UN embargo regime (the Yugoslav one). Therefore, the Court had inevitably to interpret the UN resolution and to assess its scope and legal force. How did it embark upon such task? Is it in any event legitimate to assert that under such circumstances national courts must give precedence to EC law as interpreted by the Court?

Ultimately, our analysis will highlight the tension currently existing between an incipient European foreign policy and the willingness of certain member States to retain their sovereignty and responsibilities over defence and security matters. In fact, we have to bear in mind that all actions and measures taken by a State with respect to sanctions, no matter if there exists a prior Security Council decision, deeply involve political considerations.

We will now consider in more detail the evolution of the EC practice in the field of sanctions and isolate the constitutional issues arising therefrom.

II. THE EUROPEAN COMMUNITY LEVEL

THE EC involvement in embargo cases is not a new phenomenon: there are several examples of *unilateral* adoption of Community sanctions, the most notable probably being represented by the measures imposed against Argentina at the time of the Falkland/Malvinas Islands crisis. This practice has raised the delicate issue of public international law concerning the legality of sanctions decided by States or regional organisations short of a prior Security Council decision.[15]

On the other hand, a new phenomenon is the adoption of EC regulations aimed at implementing in the Community territory the UN sanctions resolutions of the 1990s.[16] Here, the EC measures are merely

14. As rightly pointed out by Canor, *op. cit. supra* n.12, p.161. The author confronts the issue of the consistency between protection of fundamental rights at Community level and the requirement of effectiveness of UN sanctions. As is well known, but curiously enough, the legality of review of UN resolutions by the ICJ is extensively debated in the light of the *Lockerbie* case: see, I.C.J.Rep. 1992, 3, 114 (provisional measures) and the Court's judgment of 27 Feb. 1998 (preliminary objections).

15. See P. J. Kuyper, "Community Sanctions against Argentina: Lawfulness under Community and International Law", in D. O'Keeffe and H. G. Schermers (Eds), *Essays in European Law and Integration* (1982), 141; J. L. Dewost, "La Communauté, les Dix, et les 'sanctions' économiques: de la crise iranienne à la crise des Malouines" (1982) 28 A.F.D.I. 215. A detailed monograph on the EEC/EC sanctions practice has recently appeared in the Italian literature: A. Davì, *Comunità Europee e sanzioni economiche internazionali* (1993).

16. Reference is to the sanctions imposed against Iraq, Serbia and Montenegro, Libya, Haiti, the Unita Movement in Angola, Liberia and Somalia (the principal resolutions are cited *infra* Sections II.A and B): for a recent thorough survey, see the contributions in P. Picone (Ed.), *Interventi delle Nazioni Unite e diritto internazionale* (1995).

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consequential to those of the Security Council and hence are perfectly legal under international law[17]but, curiously enough, they raise controversial problems of EC constitutional law.[18]

The analysis of such problems needs a different approach according to the situation, respectively, prior and following the entry into force of the Treaty on European Union (Maastricht Treaty).[19]

A. Community Practice Before the Maastricht Treaty

In the EEC Treaty (Treaty of Rome, as amended) there was no article expressly providing for a Community competence with respect to economic sanctions. Yet, as just mentioned, this absence of an explicit legal basis has not barred the Council of Ministers from adopting regulations implementing the UN embargo resolutions made from 1990 until November 1993 (when the Maastricht Treaty entered into force).

The very first case concerns the comprehensive economic sanctions imposed against Iraq by Security Council Resolution 661 (1990) on 6 August 1990, in response to which the Community adopted Regulation 2340/90[20] and, later Regulation 3155/90.[21]

The other examples of Community action are represented by Regulation 945/92,[22]which implemented the embargo on aircraft, their components and related services imposed upon Libya by Security Council Resolution 748(1992) and, with respect to the measures imposed against Serbia and Montenegro (Federal Republic of Yugoslavia), Regulations 1432/92[23] and 990/93,[24] which implemented, respectively Security Council Resolution 757(1992) and Security Council Resolution 820(1993).

Security Council Resolution 757(1992), adopted on 30 May 1992, basically provides for a comprehensive commercial and financial

17. Art.48(2) of the UN Charter reads: "Such decisions [concerning the maintenance of international peace and security] shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members." On the problems of interpretation of this provision, see P.H. Eisemann in J.-P. Cot and A. Pellet (Eds.) *Le Charte des Nations Unies. Commentaire Article par Article* (1985) 747; M. Bryde in B. Simma (Ed.) *The Charter of the United Nations*. A Commentary (1994) 651.

18. E. Klein, "Sanctions by International Organizations and Economic Communities" (1992) 117 A.V. 101; S. Bohr, "Sanctions by the United Nations Security Council and the European Community" (1993), 4 E.J.I.L. 256; C. M. Lo Savio, "Sulla competenza comunitaria ad adottare 'sanzioni' economiche internazionali: il caso iugoslavo" (1993) R.I.D.P.C. I 439; N. Angelet, "La mise en oeuvre des mesures coercitives économiques des Nations Unies dans la Communauté européenne" (1993) R.B.D.I. 500.

19. (1993) O.J. C224

20. (1990) O.J. L213/1.

21. (1990) O.J. L304/1.

22. (1992) O.J. L101/53.

23. (1992) O.J. L151/4.

24. (1992) O.J. L102/14.

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embargo against the target State, while Security Council Resolution 820(1993), dated 17 April 1993, refined the measures envisaged in the previous resolution, extending them to the Bosnian territories controlled by Serbia and Montenegro and aiming at improving the effectiveness of the embargo by means of a naval interdiction policy.

All these EC Regulations are expressly based on Article 133 (ex-Article 113) of the Treaty of Rome, which provides for a common commercial policy (CCP) and gives the Community an exclusive competence in such a field. Now if, on the one hand, it is self-evident that embargo measures are capable of affecting the performance of the Community tasks under the CCP in a substantial way, on the other hand it is undeniable that the Community's involvement in the implementation process entails political considerations.

The two-stage procedure followed by the EC institutions in the implementation of sanctions confirms the latter: before action at the Community level was taken, a decision in the framework of European political co-operation (EPC) was in fact needed; only after that, the ordinary EC legislative machinery could be activated, the result of which was, as we know, the adoption of regulations based on Article 133.

In other words, the EPC decision was a requirement, a *conditio sine qua non*, of the EC implementation process. At any rate, the resort to Article 133 as a constitutional base prompts two considerations. First, such a provision has been used, as a whole, as an artificial treaty legal basis, given the very limited powers in the field of foreign policy the Community had. This will become clearer when analysing the member States' competence and role. Second, Article 133 could not justify, on its own, the implementation of all kinds of sanctions measures enacted by the Security Council.

In that respect, we must take into account both the willingness of the EC institutions to play an ever important function with regard to the UN embargoes, and the potentially endless range of measures envisaged by Article 41 of the UN Charter. Hence, import and export prohibitions could convincingly be covered by Article 133 and the same applied to the bans on provision of non-financial services.[25] On the contrary, the Community implementation path proved impracticable with respect to the freezing of funds and financial resources of the target States: in fact, all the regulations quoted above do not make provision for the financial sanctions imposed upon Iraq (Security Council Resolution 661(1990)) and Serbia-Montenegro (Security Council Resolutions 757(1992) and 820 (1993)). As a result, such sanctions were implemented by national

25. See, the broad interpretation given to Art.113 (now Art.133) by the ECJ in *Opinion 1/78* [1979] E.C.R. 2871, para.45, and more recently in *Opinion 1/94* [1994] E.C.R. I–5267, paras.31, 39.

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measures which had no Community norms to take into consideration and whose sole authority could rightly be identified with the UN resolutions.

The question now arises as to how it has been possible to reconcile with the letter of Article 133 the transport sanctions imposed against Iraq, Libya and Serbia-Montenegro and envisaged in Regulations 3155/90, 945/92 and 1432/92.

The legislative process followed for the adoption of Regulation 3155/90 aptly demonstrates the Community institutions' awareness of the problem: the Council, in fact, perceived the need to base the Regulation not only on Article 133 but also on Article 80 (ex-Article 84) (concerning, *inter alia*, air transport) and, especially, Article 308 (ex-Article 235), that is, the provision recognising the so-called "Community implied powers" with respect to competencies not expressly granted by the Treaty, whose exercise is nonetheless necessary to attain one of the Community's objectives. The Parliament (whose consultation is required when Article 308 is invoked) took a radical view by advising the Council to enact the regulation only under Article 308.[26] Even though the Council did not abide by the Parliament's opinion and decided to adopt the regulation under Article 133 solely (thereby avoiding the unanimous vote required by Article 308), that short account indicates that the issue at stake was a source of disagreement at the EC institutional level.

Clear confirmation of this comes from a specific case where resort to the implied powers clause of Article 308 proved inevitable. The decision was in fact taken to implement at the EC level paragraph 29 of Security Council Resolution 687(1991), by which the Security Council calls upon all to prohibit the satisfaction of claims based on the non-performance of obligations arising from contracts whose execution has been affected by the embargo. For that purpose, Regulation 3541/92[27] was passed on the basis of Article 308. In other words, the exclusive reference to the CCP for the adoption of a Community rule envisaging the dissolution of commercial contracts proved to be inconceivable.

However, the soundness of the latter conclusion has to be contrasted with the position taken by the Court in *Opinion 1/94*.[28] In the course of the proceedings, the Commission invoked the practice of adoption, on the basis of Article 133, of embargo measures concerned with transport

26. Parliament's Opinion of 26 Oct. 1990 (1990) O.J. C295.

27. (1992) O.J. L361/1.

28. *Supra* n.25. The dispute concerned the delimitation of competence between the Community and the member States with respect to the conclusion of the Agreement establishing the World Trade Organization and a number of other agreements annexed thereto. See especially J.H.J. Bourgeois, "The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession" (1995) 32 C.M.L.R.Rev. 763; A. Appella, "Constitutional Aspects of Opinion 1/94 of the ECJ Concerning the WTO Agreement" (1996) 45 I.C.L.Q. 440.

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prohibitions as evidence of the broad meaning to be given to the Community exclusive competence in the field of the CCP. The Court rejected the idea that transport services are covered by Article 133, principally because they are the object of a specific title of the Treaty of Rome (Title IV of Part Three) distinct from the title concerned with the CCP (Title VII of Part Three).[29] More importantly, it went on to say, with respect to the sanctions regulations:[30]

> Those precedents are not conclusive ... Since the embargoes related to the export and import of products, they could not have been *effective* if it had not been decided at the same time to suspend transport services. Such suspension is to be seen as a *necessary adjunct to the principal measure* (emphasis added).

Such line of reasoning is therefore capable of justifying the EC competence in the sanctions area in the light of the principle of effectiveness of Community measures and the doctrine of the principal matter.[31] Accordingly, constitutionally controversial measures, such as the "contractual" ones, may well be caught within Article 133[32] and the resort to Article 308 is yet another sign of the political factors involved in embargo decisions.

The doubtful reliance on Article 133 also arises because Article 297 (ex-Article 224) of the Treaty of Rome unequivocally grants the member States competence to implement Security Council sanctions resolutions. It reads, so far as material:

> Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

The reference to the UN Charter system of collective security in the closing words is unquestioned and, therefore, the potential conflict between Community and national implementing measures is highlighted: each, EC member was potentially free to invoke Article 297 and pursue the domestic route in order to implement the UN sanctions resolutions.[33]

29. *Opinion 1/94*, *idem*, para.48.

30. *Idem*, para.51.

31. Such a doctrine legitimates a Community measure in so far as it is *principally* concerned with a constitutional competence and other aspects thereto are merely ancillary. It is, however, evident that the problem of abuse of the doctrine itself is particularly delicate.

32. In other words, the full effectiveness, e.g. of an export-import prohibition cannot be guaranteed without providing, at the same time, that all commercial contracts concluded with persons residing in the target State are not to be given effect.

33. In *infra* Section II.B we will assess whether such a conclusion is still valid in the light of the changes envisaged by the Maastricht Treaty.

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By doing that, it could simply deny, *under EC constitutional grounds*, the existence of any Community competence or, at least, of a Community competence capable of displacing the expressly/stipulated domestic one. That explains why one of the main legal effects produced by the EC sanctions legislation of the 1990s has been identified with a *temporary renunciation* by the member States of their powers under Article 297.[34]

The resulting legal framework, however, is not straightforward: it is not logical, as it would *prima facie* seem, to maintain that a member State, once it has consented to the implementation process within the EPC (now the Common Foreign and Security Policy), is under a legal obligation to comply with Community embargo rules by all means and, accordingly, to refrain from enacting own "independent" domestic rules.[35] In fact, domestic legislation could even be indispensable (as it actually is, with respect to criminal provision) and desirable, because nothing rules out the possibility that Community measures will transpose UN resolutions incompletely, incorrectly or even in a way (although this is a remote possibility) so as to be in overt violation of them.[36]

It is then possible to characterise the interposition of the Community embargo legislation (between UN provisions and national ones) as a factor liable to produce complex legal dynamics but, at the same time, it is also undeniable that such interposition entails certain benefits for the process of compliance with UN embargo measures:

(1) the EEC/EC machinery has proved very swift, in a way that the implementing regulations have entered into force promptly after the adoption of the UN resolutions;
(2) the primary goal of the EEC/EC legislation is one of normative uniformity within the Community territory, which is also a legitimate concern in the perspective of the single market;
(3) last but not least, the principle of direct applicability of Community regulations could enhance the effectiveness of the

34. Bohr, *op. cit. supra* n.18, at p.268.

35. This is indeed the view taken by A. Lang, "Risoluzioni del Consiglio di Sicurezza, obblighi comunitari e politica estera dell'Unione Europea" (1997) XXI Comunicazioni e Studi 535, 588. She believes that such a solution is the only one compatible with the general principles regulating the subject-matter, in particular with Art.11(2) ex-Article J.1(4), TEU, according to which, *inter alia*, member States "shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations". It is, however, important to point out that Lang's work as was written before the ECJ judgments involving UN sanctions (*supra* n.11 and *infra* Part IV were rendered.

36. Lang, *idem*, p.583, outlines that a legal requirement of Community sanctions legislation is that it "cannot go beyond the provision of the [UN] resolution, unless Community action is nonetheless in conformity with general international law". Of course, this is correct, but it is also a theoretical proposition. As we shall see, the practice (both legislative and judicial) shows a complex interplay between UN, Community and national measures.

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> embargo measures, given the potential immediate enforceability of such measures before domestic courts.

Nonetheless, a crucial element is that the authority of the national implementing legislation corresponds to the UN resolutions. The courts should therefore try to resolve the ambiguities of the former in the light of the latter; in such interpretative process the Community norms can at most constitute a supplementary device.

Moreover, the EC measures have a special character, in so far as they are enacted exactly in order to implement the UN measures in the Community territory. They are not EC provisions of their own right and the issue arises whether the established principles and rules of EC law apply here to the same extent as they do with respect to the ordinary Community instruments.[37]

We must particularly pay attention to the scope of the principle of direct effect:[38] is it sensible to assert that, in principle, national provisions incorporating sanctions measures are not required? And that the latter are directly enforceable before domestic courts? As we shall see in see in Part III, the answer emerging from the implementing practice of the United Kingdom and Italy is not univocal.

B. The Maastricht Innovation

To what extent has the entry into force of the Maastricht Treaty modified the picture we have drawn so far?

The Treaty has added two new articles to the Treaty of Rome which specifically deal with the Community powers in the field of embargo measures. These are Articles 301 (ex-Article 228A) and 60 (ex-Article 73G).

Article 228A reads:

> Where it is provided, in a common position or in a joint action of the Treaty on European Union relating to the Common Foreign and Security Policy, for an action by the Community to interrupt or to reduce, in part or

37. E.g. Canor, *loc. cit. supra* n.12, at p.150, correctly points out that, although the Court applied the UN resolutions since they were incorporated into European law by specific regulations, "... that is not sufficient to justify the interpretation of the United Nations Resolution[s] being conceived *as a matter of Community act interpretation*" (emphasis added).

38. See particularly J. Winter, "Direct Applicability and Direct Effect—Two Distinct and Different Concepts in Community Law" (1972) 9 C.M.L.Rev. 425; D. Wyatt, "Directly Applicable Provisions of EEC Law" (1975) 125 N.L.J. 458, 575, 669, 793; R. Luzzatto, *La diretta applicabilità del diritto comunitario* (1980); P. Pescatore, "The Doctrine of 'Direct Effect': An Infant Disease in Community Law" (1983) 8 E.L.R. 155; G. Tesauro *Diritto Comunitario* (1995), pp.107–119; G. Gaja, *Introduzione al diritto comunitario* (1999), pp.95–110; Conforti, *op. cit. supra* n.7, at pp.321–330; T.C. Hartley, The Foundations of European Community Law (1995) pp.195–237.

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> completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

On the other hand, Article 60(1) expressly extends the provision of Article 301 to "measures on the movement of capital and on payments".

These new articles will certainly have the effect of halting the ongoing discussions on the constitutional legality of the EC competence in the field of economic sanctions. From now on, that competence will actually be exercised upon a firm basis, without the need constructively to create such a basis by resorting to controversial interpretation of the Treaty.

It is worth noting that the Community institutions have already had the opportunity to test the newly stipulated competence on several occasions.

Special mention must be made of:

(1) Regulations 3274/93 and 3275/93 of 29 November 1993,[39] both based on Article 301 (not Article 60) and implementing Security Council Resolution 883(1993);
(2) Regulation 1733/94 of 11 July 1994,[40] based on Article 301, and implementing paragraph 9 of Security Council Resolution 757(1992);
(3) Regulation 2471/94 of 10 October 1994,[41] based on Articles 301 and 60 and implementing Security Council Resolution 942(1994).

These Regulations constitute important historical evidence of the difficulties the Community had to face in order to impose its competence with respect to financial sanctions: in fact, the express provision of Article 60 notwithstanding, such competence has continued to be contested by the member States.

As a matter of fact, the main purpose of Security Council Resolution 883(1993) was to tighten the embargo against Libya, principally by the imposition of a complete freezing of Libyan assets and ban on transfers of financial resources (paragraph 3 of the Resolution). Regulation 3274/93 does not implement such provisions and is therefore based solely on Article 301. It is then particularly important to remember Regulation 2471/94 as the first manifestation of the EC competence enshrined in Article 60. Here, the Community institutions were for the first time able to overcome the strong national opposition and therefore to introduce a very detailed discipline of the freezing of Bosnian-Serb assets, as envisaged in Security Council Resolution 942(1994).

39. (1993) O.J. L295.
40. (1994) O.J. L182.
41. (1994) O.J. L266.

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The other two Regulations mentioned (3275/93 and 1733/94) deal with the complex problem of the claims arising out of contracts affected by the embargo measures imposed against, respectively, Libya and Serbia-Montenegro. It is noteworthy that the Community institutions agreed to base such legislation on the new competence under Article 301, if only we bear in mind that the similar Regulation 3541/92 (*supra* section II.A) could be adopted only under the "implied powers clause" of Article 308.

The major issue we need to tackle is the *substance* of the novelty introduced by the Maastricht Treaty: particularly, do Articles 308 and 60 definitively transfer the competence to carry out UN embargo measures to the Community institutions? Article 301 cannot be regarded as providing a clear answer. It is indeed ambiguous, since it does not mention the specific role of the Community in the implementation of UN sanctions. In addition, another element worthy of consideration is that the Maastricht Treaty did *not* envisage the abrogation of Article 297 (ex-Article 224), which, as we know, allows the member States to enact their own legislation giving effect to the decisions adopted pursuant to Chapter VII of the UN Charter.

It would certainly be incorrect to believe that the retention of Article 297 is due to a legislative oversight, given that there is evidence of the Commission's intent to abrogate the provision in issue.[42] We can therefore underline that its maintenance has indeed a clear political value, because it shows the member States' willingness to retain their powers related to the UN sanctions decisions. Such an explanation is to be preferred, rather than one which assigns to Article 297 a marginal place in the new system and which, as a consequence, limits the possibility of invoking the provision only to situations of inertia by the Community institutions.[43] If that were the case, Article 297 should be regarded as redundant, since it is logical that member States have to implement UN sanctions if they do not wish to incur international responsibility!

In conclusion, the Maastricht Treaty has not brought substantive changes to the machinery for the adoption of EC sanctions measures: the replacement of the EPC's decision with a CFSP's common position or joint action is merely a nominal change bearing the same legal conse-

42. Commission's Opinion on the Draft Revision of the Treaty establishing the EEC as concerning the political Union [1991] Bull. E.C. (suppl. No.2/91), pp.61, 95.

43. With minor differences, this is the opinion held by Davì, *op. cit. supra* n.15, at p.592 and Lang, *op. cit. supra* n.35, at pp.586–587. Canor, *op. cit. supra* n.12, at pp.173–174 holds that member States are even deprived of their competence under Art.297 if the Court annulls a Community embargo regulation for violating human rights. On the other hand, Lo Savio, *op. cit. supra* n.18, at p.458, is more in line with our position. However, we confirm (see *supra* Section II.B) that the legal situation is not straightforward, if only because States should in principle express their disagreement with the Community action in the framework of the Common Foreign and Security Policy (CFSP).

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quences, since for the latter, as well as it was for the former, a unanimous vote is required.[44]

The confirmation of such a framework constitutes a precise indication of the political nature of the decisions involved. Furthermore, it is yet another demonstration of the constitutional peculiarity of the European Union which is still far from being structured as a federal State: its institutions have neither the legal nor the political means necessary to pursue a uniform and legally binding foreign policy.

III. THE NATIONAL PRACTICE: BRITAIN AND ITALY

THE complexity of the contemporary practice of implementation of UN sanctions necessarily requires that we take into account its domestic dimension. Indeed, the adoption of specific Community rules has not suppressed the role played by national legislatures with respect to embargo cases. However, the scope of such role has not been interpreted uniformly in the different domestic orders and this is aptly demonstrated by the British and Italian embargo legislation, on which we focus.

The practice followed in these two States is particularly significant for a number of other reasons:

(1) Both countries are well known for their strong dualist tradition. We have already discussed this in Part I, where we also outlined the main consequences thereof: international rules are not given legal effect, and hence are unenforceable, unless they are transformed into national ones through the constitutional legislative machinery.
(2) They are both members of the European Community and therefore allow us to assess and compare whether the impact of the EC sanctions legislation within the respective legal systems has been the same.
(3) Interesting judicial cases have emerged from both the British and the Italian implementing legislation. That might be regarded as a mere coincidence, but we believe that the traditional dualist pattern followed to carry out the UN resolutions plays relevant role.

A basic difference in the British and Italian implementing practices rests in their source of authority. The UK system is in fact characterised by a peculiar mechanism taking the form of the so-called enabling legislation, that is, Acts of Parliament authorising in advance the exercise of the necessary powers in order to fulfil specific obligations. Such is the case with the United Nations Act 1946, section 1(I) of which reads:

44. On the relationship between CFSP decisions and adoption of sanctions under Art.301, see, Lang, *idem*, pp.556–581.

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> If, under Article 41 of the Charter of the United Nations signed at San Francisco on the 26 day of June 1945 (being the Article which relates to measures not involving the use of armed force), the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order.

The above provision enables the Crown to adopt Orders in Council in order to give effect to the UN sanctions measures and has actually been used as the legal basis for all major piece of embargo legislation of the 1990s: the Iraq and Kuwait (UN Sanctions) Order 1990[45] (in response to Security Council Resolution 661(1990)), the Serbia and Montenegro (UN Sanctions) Orders of 1992[46]and 1993[47] (giving effect, respectively, to Resolutions 757(1992) and 820(1993)), the Libya (UN Sanctions) Orders 1992[48] and 1993[49] (in response to, respectively, Resolution 748(1992) and 883(1993)), the UN Arms Embargoes (Liberia, Somalia and the Former Yugoslavia) Order 1993[50] and, finally, the Former Yugoslavia (UN Sanctions) Order 1994,[51] which implements the last sanctions measures adopted in the framework of the Yugoslav civil war by Resolution 942(1994).[52]

The Italian system, on the other hand, is not equipped with such enabling legislation and consequently provides for the implementation of the UN embargo decisions on an *ad hoc* basis, namely, through the adoption of autonomous laws on a case-by-case basis, without referring to any overriding authority such as the United Nations Act 1946. However, that circumstance has not hampered the development of a homogeneous practice based on the emergency legislative machinery envisaged in Article 77 of the Constitution (so-called Decree-Laws). The drawback of the system is that such legislation is temporary by definition, since if it is not reproduced in an Act of Parliament within 60 days, the rules become retrospectively void. Hence, in that respect, the Italian legal order does not guarantee the effectiveness of the UN measures to the same extent as

45. S.I. 1990 No.1651.
46. S.I. 1992 No.1302.
47. S.I. 1993 No.1188.
48. S.I. 1992 Nos.973 and 975.
49. S.I. 1993 No.2807.
50. S.I. 1993 No.1787.
51. S.I. 1994 No.2673.
52. For a technical analysis of the UK implementing legislation, see H. Fox and C. Wickremasinghe, "British Implementation of UN Sanctions against Iraq" (1992) 41 I.C.L.Q. 920 and "UK Implementation of Economic Sanctions" (1993) 42 I.C.L.Q. 945.

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the British system, and the enactment of a specific enabling statute would be welcome.[53]

The British and Italian implementing norms are also considerably different in so far as their structure and content are concerned: the former are in fact characterised by their extreme precision, length and detail. In other words, the British rule-maker tends to develop the content of the UN provisions, in a way that the resulting legislation assumes a strong UK connotation.

The basic reason for that rests on the non-self-executing nature of the embargo measures: in principle, they are devoid of enforcement provisions, whose enactment becomes then the exclusive duty of the domestic legislator. Indeed, a brief reading of the British legislation shows that a large number of provisions are dedicated to the identification of the public authorities entrusted with the enforcement of sanctions, as well as to the interrelated procedures dealing with the finding, prosecution and punishment of breaches thereof.

One of the main consequences of such an approach is that the domestic implementing rules may fail to incorporate the UN measures correctly, thereby giving rise to State liability for violation of the embargo regime. Moreover, the judiciary is never in direct contact with the international provisions, whereas it is bound to apply national legislation having the effect of concealing (and potentially of derogating from) the former.[54] In short, the assertion of the non-self-executing character of sanctions measures can serve the purpose of establishing the necessary enforcement mechanisms, but can also represent a subtle way of escaping the international obligation faithfully to carry out the embargo rules.

By contrast, mention must be made of a piece of British legislation showing a different and preferable approach to the implementation problem: in the Serbia and Montenegro (UN Sanctions) Order 1993, the legislator has chosen to incorporate directly full parts of the relevant UN sanctions resolutions, by scheduling them (in Schedule 1) to the main body of the instrument. The clear advantage is that the courts will immediately (and not as a mere subsidiary means) resort to the UN provisions in order to elucidate potential ambiguities in the domestic norms and determine what exactly constitutes violation of the embargo.

On the other hand, the Italian implementing legislation is characterised by a verbatim reproduction of the UN provisions, plus a few norms dealing with the enforcement regime. It then contrasts with the British

53. The UK system itself needs revision, given that the UN Act 1946 does not constitute sufficient authority for implementing all types of sanctions adopted by the Security Council (e.g. the "naval interdiction" measures). Cf. *idem* (1993), pp.966, 967, 970.

54. However, the principle of consistent interpretation must be taken into account. See *supra* n.6.

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measures for its conciseness and plainness. Such an approach does not, of course, rule out any possibility of divergence with the international rules. Indeed, the latter can be incorrectly transposed or, at any rate, misconceived. We can, however, point out that the operation of the Italian system, when compared to the British one, leaves less room for the interpretative powers of both the judiciary and the competent enforcement agencies and is therefore less likely to allow deviations from the UN measures.

Of course, the analysis of the enforcement machinery is also necessary in order to assess a State's commitment towards the effectiveness of sanctions regimes. Mention must then be made of the rigidity of the British system, which provides for extremely strict rules on the inspection of all means of transport suspected of violation of UN embargoes and, generally, on investigations over sanctions breaking. To that end, broad powers are granted to the enforcement authorities (take, as an example, Articles 3–10 of the Serbia and Montenegro Order 1993). In addition, all violations of the embargo measures are considered criminal offences, subject to imprisonment for up to seven years (on conviction on indictment) or for up to six months (on summary conviction). By contrast, the Italian system regards all embargo violations as administrative offences, punishable with a fine measured against—and by no means superior to—the value of the prohibited transaction.

It is now clear that the two States under consideration, despite their common dualist beliefs, have availed themselves of considerably different procedures in order to comply with the obligations flowing from the UN sanctions resolutions.

However, the most striking divergence refers to the impact of the EC legislation: in so far as the Italian legal order is concerned, it does not seem hazardous to claim that the interposition of the EC sanctions regime has revolutionised the national approach to implementation. First, the domestic statutes have, with no exception, pointed to the Community acts as their authority, beside the UN resolutions. Second, their enforcement sections define as offences the activities contrasting with both the national and EC rules. Third , and more remarkably, on the assumption of the direct effect of the EC regulations, the domestic rules have been left out. Such process has taken place in a gradual manner, which is worth consideration.

Let us take the example of the Yugoslav embargo legislation: the first Italian implementing statute[55] expressly incorporates *only the financial provisions* of the relevant UN resolution (Security Council Resolution 757 (1992)). By contrast, the restrictions concerning imports and exports and non-financial services are not reproduced. The legislator, in fact,

55. Decree-Law No.305 of 6 June 1992 [1992] 133 G.U.

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deems it sufficient to stipulate, in Article 3(1), that "All activities carried out in violation of the provision ... of EC Regulation 1432/92 are a nullity" (own translation) and to declare, in the following paragraph of the same provision, that the penalty provisions are also applicable to breaches of Regulation 143 2/92. It is therefore evident that the method consists of reproducing only those sanctions not implemented at Community level (the financial ones, see *supra* Section II.A). The same picture in fact emerges from the statute giving effect to Security Council Resolution 820(1993),[56] the greater length of which is due to the establishment of detailed rules necessary to comply with the naval interdiction policy decided by the United Nations. Besides that, Article 8 provides, with the standard formula, that the penalty regime is also applicable to violations of Regulation 990/93.

The final outcome of such an approach is to be found in the last piece of Italian legislation regarding the Yugoslav embargo,[57] whereas the domestic rules almost vanish. As a matter of fact, the complicated and lengthy sanctions regime established by Security Council Resolution 942(1994) and mirrored in Regulation 2471/94 is merely given *direct effect* by declaring (Article 1) all violation of the Community provisions a nullity and subject to the standard penalty represented by an amount of money measured against the price of the forbidden transaction. Indeed, Regulation 2471/94 constitutes the first manifestation of Community powers in the field of financial restrictions, as envisaged in Article 60 of the Maastricht Treaty (see *supra* Section II.B); hence, according to the Italian approach, even that type of national rules could be omitted. In sum, the resort to such legislative practice entails the lowest relevance of the domestic level in the implementation process, whereas it is confined to the establishment of enforcement measures and penalty provisions.

By contrast, the British legal system does not appear to be affected by the Community embargo legislation: nowhere, in the above-mentioned UK rules, can be identified the slightest reference to the EC regulations and, accordingly, the only stated authority corresponds to the United Nations Act 1946, which is never combined with the European Communities Act 1972.

Such situation might be hard to explain.[58] We can indeed assume that the underpinning political reason for such an approach is to be found in

56. Decree-Law No.144 of 15 May 1993 [1993] 113 G.U.

57. Decree-Law No.107 of 7 Apr. 1995 [1995] 84 G.U.

58. Indeed, a partial explanation is to be found in the European Communities Act 1972 itself. In fact, subpara.I(d) of Sched.2 prevents the implementation of EC provisions by means of subordinate legislation, when, *inter alia*, "... any new criminal offences punishable with imprisonment for more than two years ..." are envisaged. Such is the case with the embargo rules. It is, however, worth considering other possible reasons for the UK practice: see further in the main text.

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the traditional British opposition to any kind of Community intervention which is outside its clearly defined constitutional competencies. However, we should not forget how the EC implementing machinery is shaped: a prior decision in the CFSP (formerly EPC) framework is a requirement of any further action and such a decision is subject to unanimity voting. The CFSP is therefore the forum where any member State (like the United Kingdom) could have prevented the adoption of any EC embargo regulation, but neither the United Kingdom nor any country made use of its veto power, thereby allowing the EC provisions to be successfully enacted.

Hence, the above line of reasoning does not satisfactorily explain the British indifference towards the Community sanctions regulations. In fact, it seems logical that the domestic legislator would be prepared to grant such EC provisions their natural effects (*in primis*, the direct applicability), consistently with the consent given by the State in the CFSP framework.

What is certain is that the UK legislator conceives the embargo rules as major examples of non-self-executing norms (as they actually are with respect to the enforcement provision), which therefore require statutory specification and supplement. Such finding cannot, however, constitute a sufficient justification for the indiscriminate reformulation of embargo measures which the UK legislator decided to embark upon.

What conclusions may be drawn from the UK practice? First from a strictly formal point of view, the emerging legal framework takes a rather clumsy shape: three types of legislation are simultaneously in force and their substantive parts are in large measure identical. Something might appear redundant even to the layman. On the other hand, the judiciary is clearly confronted with a problem of choice of applicable instruments. Second, each of the three regimes has its own authority (the UN Charter, the EC Treaty and the United Nations Act 1946, respectively) and ambit of application, but they all share the same goal: the imposition of economic and financial sanctions on a third country, in order to convince it to put an end to its international wrongdoing. However, the Community and national provisions are both a reflection of the international ones, but they appear to be disconnected and independent from each other.

Is the latter assertion sound from a legal point of view? In other words, is it possible to identify any kind of legal interaction between the EC embargo regulations and the national rules? And to what extent is the answer to the last question affected by the existence of the primary international rules?

All these questions came into focus in a paradigmatic case that we will now review. Before doing that, it is worth noting that this key case resulted from the UK embargo legislation. We do not believe that is a mere coincidence: the extreme degree of normative overlapping arising

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from the features of the British implementing practice is likely to produce legal conflicts and inconsistencies.

IV. CONTRASTS IN ACTION: THE *CENTRO-COM* CASE

IN recent times, national courts have often made preliminary references to the European Court of Justice involving controversial aspects of the domestic rules implementing UN embargo decisions.[59]

In the *Ebony Maritime* case[60] one of the most delicate issues regarded the decision taken by the Italian authorities to forfeit a vessel found in violation of the Yugoslav embargo, *together with its cargo*. Such a power was actually granted by Article 2 of Decree-Law No. 144/1993, pursuant to the similar provision included in paragraph 25 of Security Council Resolution 820(1993).

The company owning the cargo, nevertheless, contested the legality of the decision, arguing that the relevant EEC regulation (990/93) did not provide for the forfeiture of cargoes, but only of means of transport. When the matter was raised before the Consiglio di Stato, the Consiglio decided to stay proceedings and ask the European Court whether the Italian rule was compatible with Community law.

Before the Court, however, it emerged that the Italian language version of Regulation 990/93 was affected by a material error, since all the others (with the exception of the Finnish one) mention the possibility of forfeiture of both means of transport and cargoes.

The Court could then simply declare the Italian rule to be compatible with Regulation 990/93 by recalling that the Community instruments, in case of doubt, have to be interpreted and applied in the light of the versions existing in the other official languages.[61] Explicit discussion of the significance of the EC embargo legislation and its relationship with the international and national rules could be avoided.[62]

By contrast, that issue was tested in another dispute,[63] which arose as Centro-Com, an Italian company trading in pharmaceutical and medical goods, was refused payment for some consignments of medicines and

59. The most important cases are *Centro-Com*, *Ebony Maritime* and *Bosphorus*, cited *supra* n.11.

60. *Ibid.*

61. See, most recently, case C-64/95, *Konserven Lubella Friedrich Büker GmbH & Co. KG* v. *Hauptzollamt Cottbus* [1996] E.C.R. I-5105, para.17 of the judgment.

62. For another instance of hypothetical conflict see Case C-299/94, *Anglo Irish Beef Processors International and Others* v. *Minister for Agriculture, Food and Forestry* [1996] E.C.R. I-1925. The plaintiff here unsuccessfully tried to persuade the ECJ that Reg.2340/90 did not correctly implement S.C.Res. 661(1990) on the embargo against Iraq.

63. *Supra* n.11. See the annotation in 1997 R.M U. EI11 and by C. Vedder and H.-P. Folz (1998) 35 C.M.L.Rev. 209. See also A. Sam-Simenot "Les Conflits de Competence entre la Communauté Européenne et les Etats Membres dans Domaine des Sanctions Economiques Edictées par le Conseil de Sécurité de l'ONU" (1998) Recueil Dalloz-Chronique 83.

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blood-testing equipment to two Serbian and Montenegran wholesalers by Barclays Bank in London, where the National Bank of Yugoslavia held an account.

Barclays' refusal was motivated by a change of policy on the part of the Bank of England, taken on behalf of the Treasury and with effect from 25 February 1993, stipulating that thenceforth the Yugoslav asset-freezing, imposed by Security Council Resolution 757(1992) and implemented in the United Kingdom by Article 10 of the Serbia and Montenegro (UN Sanctions) Order 1992, would be derogated from *only with respect to exports taking place from the United Kingdom*. Centro-Com's transactions were immediately affected by that decision, since they had been carried out from Italy.

Here, we are before a typical situation where the operation of the legal framework analysed in the previous sections is not entirely straightforward: Centro-Com was actually proceeding on the basis that its request to Barclays Bank was perfectly lawful under international law, since paragraphs 4(c)–5 of Security Council Resolution 757(1992) exempted from the embargo regime supplies and payments intended strictly for medical purposes. By contrast, the British authorities' action was made possible by Article 10(3) of the 1992 Order, which provides that permission for the unfreezing of Yugoslav funds can be "granted by the Governor ... either absolutely or subject to conditions and may be varied or revoked at any time by the authority granting it".

It is therefore evident that the British legislature interpreted the humanitarian exceptions clause envisaged by Resolution 757(1992) as not being compulsory, but simply optional, thereby giving rise to a statutory and administrative discretionary power.

The latter interpretation was upheld by the Queen's Bench Divisional Court,[64] before which Centro-Com unsuccessfully challenged the Bank of England's change of policy. Already at that stage, Centro-Com's application made it clear that judicial review of the disputed decision was claimed not only by reference to alleged inconsistencies between the latter and either the relevant UN resolutions or the United Nations Act 1946, but also with specific regard to the provisions of Regulation 1432/92 and the EEC Common Commercial Policy.

Hence, Centro-Com's complaint makes our picture complete: the judiciary has inevitably to deal with the interactions and potential conflicts arising out of the co-existence of the three levels of legislation. A confirmation thereof also comes from the key argument strongly advanced by the UK government throughout the proceedings, according to which the decision to allow the unfreezing of the embargoed funds only

64. *R.* v. *HM Treasury and the Bank of England, ex p. Centro-Com Srl* [1994] 1 C.M.L.R. 109.

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with respect to exports made from UK territory was necessary in order to guarantee the effective enforcement of the UN sanctions resolutions.

That is a major argument, since it is grounded on the UN Charter and the obligations it imposes upon the member States: the duty to carry out faithfully all Security Council embargo decisions, resulting from Article 25 of the Charter, would in fact entail an obligation to adopt all necessary means aimed at ensuring the effectiveness of sanctions. It is indeed clear that, in the United Kingdom's view, the disputed decision was to be considered one of those means, since it was an attempt to remedy the widespread evasions of the sanctions regime, by means of abuse of the humanitarian exceptions channel.

However, before the Divisional Court, the latter issue was not deeply analysed, mainly because the UK government was able to resist all Centro-Com's claims based on Community and domestic law on other grounds. It particularly succeeded in convincing the Court that no conflict of norms whatsoever was involved in the case: in fact, since the pertinent Community legislation did not contain any provision on financial sanctions (thereby *prima facie* leaving their implementation to the exclusive competence of the member States—see *supra* Section II.A), it proved easy to deny any kind of relevance to the Community norms.

In other words, the Court ruled that the British provisions correctly implemented Resolution 757(1992) with respect to the Yugoslav asset-freezing; that the contested change of policy was indeed a reflection of the British commitment towards the effectiveness of those measures; and that Community law could not be regarded as being incompatible with the national rules, primarily because it was irrelevant.

The Court, however, expressed its opinion on the issue of the legal relationships between the three levels of implementation, even if only, for the said reasons, in the form of an *obiter dictum*.[65] Hence, it made clear that, if a real conflict between the national rules and Community law were ascertained, Centro-Com's application would have been nonetheless dismissed, because the former were in conformity with the UN resolutions. Such an assertion is indeed solidly grounded on Article 103 of the UN Charter, which stipulates that:

> In the event of a conflict between the obligations of the members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

65. *Idem*, paras.90–91.

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Moreover, such "pre-eminence clause" is expressly mirrored by the EC Treaty, whose Article 307(1) (ex-Article 234(1)) reads:[66]

> The rights and obligations arising from agreements concluded before the entry into force of this Treaty [or before accession to the Community, as in the case of the United Kingdom] between one or more member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

It is now necessary to assess the soundness of the reasoning according to which Resolution 757(1992) merely *allowed*, not obliged, the UK government to grant the humanitarian exceptions. Is that the correct interpretation of the international provisions? Serious doubts can be raised about that, given the absence of any indication in the wording of the relevant resolutions supporting such a view. On the contrary, it seems logical to regard all mandatory embargo rules as having the same legal force and effect. Nothing allows a distinction between positive (duty to prohibit) and negative (duty *not* to prohibit) obligations.

But, how is it possible to counter the UK key argument, according to which such an interpretation conforms to the primary necessity of strengthening the effectiveness of the embargo regime? As a matter of fact, such an aim appears to be completely consistent with the letter and spirit of the UN Charter.

Here, a crucial problem is represented by the extremely broad discretion which is granted to the domestic judicial organs in order to determine which national norms are in compliance (and which are not) with the sanctions, even though such a consequence is a mere reflection of the present rules governing the relations between States, whereby there does not exist a universal judicial body entrusted with the power to review the domestic rules implementing international obligations.[67]

However, mention must be made of an important institutional machinery which has been set up by the United Nations in all embargo cases, namely a committee consisting of the representatives of all the members of the Security Council and charged with the supervision of the enforcement of sanctions.

Practice has developed in such a way that States often seek the Committee's opinion on the consistency with the UN resolutions of controversial aspects of their domestic measures. That is exactly what

66. Curiously enough, while the consequences arising from the superiority of the UN charter provisions were only incidentally and *ad abundantiam* dealt with by the Divisional court, such an argument would prove to be fundamental, as we shall see, before the ECJ.

67. The establishment of such a body is urged by Klein, *op. cit. supra* n.18, at pp.111–112.

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happened in the *Bosphorus* case,[68] where the Yugoslav Sanctions Committee[69] had held, pursuant to a specific request of the Irish Minister for Transport, that the decision to impound an aircraft owned by a Yugoslav undertaking, but leased to a Turkish one, was compatible with the provisions of Security Council Resolution 820 (1993).

But do the Committee's rulings have any binding legal force? The point is dealt with in Advocate General Jacobs's opinion, where he maintains that:[70]

> Clearly, due regard should be given to the opinion of the Committee ... [its] views carry considerable weight .... However, it seems questionable whether in the present case the Committee's opinion could be regarded as binding if only because such an effect is not provided for by the relevant provisions of the resolution ... The general powers of the Committee do not include decision-making powers.

In other words, the committees are an important achievement from the perspective of the uniform implementation of sanctions throughout the community of States, but their role should not be overestimated: they are not judicial bodies (at least according to the majority of opinions) and the effectiveness of their decisions depends in large part on the willingness of the member States to accept them, especially when the latter are permanent members of the Security Council, such as the United Kingdom.

In that respect, the *Centro-Com* case is exemplary, since it appears that the disputed British rules had not been brought to the attention of the Yugoslav Sanctions Committee. It follows that, at the time of the order for reference issued by the Court of Appeal on 27 May 1994,[71] everything seemed to indicate the European Court as the only body capable of making a final determination on the legality of contested national measure.

Everything *but* one element: with the second question, in fact, the Court of Appeal asked the European Court to rule upon the relevance to

68. For a sharp (and somewhat overstated) critique of the Bosphorus judgment see Canor, *op. cit. supra* n.12. The author maintains that the need to protect the property rights of the Turkish company should have urged the Court either to declare the Reg. void (esp. at p.170) or to interpret it consistently with such requirement (esp. at p.186).

69. Established by virtue of S.C.Res.724 (1991). See M. P. Scharf and J. L. Dorosin, "Interpreting UN Sanctions: the Rulings and Role of the Yugoslavia Sanctions Committee" (1993) 19 Brooklyn J.I.L. 771.

70. *Bosphorus, supra* n.11, at para.46 of the opinion. The literature disagrees on this point: Scharf and Dorosin, *idem*, pp.821–827, see the Yugoslavia Committee as a "quasi-judicial" body, while Conlon denies to Sanctions Committees in general any judicial authority; see P. Conlon, "Legal Problems at the Centre of United Nations Sanctions" [1996] Nordic J.I.L. 73.

71. The *Independent*, 3 June 1994.

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the case of the provisions of *Article 307 of the EC Treaty*. We shall shortly appreciate the implications inherent in such a crucial move.

The point now is that, in the proceedings before the European Court, it was evident from the outset that it would have proved very problematic for the United Kingdom to justify its legislation. As a matter of fact, the Court was very likely to give a negative answer to the first question referred by the Court of Appeal, namely, whether the disputed policy undertaken by the Treasury was compatible with the Common Commercial Policy and Regulation 1432/92.[72]

The United Kingdom had therefore to rely on powerful arguments and, accordingly, the textual argument grounded upon the optional character of the humanitarian exceptions was soon abandoned (while, as we know, it had been successful before the Divisional Court). By contrast, the absence of conflict between the national rules and the Community ones was reasserted, thereby claiming that Regulation 1432/92 does not make provision for financial sanctions and that, consistently, member States only are competent to implement them.

The Court, however, circumvented such an argument by resorting to the established principles and jurisprudence concerning the free movement of goods (Articles 28–30 (ex-Article 30–36 of the Treaty of Rome[73]): hence, the UK restriction on payments was to be regarded as a measure having equivalent effect to a quantitative restriction on exports and therefore unlawful, given that its "application precludes the making of payments in consideration of the supply of goods dispatched from other Member States and thus prevents such exports".[74]Furthermore, the British measure was not justifiable on grounds of public policy or security (Article 11 of Regulation 2603/69[75]) because, on the one hand, those interests were sufficiently safeguarded by the harmonisation rules of Regulation 1432/92 and, on the other, it was disproportionate.

Once again, such conclusions are perfectly consistent with the case law developed on the free movement of goods, whereby the Court has held that the exceptions envisaged in Article 30 (ex-Article 36) of the Treaty cannot be invoked by States (at least to the same extent) when the Community has adopted harmonisation measures capable of ensuring protection of the interests constituting the rationale of those exceptions.[76] Moreover, as long as the British measure was seen as derogating from a

72. See the critical views expressed by the Belgian, Dutch and Italian governments and by the Commission: [1997] 3 W.L.R. 239, pp.250–254.

73. As applied by analogy to the instrument material in the case, namely Reg.2603/69 establishing common rules for exports: (1969) O.J. Spec. Ed. 590.

74. *Centro-Com, supra* n.11, at para.42 of the judgment.

75. See *supra* n.73.

76. See e.g. Case 72/83, *Campus Oil Ltd and Others* v. *Minister for Industry and Energy* (1984) E.C.R. 2727, para.27.

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basic Community freedom, it had to respect the principle of proportionality, namely, it should not extend its effects beyond what is necessary for safeguarding the interest at stake (public security). Hence, even in that perspective, the Court found the UK measure to be unlawful, since it consisted of a "requirement that all goods should be exported from its territory" and that was certainly not regarded as the least restrictive measure that could have "secure[d] the protection of the interests involved".[77]

A more powerful weapon in the hands of the UK government was the controversial issue of the competence to implement the UN sanctions resolutions. In that respect, the reality of the legal situation was not disguised and hence the Court accepted:

(1) that the sanctions measures have a primary political dimension;
(2) that therefore member States are entrusted with the duty to carry them out, consistently with their competence in the field of foreign policy;[78]
(3) that such conclusions are not substantially affected, either by the new provisions of Articles 301 and 60 of the Maastricht Treaty, or by the replacement of the EPC with the CFSP machinery.[79]

At the end of the day, the Court was, however able to overcome such obstacles and to rule that: "The powers retained by the member states must be exercised in a manner consistent with Community law", and that: "Similarly, the member states cannot treat measures whose effect is to prevent or restrict the export of certain products as falling outside the scope of the Common Commercial Policy on the ground that they have foreign and security objectives."[80]

The reasoning of the Court is not perfectly sound: the situation, as we know, consists of the imposition of an embargo by the United Nations pursuant to which the Community enacts its own measures of implementation having the effect of, *inter alia*, establishing a CCP. But if, at the same (or a later) time, a member State invokes its own national competence and adopts its own implementing rules, to what extent is it sensible to maintain that the latter must be consistent with the EC measures and the CCP? What about the relevance of the overriding UN regime, then?

77. *Centro-Com*, *supra* n.11, at para.52 of the judgment.
78. See esp. *idem*, para.24
79. The Court does not specifically deal with the Maastricht provisions, but our conclusion can be inferred from its reasoning and it is also (reluctantly) agreed by the A.G.: see *idem*, para.44 of the opinion.
80. *Idem*, paras.25 and 26 of the judgment. The Court gives particular emphasis to the analogous ruling in Case C–70/94, *Fritz Werner Industrie-Ausrüstungen GmbH* v. *Federal Republic of Germany* [1995] E.C.R. I–3189, para.10.

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Furthermore, it is quite striking that neither in the Advocate General's reasoning nor in the Court's there is any room for discussion about the function and scope of the provisions of Article 297, which undisputedly give competence to the member States to implement the UN sanctions measures.[81]

The underpinning argument of the Court is, however, that the CFSP is the only appropriate forum where a member is allowed to give relevance to its national competence and that when agreement therein leads to the adoption of an EC regulation, the member itself cannot step back and purport to adopt its own domestic rules derogating from the EC regime. In other words, once a State consents to Article 297 competence being covered by a CCP and now Article 301 measure, it has to conform with that measure (as well as with the CCP framework thereby established).

The United Kingdom's standpoint is evidently different. It in fact concedes that "member states must of course comply with any measures adopted under those provisions [Articles 301 and 60]", but not that "the adoption of such measures ... ha[s] the effect of removing national competence in the field to which the measures relate".[82]

That may be regarded as a perfect example of circular argument but, on the contrary, it carries far-reaching legal implications with it, as we will soon see.

The UK reliance upon Article 307 of the Treaty of Rome was, however, functioning as last resort for the defence of its national rules, in the event the European Court ruled them to be contrary to Community law. Two distinct considerations underpin this:

(1) since national rules such as those in issue are to be considered as necessary or expedient in order to strengthen a UN sanctions regime, they are perfectly lawful under international law;
(2) on the other hand, the EC norms alone might, in specific cases, be insufficient for (or, *a fortiori*, inconsistent with) the realisation of that priority, namely, the full effectiveness of the embargo.

It follows that the conflict between EC and national norms must be balanced in favour of the latter. That is indeed the rule envisaged in Article 103 of the UN Charter and mirrored in Article 307 of the Treaty of Rome.[83]

81. Such a circumstance is also pointed out by J. Kokott and M. Conrads. "Note to *Ex p. Centro-Com*" (1997) 91 A.J.I.L. 722, 725.

82. *Centro-Com, supra* n.11., A–G's opinion, para.35. A very similar view has been expressed by Klein, *op. cit. supra* n.18, at p.111.

83. See text accompanying *supra* nn.64 *et seq.* for the analogous reasoning of the Divisional Court.

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How did the European Court handle such a crucial matter? It had to consider the pleadings of the Commission and the intervening governments which, in similar terms, strove to convince the Court that no conflict whatsoever was involved in the case and that therefore Article 307 was not pertinent. It appears, however, that they did not centre, the real issue at stake: they merely compared the provisions of Security Council Resolution 757(1992) with those of Regulation 1432/92 and concluded that the latter was perfectly consistent with the former. By contrast, the United Kingdom submitted the *real* conflict was between a broad, primary obligation to adopt all necessary means to ensure the effectiveness of the UN measures and certain obligations arising out of Community law (Regulation 1432/92, as interpreted in the light of Articles 28, 30 and 133); shortly, it was a conflict between international and EC law.

The Court acknowledged the relevance of Article 307 and consequently applied a well-established formula:[84]

> In proceedings for a preliminary ruling, it is not for this Court but for the national court to determine which obligations are imposed by an earlier agreement on the member State concerned and to ascertain their ambit so as to be able to determine the extent to which they thwart application of the provisions of Community law in question.

It is nevertheless clear that the Court, as well as the Advocate General, was eager to fetter the discretion left to the national judges, since both the exports in issue and the applications for payment to Barclays Bank predated the announcement of the change of policy and the disputed measure was consequently to be seen as irrational and unfair.

Indeed, the Advocate General points out that "... the refusal to grant the applications to release funds for payment to Centro-Com could not in any way serve the aim of preventing circumvention of the sanctions ...". Consistently, the application of the restrictive measures could be justifiable only with respect to exports made after the decision was taken: "only for such exports could it be argued that the new policy might improve the effectiveness of the sanctions by combating the abuse of the system of export permits".[85]

The Court, on the other hand, reminds us that "... when an international agreement allows, but does not require, a member State to adopt a measure which appears to be contrary to Community law, the

84. *Centro-Com, supra* n.11, at para.58 of the judgment. See, in recent times, Case C–158/91, *Criminal proceedings against Levy* [1993] E.C.R. I–4287, para.21 and Case C–324/93, *R. v. Secretary of State for the Home Department, ex p. Evans Medical Ltd and Macfarlane Smith* [1995] E.C.R. I–563, para.29. On the significance of Article 307 see, most recently, Case C–122/95, *Germany v. E.U. Council* [1998] E.C.R. I–999, para.58–65.

85. *Centro-Com, idem*, A–G's opinion, para.71.

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member State must refrain from adopting such a measure".[86] We must emphasise that the implications of the UK argument appear, once again, to be unduly reduced: its starting point is indeed that the national authorities were under a legal obligation to take the disputed measure![87]

The Court's attempt at suggesting the final decision to be taken on the case is evident. It did not, however, go further than that. Such judicial restraint is probably due to the awareness that, given the current unclear legal situation, it must be left to the discretion of the domestic courts to decide whether their respective legal orders are consistent with the UN sanctions resolutions.[88]

V. CONCLUSIONS

THE present legal framework arising from the adoption of embargo resolutions by the UN Security Council is not straightforward, particularly in so far as the EC member States' legal orders are concerned.

The overlapping of implementing measures taken by both the Community and national legislators has actually generated problems of co-ordination and legal uncertainty. As a matter of fact, we have seen that, quite apart from the important role nowadays played by the EC institutions, the domestic sanctions legislation is viable and the European Court is not in a position plainly to strike it down, on the assumption of its inconsistency with the UN measures.

The crucial issue is that the Community is not a member of the United Nations, and therefore national organs only are to be regarded as the addressees of the embargo resolutions, whose full effectiveness on the domestic plane is still their primary responsibility; likewise, only States can be internationally liable for violation of the embargo regimes.[89]

Given such circumstances, national rules are at times not only viable but even indispensable. In other words, their function is not limited to the provision of criminal penalties with respect to sanctions-breaking, but

86. *Idem*, para.60 of the judgment, where para.32 of *Evans Medical*, *supra* n.84, is quoted.

87. The same argument suggests that the UK was well aware of what the ECJ could say about Art.234.

88. Following an interview with Centro-Com's counsel, we have been informed that it has not been possible to reintroduce the case before the Court of Appeal as a consequence of the company's bankruptcy (declared by Tribunale di Udine, judgment of 12 Dec. 1996). Then, we are unfortunately deprived of the judicial epilogue of the Centro-Com affair, which would certainly represent an important testimony to the current law concerning the implementation of UN sanctions. However, we certainly doe not believe that the British court would have interpeted the ECJ ruling as implying *only* an "illusory" power of national judges with respect to the ascertainment of the conformity of domestic rules to the UN sanctions and *only* a "residual and virtual competence" of member States to implement the sanctions themselves. This is the view taken by SAM-SIMENOT, *supra* n.63, pp.86–87.

89. As rightly put by Canor, *op. cit. supra* n.12, at p.167, such a situation "cannot be avoided by a simple transfer of competences in the relevant field to the Community".

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they also constitute the instrument by which the inefficiency, inconsistency or ambiguity of the EC regime can be redressed.

The latter statement has certainly a major drawback, which we briefly tried to highlight: a great margin of discretion is left to national governments to determine what is the correct interpretation of the sanctions resolutions. The resulting scenario could then be particularly unattractive, being one where the requirement of uniformity of implementation is replaced by a normative chaos.

In that respect, the rulings of the UN Sanctions Committees are not enough to remedy this unwelcome situation, since nothing prevents the State authorities from not complying with them.[90]

It would be now clear that we do not identify the European Court of Justice as the body capable of solving all problems arising from the domestic rules of implementation. Such a circumstance has been acknowledged by the Court itself in the *Centro-Com* case.

On the other hand, it is not our intention to underestimate the important function that both the EC institutions and the Court have undertaken in the last few years in respect of UN-imposed embargoes, because the reasons prompting the EC legislation (swiftness of action, uniformity) are indeed commendable.

The Court itself has at times succeeded in reconciling the EC rules with the spirit of the UN resolutions and Charter. Such an achievement has indeed resulted from the special attention paid to the necessity of effectiveness of the embargo regimes.[91] By contrast, the Court has not been able to make a final determination when called upon to rule on the compatibility with EC law of national measures aimed at fulfilling the very same requirement of effectiveness.

The latter is the situation that, throughout the present article has been described in terms of *conflict between normative levels*. The Court has held that if the existence of the conflict is ascertained, then the national rules prevail over the EC ones and that such ascertainment essentially comes within the competence of the domestic courts, whose function is then crucial.

Yet it is almost certain that the future tendency will be one of ever greater involvement of the EC institutions in embargo policies, both at the level of implementation of UN resolutions and by means of unilateral action. A clarification of the present controversial legal framework will, hopefully, be devised.

90. However, the effectiveness of the UN sanctions system would certainly get benefit from the improvement of the committee machinery, at least in terms of swiftness of the process of review of national measures.

91. See the *Bosphorus* and *Ebony Maritime* cases, *supra* n.11.

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In that respect, it is particularly regrettable that the reforms envisaged by the Treaty of Amsterdam seem to ignore the sanctions problem. On the contrary, one of the major innovations will be likely to make the situation even more complex: a limited majority voting rule has in fact been introduced within the CFSP (Article 23(2)TEU).

Consequently, it will become untenable to challenge the national embargo rules inconsistent with the corresponding EC ones, on the ground that prior consent to the latter was given. It is worth remembering that such was the significance of one of the strongest arguments the European Court advanced against the British government in the *Centro-Com* case.[92]

92. See *supra* Part IV, especially text accompanying n.82v. However, Article 23(2) TEU, after establishing qualified majority voting for important decisions (such as joint actions and common position re-introduces unanimity with respect to the very same cases: any member State had in fact that power to oppose the adoption of a decision for important and stated reasons of national policy (so-called "emergency brake"). Of course, it is not wise to draw any final conclusions on the impact the new decision-making procedures will have on the CFSP of the Union. However it seems reasonable to predict that the problems outlined in this article will not be easily eradicated. On the contrary, another innovation may potentially amplify such problems. Under the so-called "constructive abstention" procedure (see Article 23(1) TEU) any member State is in fact allowed to make a formal declaration to this effect and, as a consequence, it will not be obliged to comply with a particular decision, while accepting that the latter commits the Union.

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