

## THE IMPLEMENTATION OF SECURITY COUNCIL RESOLUTIONS IN THE EUROPEAN LEGAL ORDER

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### **ABSTRACT**

*The paper examines the legal status of Security Council Resolutions and limits of their bindingness within the European legal order. In that context, the paper analyses the legal relationship between international legal order under the UN and the European legal order; the jurisdiction of Community Courts with regard to both Security Council Resolutions and implementing Community acts; the scope and nature of Community competences and interpillar structure with respect to the implementation of Security Council Resolutions; modifications which would be brought to the system by the Constitutional Treaty.*

**Key Words:** *The UN Charter, International Terrorism, Security Council Resolutions, Judicial Review of Security Council Resolutions at the European Level, Human Rights, Competence of the European Community, Constitutional Treaty.*

### **ÖZET**

*Makale, Birleşmiş Milletler Güvenlik Konseyi kararlarının Avrupa Topluluğu hukuk düzeni içerisindeki statüsünü ve bağlayıcılığının sınırlarını irdelemektedir. Bu çerçevede Birleşmiş Milletler sisteminin altında oluşan uluslararası hukuk düzeninin ve*

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*Topluluk hukuk düzeninin hukuki ilişkisi, Topluluk mahkemelerinin dolaylı olarak Güvenlik Konseyi kararlarına ve doğrudan onları uygulamaya geçiren Topluluk işlemlerine ilişkin yargısal denetleme yetkilerinin kapsamı, Avrupa Topluluğu'nun BM Güvenlik Konseyi kararlarını yerine getirme açısından sahip olduğu yetkilerinin kapsamı, bu yetkilerin niteliği ile ekonomik ve politik yönleri nedeniyle yaptırımlara ilişkin oluşturulan sütunlararası normatif altyapı ve Anayasal Andlaşma'nın mevcut duruma ne gibi değişiklikler getirebileceği tartışılmaktadır.*

**Anahtar Kelimeler:** *BM Şartı, Uluslararası Terör, Güvenlik Konseyi Kararları, Güvenlik Konseyi Kararlarınının AB'de Yargısal Denetimi, İnsan Hakları, Avrupa Topluluğu'nun Yetkisi, Anayasal Anlaşma.*

### Introduction

As stated in Articles 1 and 2 of the Charter of the United Nations (hereinafter the UN), the UN system had been constructed from the standpoint of traditional international law to deal with matters and relations between the states, i.e. the main subjects of international law, however it went further. According to Article 39 of the UN Charter the Security Council, which has the primary responsibility for the maintenance of international peace and security, shall determine the existence of any threat to international peace and security and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security. In that regard, Article 41 of the UN Charter provides that the Security Council may decide measures not involving the use of armed force are to be employed and it may call upon the Members of the UN to apply such measures, which 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 relations. Briefly, the measures taken could be economic, financial, travel-related or diplomatic.

Upon the demise of the Communist bloc, the end of cold war and of the paralysis of the Security Council led to increase of UN sanctions by virtue of the consensus provided in the Security Council. In common usage economic sanctions connote restrictive measures imposed in pursuance of foreign policy objectives and of national security to produce a change in the political behaviour of another state or groups of states, to weaken the targeted regime(s), thereby discouraging it/them from disrupting international peace and security.<sup>1</sup> Sanctions combine economic and policy matters. In

<sup>1</sup> Koutrakos, P., **Trade, Foreign Policy and Defence in EU Constitutional Law – The Legal Regulation of Sanctions, Exports of Dual-Use Goods and Armaments**, Hart, Oxford, 2001, at 50-51. Although there is no generally accepted definition of smart sanctions, the concept is usually assumed to contain the freezing of financial assets, the suspension of credits and aid, the

1990s the Security Council launched smart or targeted sanctions<sup>2</sup> in order to restrict as far as possible the impact of sanctions on the population of a country or regime against which sanctions are directed and confining the scope of those sanctions to a certain individuals, groups or entities. As a response to the new threat of international terrorism, in particular to September 11, economic and financial sanctions have recently been taken by the Security Council and in consequence by the Community against individuals who, entities, groups and non-state actors which have connection with a country or regime for the purpose of suppressing international terrorism. Therefore citizens of a country became the direct subject of UN sanctions. The target scope of such sanctions was further extended by Security Council Resolution No 1390 (2002) to include even individuals who, entities and non-state actors which have no connection with any country or regime. The war against international terrorism have recently been regarded as being a forever war given the characteristics of recent resolutions which are open-ended and did not have a connection to a certain territory, relate to a certain state, regime and had no factual or temporal limitation.<sup>3</sup> The main characteristics of those sanctions have been in pursuance of the elimination of terrorist groups and entities rather than change in their behavior, which differentiate them from traditional broad sanctions.

The paper examines first the legal status of Security Council resolutions in the European legal order. Secondly, it scrutinizes the scope of the review of legality by the European Courts of Security Council resolutions and of Community acts implementing them in order to clarify the limitation on judicial review of resolutions and implementing Community acts in the Community legal order and the limits of their binding effect. Thirdly, the history of the implementation of resolutions, their legal basis and the procedure under which will be briefly pointed out. Fourthly, the current legal bases and procedural rules will be analysed. In that respect, the material scope of competences under the EC Treaty in imposing economic and financial sanctions pursuant to the stage of international law and international practice will be observed. Lastly, what difference would the Constitutional Treaty provide for is to be examined.

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denial and limitation of access to foreign financial markets, trade embargoes, flight bans, the denial of international travel, visas and educational opportunities. See Cameron, I., "UN Targeted Sanctions, Legal safeguards and the European Convention on Human Rights", 72 *Nordic Journal of International Law*, 159, 2003.

<sup>2</sup> Smart sanctions against groups or non-state actors began with sanctions against UNITA (The National Union for the Total Independence of Angola) applied first in 1997.

<sup>3</sup> For more detail see Cameron, *supra* note 1; See also Birkhäuser, N., "Sanctions of the Security Council Against Individuals – Some Human Rights Problems", *ESIL FORUM* 2005, at <<http://www.esil-sedi.org/english/pdf/Birkhauser.PDF>>.

### The Legal Status of Security Council Resolutions within the Community Legal Order

Until the *Yusuf Case*<sup>4</sup> the European Courts have not clarified the legal status of Security Council resolutions within the Community legal order, albeit they had this opportunity in several times. According to this case the Court of First Instance (hereinafter the CFI) stated that from the standpoint of international law, the obligations of the Member States of the UN under the UN Charter prevail over every obligation of domestic or of international treaty law that rule of primacy is derived first from the principles of customary international law as enshrined under Article 27<sup>5</sup> of the Vienna Convention on the Law of Treaties and second, is expressly laid down in Article 103<sup>6</sup> of the UN Charter.<sup>7</sup> That primacy extends to decisions contained in a Security Council resolution, in accordance with Article 25 of the UN Charter under which the Members agree to accept and carry out Security Council decisions.<sup>8</sup> Having regard to the relationship between the obligations of the Member States of the Community by virtue of the UN Charter and their obligations under Community law, Article 307 EC, which is enshrined not to affect the duty of the Member States concerned to respect third countries' rights under a prior agreement and to fulfil their obligations thereunder, states that "[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, 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".<sup>9</sup> The CFI held that on the one hand five of six signatory states to the EEC Treaty were already members of the UN on 1 January 1958, as regards the Federal Republic of Germany, albeit it was not formally a member of the UN until 18 September 1973, its duty to perform its obligations under the UN Charter predates 1 January 1958 by virtue of the Final Act of the Conference held in September-October in 1954 and the Paris Agreements signed on 23 October 1954, on

<sup>4</sup> Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 21 September 2005. In this case, the action was brought by Yusuf and Al Barakaat International Foundation for annulment of first Council Regulation (EC) No 467/2001, second Commission Regulation (EC) No 2199/2001 and subsequently for Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures, economic and financial, directed against individuals and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban pursuant to Security Council resolutions concerned. Arguments of the applicants for annulment were: incompetency of the Council to adopt those regulations, infringement of Article 249 EC and the breach of applicants fundamental rights, as regards the right to respect for property and the principle of proportionality, the right to a fair hearing and the right to effective judicial review.

<sup>5</sup> According to this provision a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

<sup>6</sup> Article 103 of the UN Charter provides that in the event of conflict between the obligations of the Member States of the UN and their obligations under any other international agreement, their obligations under the UN Charter shall prevail.

<sup>7</sup> Case T-306/01, *supra* note 4, paras. 231-233.

<sup>8</sup> *Ibid.*, para. 234.

<sup>9</sup> *Ibid.*, paras. 235-236.

the other hand all subsequently accessing Member States to the Community were members of the UN before their accession.<sup>10</sup> Moreover, Article 297 EC was specifically introduced into the Treaty to observe that rule of primacy.<sup>11</sup> Consequently, Security Council resolutions adopted under Chapter VII of the UN Charter are binding on all the Member States of the Community which must take all measures necessary to ensure that those resolutions are implemented.<sup>12</sup> The CFI then clarified following to the considerations aforementioned that the Member States may, an indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper fulfilment of their obligations under the UN Charter.<sup>13</sup>

Conversely, the CFI held that unlike its Member States, the Community is not directly bound by the UN Charter and it is not therefore required under public international law to accept and fulfil Security Council resolutions in accordance with Article 25 of the UN Charter on the ground that the Community is neither an addressee of Security Council resolutions, nor the successor to the rights and obligations of the Member States for the purposes of public international law.<sup>14</sup> The CFI took a stand that the Community must nevertheless be regarded as being bound by the obligations under the UN Charter in the same way as its Member States by virtue of the EC Treaty.<sup>15</sup> Having regard to the delimitation of competences between the Community and the Member States, the CFI held that by concluding a treaty between them the Member States could not transfer to the Community more powers than they possessed or withdraw from their obligations to third parties under the UN Charter.<sup>16</sup> The fact that their desire to perform their obligations under the UN Charter follows from the very provisions of the EC Treaty, which are clarified in particular in Articles 297 and 307 EC, implies a duty on the Community institutions not to impede the performance of those obligations.<sup>17</sup> Given the characteristics of delimitation of competences within the Community legal order, insofar as the competences necessary for the fulfilment of Member States' obligations have been transferred to the Community, the Member States have undertaken, pursuant to public international law, to ensure that the Community itself should exercise those competences to that end.<sup>18</sup>

Accordingly, on the one hand in accordance with Article 48(2) of the UN Charter, Security Council decisions '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 other hand according to settled case law, the Community must

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<sup>10</sup> *Ibid.*, para. 237.

<sup>11</sup> *Ibid.*, para. 238.

<sup>12</sup> *Ibid.*, para. 239.

<sup>13</sup> *Ibid.*, para. 240.

<sup>14</sup> *Ibid.*, para. 242.

<sup>15</sup> *Ibid.*, para. 243.

<sup>16</sup> *Ibid.*, para. 245.

<sup>17</sup> *Ibid.*, paras. 246-247.

<sup>18</sup> *Ibid.*, para. 248.

respect international law in the exercise of its competences and Community law must be interpreted, and its scope limited, in the light of international law.<sup>19</sup> The CFI by making an analogy with the *International Fruit Case*,<sup>20</sup> then maintained that Article 301 EC was introduced into the Treaty so as to provide a specific legal basis for the economic sanctions that the Community may need to impose on third countries for political reasons in connection with the CFSP, most commonly pursuant to a Security Council resolution.<sup>21</sup> Insofar as under the EC Treaty the Community has assumed competences previously exercised by the Member States in the field governed by the UN Charter, the provisions of that Charter have the effect of binding the Community.<sup>22</sup> Not only is the Community therefore under the duty not to infringe the Member States' obligations under the UN Charter or not to impede their performance, but also in the exercise of its competences it is bound by virtue of the EC Treaty to adopt all the measures necessary to enable the Member States to fulfil those obligations.<sup>23</sup>

In consequence, the CFI gives Security Council resolutions primacy over even primary Community law, in an indirect way by virtue of the EC Treaty, and over the European Convention on Human Rights. However, it remains to be seen whether the ECtHR confirms this primacy over the ECHR upon an application made after the exhaustion of internal remedies. From the perspective of the CFI, the UN Charter seems as the constitutional instrument of international legal order having priority over national constitutions, the constitutional charter of the Community legal order and the ECHR.

### 1. The Scope of the Review of Legality by the European Courts of Security Council Resolutions and of Community Acts Implementing Them

To what extent Security Council resolutions have primacy over primary Community law was examined in the same case by the CFI. The CFI maintained that although the Community is based on the rule of law and the principle of judicial control finds expression in the right to submit the lawfulness of any regulation to the CFI under Article 230 EC, the question arises whether there exist any structural limits, imposed by general international law or by the EC Treaty, on the judicial review at the Community level.<sup>24</sup> As regards the implementation of Security Council resolutions in the Community legal order, since the institutions act under circumscribed powers without any autonomous discretion (they could neither directly alter the content of resolutions nor set up any mechanism capable of giving rise to such alteration), any review of the internal lawfulness of any regulation would imply that the Court is to consider, indirectly, the lawfulness of those resolutions concerned.<sup>25</sup> In that regard, the origin of

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<sup>19</sup> *Ibid.*, para. 249.

<sup>20</sup> Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

<sup>21</sup> Case T-306/01, *supra* note 4, para. 252.

<sup>22</sup> *Ibid.*, para. 253.

<sup>23</sup> *Ibid.*, para. 254.

<sup>24</sup> *Ibid.*, paras. 260-263.

<sup>25</sup> *Ibid.*, paras. 265-266.

the illegality of would have to be sought not in the adoption of regulations implementing them, but in Security Council resolutions concerned,<sup>26</sup> since such a limitation of jurisdiction is necessary as a corollary to the principles aforementioned in terms of the relationship between the international legal order under the UN and the Community legal order.<sup>27</sup>

Given that while adopting resolutions in accordance with Chapter VII of the UN Charter, the Security Council has the primary responsibility to determine what constitutes a threat to international peace and security and measures required to maintain or restore in the pursuance of which, that escape the jurisdiction of national or Community authorities and courts, subject only to the inherent right of individual or collective self-defence pointed out in Article 51 of the UN Charter.<sup>28</sup> Accordingly, Security Council resolutions fall, in principle, outside the scope of European Courts' judicial review and the European Courts have no authority to call in question, even indirectly, their legality in the light of Community law, on the contrary are bound, so far as possible, to interpret and apply that law in a manner compatible with the Member States' obligations under the UN Charter.<sup>29</sup> Nevertheless, the European Courts are empowered to check, indirectly, the lawfulness of Security Council resolutions in respect of *jus cogens*, which are peremptory norms of general international law and intransgressible principles of international customary law, from which no derogation is possible, as a body of superior rules of public international law binding all subjects of international law, including the bodies of the UN.<sup>30</sup> International law therefore permits the interference that there exists one limit to the principle of primacy of Security Council resolutions and their binding effect: the observation of fundamental peremptory provisions of *jus cogens* by those resolutions, in the failure of which, however improbable that may be, they would have no effect of binding the Member States of the UN, or, in consequence, the Community.<sup>31</sup> If it was understood in combination with the previous part, Security Council resolutions adopted under Chapter VII of the UN Charter, unless they violate *jus cogens*, have supremacy over primary Community law and also have the effect of binding the Community within the scope of conferred competences.

### A Brief History of Pre-Maastricht Economic Sanctions

Until the development of the European Political Cooperation in 1980s, the Member States had been regarded as sole competent under Article 297 EC to impose economic sanctions for political objectives under the Rhodesia Doctrine against third countries. Article 297 EC states that "Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common

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<sup>26</sup> *Ibid.*, para. 266.

<sup>27</sup> *Ibid.*, para. 269.

<sup>28</sup> *Ibid.*, para. 270.

<sup>29</sup> *Ibid.*, para. 276.

<sup>30</sup> *Ibid.*, paras. 277-278, 282.

<sup>31</sup> *Ibid.*, para. 281.

market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.” The Member States imposed those restrictive measures pursuant to consultations and cooperation, as stated in Article 297 EC, so as to prevent the functioning of the common market from being affected by such measures. For instance, Security Council Resolutions Nos 216 (1965), 217 (1965) and 253 (1968) demanding from the international community to cease its trade relations with Rhodesia were implemented by the Member States under national rules on the basis of Article 297 EC, which led to the adoption of Rhodesia doctrine.

Nevertheless, their implementation gave rise to practical problems rendering the whole embargo ineffective by virtue of lack of coordination, since they had been implemented with national measures of differing content and at different times.<sup>32</sup> The development of the common commercial policy and the improvement of the European political cooperation, on the other hand, made possible to recourse to a Community instrument on the basis of Article 133 EC in order to ensure uniform implementation of Security Council resolutions throughout the Community through the monitor of the Commission for the sake of effectiveness.<sup>33</sup> Given the difficulty in separation of economic and politic issues in external relations, a kind of dual structure was thus established, which may refer to the second phase in imposing sanctions: economic sanctions were taken on the basis of Article 133 EC pursuant to a political decision attained by consultations and consensus within the framework of the European Political Cooperation, which was the precursor of the CFSP. In the transitional stage to the second phase, restrictive measures have been adopted both at the Community and national level on the basis of Article 133 EC on the one side and Article 297 EC on the other for a while. It is worth mentioning that the Community involvement in imposing economic measures however was regarded as the effective and uniform imposition, rather than as recognition of Community competence,<sup>34</sup> on the ground that the Community competence in imposing restrictive measures on the basis of Article 133 EC is of exclusive nature. As regards second phase, Security Council Resolutions Nos 660 (1990) and 661 (1990) against Iraq are implemented by Council Regulation 2340/90 on the basis of Article 133 EC pursuant to consultations and a following decision taken by consensus in the framework of European Political Cooperation. The Maastricht revision introducing Articles 60 and 301 EC into the EC Treaty, as autonomous legal basis, brought the third phase, which is the current stand, in imposing economic and financial sanctions adopted mostly pursuant to Security Council resolutions in the Community legal order.

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<sup>32</sup> Koutrakos, *supra* note 1, at 58.

<sup>33</sup> The preamble of Regulation 2340/90 at OJ 1990 L 213/1. See also *Ibid.*, at 63-64.

<sup>34</sup> Koutrakos, *supra* note 1, at 58.

## **The Current Stand in the Implementation of Security Council Resolutions**

### *Articles 60 and 301 EC*

Article 301 EC incorporated the preceding dual construction into the new established pillar structure and established a cross pillar link between the Community pillar and the CFSP pillar. Article 301 EC declares that “[w]here it is provided, in a common position or in a joint action adopted according to the provisions 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 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.” Policy concern is a matter of CFSP, while the means of achieving that policy is economic and so Community matter.

Having regard to financial sanctions Article 60 EC provides that “[i]f, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.” Article 60 EC provides that according to the same procedure provided for in Article 301 EC, the Council may take the necessary urgent measures on the movement of capital and on payments against third countries.

Common position is an instrument adopted by unanimity on the basis of Article 15 of the Treaty European Union (hereinafter the TEU) and defines the approach of the Union to a particular matter of a geographical or thematic nature in terms of which the Member States shall ensure that their national policies conform to it; whereas joint action, which also is adopted by unanimity on the basis of Article 14 of the TEU, shall address specific situations where operational action by the Union is deemed to be required. The common positions, which have been primarily adopted for the implementation of Security Council resolutions, include instructions to the Community originally laid down in resolutions for fulfilling obligations stemming from the UN Charter.

The Maastricht revision explicitly established a bridge between Community actions imposing economic and financial sanctions under Articles 60 and 301 EC and the objectives of the Treaty on European Union in the sphere of external relations,<sup>35</sup> which reflects a cross pillar dimension. The CFI considers Articles 60 and 301 EC quite special provisions of the EC Treaty, in that they expressly contemplate situations in which action by the Community might be proved to be necessary so as to achieve, not one of the Community objectives enshrined in the EC Treaty but rather one of the

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<sup>35</sup> Case T-306/01, *supra* note 4, para. 159.

objectives of the Union under the CFSP, the implementation of which finds its footing on the Community pillar pursuant to a prior common position or joint action adopted.<sup>36</sup>

The Maastricht Treaty, in that respect, established an explicit exemption to the general rule enshrined in Article 47 of the TEU for the purpose of aiming at safeguarding the *acquis communautaire* that Union law may not have any binding effect for the institutions acting in the Community pillar, the institutions therefore, under the principle of consistency enabling the Union served by a single institutional framework to ensure the consistency of external activities of as a whole in the context of the Union's external relations, security, economic and development policies, are obliged by virtue of the EC Treaty to implement an act taken under the second pillar, i.e. a common position or joint action.<sup>37</sup>

Article 301 EC constitutes an autonomous legal basis for more comprehensive measures than provided for by Article 133 EC within the limited scope of the common commercial policy, comprising also subject-matters such as development aid, transport services. However, Article 301 EC should be regarded as regulating provision rather than a genuine empowering provision,<sup>38</sup> since it does not enable the Community to act in fields which are not already fallen within the scope of its actual competences, although those subject-matters may signify the existence of its non-exclusive implied external competences on the basis of its internal competences. The scope of the Community competence in imposing economic measures under Article 301 EC is therefore confined to the ambit of its existing competences to be exercised independently of the enactment of internal legislation.<sup>39</sup> The requirement of a prior common position or joint action also signifies that Community competence under Article 301 EC is conditional.<sup>40</sup> However, this non-exclusivity connotes only the field falling outside the ambit of the common commercial policy, in which the Community has exclusive competences. Accordingly, Article 301 EC respects the delimitation of competences between the Community and the Member States: whereas economic measures related to the subject-matters which fall within the scope of the common commercial policy and in terms of which the Community has acquired exclusive implied competences are exclusive, economic measures related to the subject-matters exceeding the scope of the common commercial policy and in terms of which the Community has only non-exclusive implied competences are shared.<sup>41</sup>

<sup>36</sup> *Ibid.*, paras. 160-161.

<sup>37</sup> Lukaschek, A. "Economic Sanctions and the European Union's Legal Framework" in S. Griller, B. Weidel (eds.), *External Economic Relations and Foreign Policy in the European Union*, Springer, WienNewYork, 2002, at 343.

<sup>38</sup> *Ibid.*, at 345.

<sup>39</sup> *Ibid.*, at 345.

<sup>40</sup> Eeckhout, P., *External Relations of the European Union – Legal and Constitutional Foundations*, OUP, 2004, at 448.

<sup>41</sup> In the *Yusuf Case*, the CFI clarified the nature of those competences by stating the fact that Article 301 EC provides "a specific basis for the economic sanctions that the Community, which has exclusive competence in the sphere of the common commercial policy" signifies their nature

A margin of deviation from the sanctions regime is provided for the Member States mostly for humanitarian concerns by regulations imposing economic sanctions. The deviation from the sanctions regime established by regulations incorporating Security Council resolutions primarily is linked to the exemptions granted by the Sanctions Committee, founded by the Security Council, composed of Security Council members and responsible for ensuring that the States implement the sanctions, for monitoring the implementation of those sanctions and considering requests for exemptions from the sanctions etc.

As regards the relationship between Article 301 and Article 297 EC in respect of the implementation of Security Council resolutions, Article 297 EC, as *lex specialis* to Article 307 EC in the implementation of Security Council resolutions and concerned an entirely exceptional situation along with other exceptions in the EC Treaty, a Member State could rely on it to justify derogating from its obligations under the EC Treaty.<sup>42</sup>

In the case of Security Council resolutions, it could be asserted that the delimitation of competences within the European framework obliges that they are to be implemented by a Community instrument at the Community level.<sup>43</sup> This is because first when Article 297 EC was designed, no involvement of the Community was envisaged.<sup>44</sup> Secondly, the introduction of Article 301 EC emphasises that a wholly exceptional characteristic of Article 297 EC renders it applicable insofar as exceptional circumstances required which is not the case<sup>45</sup> when the Community sees itself bound to implement Security Council resolutions by virtue of the EC Treaty. Unless a clear conflict between a Security Council resolution and the obligations of the Member States stemming from Community law should be shown, the Member States should be in compliance with Community law.<sup>46</sup> However, no compatibility<sup>47</sup> problem between the obligations of the Member States under the UN Charter and their obligations under Community law and so no such derogation in order to fulfil their obligations arising from the UN Charter is allowed where Security Council resolutions are implemented within the Community framework on the basis of Article 301 EC. Otherwise where the Community regulated the matter, the uniformity and effectiveness of Community law would be undermined if the Member States may derogate from the sanctions regime on the basis of Article 297 EC.<sup>48</sup>

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as nonexclusive outside the scope of the common commercial policy. See Case T-306/01, *supra* note 4, para. 252. See also Lukaschek, *supra* note 37, at 346.

<sup>42</sup> Eeckhout, *supra* note 40, at 443.

<sup>43</sup> Bohr, S. "Sanctions by the United Nations Security Council and the European Community", 4 EJIL 256, 1993.

<sup>44</sup> Koutrakos, *supra* note 1, at 84.

<sup>45</sup> *Ibid.*, at 85.

<sup>46</sup> Eeckhout, *supra* note 40, at 444.

<sup>47</sup> Koutrakos, *supra* note 1, at 85.

<sup>48</sup> Eeckhout, *supra* note 40, at 444.

Furthermore, although the nature of whole competences under Article 301 EC cannot be considered exclusive, whenever the Community exercises those competences once by adopting a sanctions regulation, the Member States are no longer allowed to act outside the Community framework under Article 297 EC.<sup>49</sup> Put it differently, once they have been implemented by the Community, the Member States no longer have competence to implement resolutions, the nature of competences (through exercise) under Article 301 EC therefore prevent the Member States from taking national measures. As a consequence, the Member States are under the duty to implement them under the Community pillar through a Community instrument and then the competences in this field become exclusive once exercised at the Community level, the Member States have to act in accordance with sanctions regulations regime.

Article 60 EC on the other hand signifies the exclusive nature of this competence, since this provision explicitly regulates the delimitation of competences between the Community and the Member States. According to Article 60 EC “[w]ithout prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments.” The limitation on national competences under which circumstances the Member States are allowed to adopt financial measures and the competence of the Council in deciding that the Member States concerned shall amend or abolish such measures are in compliance with the characteristics of exclusive Community competence in which the delegation of Community power to the Member States is provided for.

As regards the material scope of those competences, in the UN practice as mentioned above, classic economic sanctions aimed at a country have been replaced by smart sanctions which impose genuine sanctions on the targeted regime or those in charge of it, in order to exert effective pressure on the rulers of the country and to reduce the suffering of endured by the civilian population of the country concerned both by considerations of effectiveness and by humanitarian concerns.<sup>50</sup> In respect of smart sanctions that impose sanctions on individuals who, entities, groups or non-state actors which have connection with a country aimed, the CFI stated that nothing in the wording of Articles 60 and 301 EC makes it possible to exclude the adoption of restrictive measures directly affecting individuals or organisations, whether or not established in the Community, insofar as such measures actually seek to reduce, in part or completely, economic relations with third countries.<sup>51</sup> In other words, having regard to Security Council resolutions imposing sanctions against individuals, entities, groups and non-state actors, whenever there is a connection between those and a country or regime

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<sup>49</sup> Order of the President of the Court of First Instance on Case T-306/01, *Abdirisak Aden, Abdulaziz Ali, Ahmed Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European communities*, 7 May 2002, para. 60.

<sup>50</sup> Case T-306/01, *supra* note 4, paras. 113-116.

<sup>51</sup> *Ibid.*, para. 112.

against which sanctions are directed provided, the Community is competent to implement those resolutions on the basis of Articles 60 and 301 EC. On the contrary, in the case of economic and financial sanctions against individuals who, entities, groups and non-state actors which have no connection with any country or regime, Articles 60 and 301 EC are not adequate legal basis in themselves for such sanctions.

### *Article 308*

Having regard to smart sanctions against individuals who, entities, groups and non-state actors which have no connection with any country or a regime, but are suspected of contributing to the funding of terrorism, whether the Community, on the basis of Articles 60 and 301 EC in themselves or on the basis of Article 308 EC in itself, is able to implement Security Council resolutions imposing economic and financial sanctions related to the fight against international terrorism was examined by the CFI in the *Yusuf* Case according to the settled case-law.

The CFI stated that in respect of this kind of measures Articles 60 and 301 EC do not constitute in themselves a sufficient legal basis to implement Security Council resolutions.<sup>52</sup> Having regard to Article 308 EC in itself, the CFI scrutinised conditions for the application of this provision to that kind of measures. With respect to the first condition, the CFI considered that since no provision of the EC Treaty provides for the adoption of measures of that kind, the first condition is satisfied.<sup>53</sup> However, with respect to the second condition, the CFI stated that there is no connection between the objectives of the Community enshrined in Articles 2 and 3 EC and the preamble of the EC Treaty and the fight against international terrorism, more particularly the imposition of economic and financial sanctions in respect of individuals and entities suspected of contributing to the funding of terrorism.<sup>54</sup> It appears impossible to interpret Article 308 EC as giving the Community institutions general authority to rely on provision as a basis for the attainment of one of the objectives of the TEU so as to mitigate the fact that the Community lacks the competence necessary for the achievement of one of the Union's objectives.<sup>55</sup> In that regard, it must be concluded that Article 308 EC does not, any more than Articles 60 and 301 EC taken in isolation, constitute of itself a sufficient legal basis for this kind of measures.<sup>56</sup>

The CFI then scrutinised whether Article 308 EC in conjunction with Articles 60 and 301 EC could constitute legal basis for this kind of measures implementing Security Council resolutions concerned. According to the CFI, the Maastricht revision established an explicit bridge between Community actions imposing economic and financial sanctions under Articles 60 and 301 EC and the objectives of the TEU in the

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<sup>52</sup> *Ibid.*, paras. 129-133.

<sup>53</sup> *Ibid.*, para. 136.

<sup>54</sup> *Ibid.*, paras. 137-154.

<sup>55</sup> *Ibid.*, para. 156.

<sup>56</sup> *Ibid.*, para. 157.

sphere of external relations.<sup>57</sup> Given that Articles 60 and 301 EC are quite special provisions of the EC Treaty contemplating situations in which action by the Community may be proved to be necessary in order to achieve one of the objectives of the Union under Article 2 of the TEU in the implementation of a CFSP, action by the Community, under Articles 60 and 301 EC, is in actual fact action by the Union, the implementation of which finds its footing on the Community pillar upon the adoption of a prior common position or joint action under the CFSP.<sup>58</sup> The Union, served by a single institutional framework, is to ensure the consistency and continuity of the activities carried out so as to attain its objectives while respecting and building upon the *acquis communautaire*.<sup>59</sup> Just as the powers provided for by the EC Treaty may be proved to be insufficient in the attainment of one of the Community objectives, in the operation of common market, so the powers to impose economic and financial sanctions provided for by Articles 60 and 301 EC may be proved insufficient for the attainment of the objective of the CFSP under the TEU, in view of which those provisions were specifically introduced in to the EC Treaty.<sup>60</sup> Accordingly, when Articles 60 and 301 EC do not give the institutions the power necessary, in the field of economic and financial sanctions, to act in the attainment of the objective pursued by the Union and its Member States under the CFSP, in the specific context contemplated by those articles, recourse to the additional legal basis of Article 308 EC is justified for the sake of the requirement of consistency.<sup>61</sup>

Given that as the world now stands, States can no longer be regarded as the only source of threats to international peace and security, recourse to Article 308 EC, in order to supplement the powers to impose economic and financial sanctions conferred on the Community by Articles 60 and 301 EC, is justified.<sup>62</sup> Therefore, like the international community, the Union and its Community pillar are not to be prevented from adapting to those international new threats by imposing economic and financial sanctions not only on third countries, but also on individuals who, entities, groups and non-state actors which, albeit have no connection with any country or regime, develop international terrorist activity or strike a blow at international peace and security.<sup>63</sup> Consequently, the Community is competent to implement such Security Council resolutions on the cumulative legal bases of Articles 60, 301, 308 EC. In brief, the lack of Community power under Articles 60 and 301 EC in imposing economic and financial sanctions, mostly pursuant to Security Council resolutions, against individuals who, entities, groups and non-state actors which have no connection with any country or regime is supplemented for the sake of the principle of consistency by Article 308 EC pursuant to the development of the international situation in order to attain the

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<sup>57</sup> *Ibid.*, para. 159.

<sup>58</sup> *Ibid.*, paras. 160-161.

<sup>59</sup> *Ibid.*, para. 162.

<sup>60</sup> *Ibid.*, para. 163.

<sup>61</sup> *Ibid.*, para. 164.

<sup>62</sup> *Ibid.*, para. 169.

<sup>63</sup> *Ibid.*, para. 169.

objectives of the CFSP in view of which those Articles were specifically introduced into the EC Treaty.

### **Article III-322 in the Constitutional Treaty**

Article III-322 provides that “[w]here a European decision, adopted in accordance with Chapter II, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the Union Minister for Foreign Affairs and the Commission, shall adopt the necessary European regulations or decisions.” Article III-322 thus incorporates into and takes over Articles 60 and 301 EC. It also extends the scope of Articles 60 and 301 EC so as to enable the Union to take economic and financial restrictive measures not only against States, but also against natural or legal persons, groups or non-State entities which have no connection with territory or regime of a third country.<sup>64</sup> The flexibility clause in Article I-18 of the Constitutional Treaty (current Article 308) and procedural rule of unanimity would no longer be necessitated in the case of such measures pursuant to smart sanctions of the Security Council. Nonetheless, the provision still reflects national sovereignty concerns of the Member States on the fields of high politics: within the consideration of dual-approach procedure the requirement of a prior European decision adopted by unanimity within the framework of the CFSP is maintained. In other words, the qualified majority voting would diminish its meaning when the unanimity rule in a prior European decision is taken into consideration. To be precise, fragmentation as to the procedure and instruments in economic and policy matters is maintained which reflects the residual characteristics of the pillar structure. On the other hand, the Council will act on a joint proposal of the Union Minister for Foreign Affairs and the Commission to ensure the consistency of measures, consistency would be provided in the external relations of the EU and fragmentation would be lessened. Moreover, Article III-322 is not part of the CFSP, European decisions and regulations adopted under it fall within the ambit of European judicial review.

With regard to the nature of competence in imposing economic and financial sanctions, Article III-322 is not designed as a specific category of competence in Part I, Title III of the Constitutional Treaty. Given that Article I-14 is taken into consideration according to which the Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 (areas of exclusive competence) and I-17 (areas of supporting, coordinating or complementary action), the competences under Article III-322 should be regarded as shared. However, the approach applied to Article 301 EC would be carried into Article III-322 that this provision having regulating characteristics, rather than a genuine empowering characteristics, and therefore respects the delimitation of

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<sup>64</sup> Article III-322 (2) states that “Where a European decision adopted in accordance with Chapter II so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.”

competences within the Union structure. Accordingly, to the extent the Union has exclusive competences, express or implied, the competences in imposing restrictive measures regarding the subject-matters which fall within the scope of exclusive Union competence should be considered exclusive. Nonetheless, it should be stressed, in compliance with the current stand and practice as to the delimitation of competences in imposing restrictive measures that the Member States are to be considered under the duty to use Union instruments in accordance with Article III-322 in incorporating Security Council resolutions. Once resolutions would be implemented by the Union on the basis of Article III-322, the shared competences under this Article render exclusive, no derogation in order to fulfil their obligations arising from the UN Charter would therefore be allowed. The Member States would act within the margin of deviation provided in European regulations and decisions. It is worth mentioning that contrary interpretation would not be in compliance with the general trend provided in the Constitutional Treaty which is to extend the Union's external competences and to fortify its external action.

### Conclusion

It is concluded that Security Council resolutions adopted under Chapter VII of the UN Charter have the effect of binding the Community by virtue of the EC Treaty within the scope of the conferred competences. In that respect the Community is competent on the basis of Article 60 and 301 EC to implement Security council resolutions which impose sanctions, economic and financial, against individuals who, entities, groups and non-state actors which have connection with a third country or regime. In the case of economic and financial sanctions against individuals who, entities, groups and non-state actors which have no connection with any country or regime, the Community is competent to implement concerning resolutions on the cumulative legal bases of Articles 60, 301 and 308 EC. The Member States are under the duty to use Community instruments to implement Security Council resolutions and once those measures are taken the Member States cannot act outside the Community framework, since those competences, which fall outside the scope of the common commercial policy, become exclusive through exercise.

The CFI narrowly interpreted, in the *Yusuf* Case, the scope of judicial review by the European Courts of Security Council resolutions indirectly, Community measures implementing them directly. However, the implementation of recent Security Council resolutions gives rise to several possible violations of the ECHR in the Community legal order,<sup>65</sup> in particular Articles 6 and 13 of the ECHR the right to a fair hearing and the right to an effective judicial review. This situation in which if a Security Council resolution itself violates or obliges the Community or its Member States to violate certain human rights would bring the Community and its Member States in a

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<sup>65</sup> Cameron, *supra* note 1.

constitutionally very delicate situation.<sup>66</sup> In that respect, a legal debate between the legal scholars has been increasing about the legality of Security Council resolutions, the violations of human rights by sanctions, the relationship between the international legal order under the UN and the ECHR, the effectiveness of smart sanctions, the proportionality of smart sanctions to the aims to be achieved, the legal lacuna in the international judicial review of those resolutions and limited scope of judicial review in national and domestic legal systems. International community is assumed to develop norms and procedures, i.e. legal safeguards, in terms of the protection of human rights in combating international terrorism from the human rights centered notion of international law.

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<sup>66</sup> Wouters, J. and Naert, F. "The European Union and "September 11", WP No. 40, Katholieke Universiteit Leuven, Institute for International Law, 2003, at <<http://law.kuleuven.be/iir/nl/wp/WP/WP40ed2e.pdf>>.