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NATIONAL MEASURES TO IMPLEMENT UN SANCTIONS : ITALY

Document submitted by the delegation of Italy

Introduction

Part I. – Implementation of UNSCR in Italy.

(**A**) Implementation under EU-EC law

Question 1

Premise
Normative references
Relevant practice

Question 2

Question 3

Question 4

Question 5

(**B**) Implementation under Italian law

Question 1

Question 2

Question 3

Question 4

Question 5

Part II. – Judicial protection of fundamental human rights

Question 6

1. Constitutional challenges against UNSCR and EU-EC measures (or the national measures of implementation thereof)
2. Judicial protection under the TEU and the ECT
3. Judicial protection before the ECHR
4. Filling the gaps in the judicial protection of fundamental rights.

Introduction

The following comments on behalf of the Italian delegation address the issues raised by the Greek delegation in the document submitted to the CAHDI meeting of 18-19 March 2003.

As in recent years the European Union (EU) has been endowed with the power to impose sanctions *vis-à-vis* third States and developed its practice accordingly, including by way of implementation of relevant United Nations Security Council resolutions (UNSCR), questions from 1 through 5 are answered twice.

Part I, heading (**A**) examines measures of implementation adopted by the EU; heading (**B**) concerns national measures of implementation of UNSCR, including those needed to complement and/or give effect to EU measures.

Question 6 is answered in Part II, taking into account various possible scenarios according to Italian Constitutional law, EU law and the system of judicial protection established under the European Convention on Human Rights. This part highlights the problem of possible gaps in the judicial protection of fundamental rights vis-à-vis EU and national measures adopted in the implementation of UNSCR.

Part I – The implementation of UNSCR in Italy

(A) Implementation by / under EU-EC law

Question 1.

Premise

The EU is not bound *per se* by the decisions of the United Nations. This is so because neither the EU nor the European Community (EC) is a member of the UN; while in the case of the UN, no succession by the EU (or the EC) in the position of its member States has taken place, the constituent treaties do not impose on the EU (or the EC) an obligation to comply with UNSCR.

However, the EU and the EC are endowed under the constituent Treaties with the power to impose trade embargoes and adopt other types of sanctions, including measures that are based on UNSCR.

Normative references

II Pillar measures:

Under Title V of the Treaty of the European Union (TEU) devoted to the Common Foreign and Security Policy (CFSP), the Council is endowed with the power to adopt *inter alia* common positions and joint actions.

According to Article 14 of the TEU, Joint Actions:

"lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation. [...] As long as the Council has not acted, the joint action shall stand. Joint actions shall *commit* the member States in the positions they adopt and in the conduct of their activity."

Article 15 of the TEU provides that Common Positions:

"define the approach of the Union to a particular matter of a geographical or thematic nature. Member States *shall* ensure that their national policies conform to the common positions."

I Pillar (EC) measures:

In connection with the Council's power to adopt common positions or joint actions in the framework of the CFSP, Article 301 of the European Community Treaty (ECT) provides that:

"Where it is provided [...] 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".

Article 60 extends to movements of capital and payments *vis-à-vis* third States the power that Article 301 envisages with regard to economic sanctions.

Regulations are the acts through which the Council (or the Commission upon a delegation of power by the latter) implement the provisions of Articles 60 and 301 of the ECT.

As is well known, EC regulations are of general application. They are binding in their entirety and directly applicable in all member States (Article 249, paragraph 2).

According to the case-law of the Court of Justice of the European Community (ECJ), the direct applicability of regulations implies that, as a general rule, national provisions of implementation are not only unnecessary, but even prohibited under the ECT. However, should a regulation exceptionally require an act of implementation to be taken at the national level, the member State is under an obligation to adopt the necessary measures.

III Pillar measures:

Pursuant to the provisions of Title VI of the TUE, in the field of Police and Judicial Cooperation in Criminal Matters (JHA, from the acronym of the third pillar's previous name Justice and Home Affairs) the EU may adopt in, *inter alia*, Framework Decisions and Decisions.

Pursuant to Article 34, paragraphs (b) and (c), respectively:

Framework Decisions

"shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall entail direct effect"

not

Decisions

"shall be binding and shall not entail direct effect; the Council [...] shall adopt measures necessary to implement those decisions at the level of the Union".

One of the consequences of the lack of direct effects which attaches to both types of act is that, in the absence of implementation by the member State concerned (or the EU, in the case of decisions), they cannot be applied – in favour or against individuals or any entity of the State – within the national legal order.

Relevant practice

Even before the TEU provided for a CFSC – which replaced the former EPC (European Policy Cooperation) – and introduced Articles 301 and 60 in the ECT, in three instances member States decided to resort to Community instruments in order to ensure uniform implementation, throughout the Community, of UNSCR. In all such instances, Community Regulations were adopted on the basis of former Article 113 (now Article 133 on Common Commercial Policy), following – and with reference to – an agreement reached by the member States within the EPC.

The complete trade embargo against Iraq adopted by the SC during the Iraq/Kuwait crisis, was implemented by the EC with Community measures. The same course of action was taken against Libya and Yugoslavia. Here follows a review of the most relevant acts for each of such instances.[1]

Iraq/Kuwait

In response to SC Res. 661(1990) imposing an economic, trade, finance and arms embargo, the Council adopted Regulation 2340/90 banning trade between by the Community with Iraq and Kuwait. Moreover, in order to fully implement Res. 661, the Council enacted Regulation 3155/90 extending existing Community measures to all kind of services (with the exception of financial services, this exception being explained by the Community's lack of competence in the field). Regulation 3155 also implemented para. 9 of Res. 661, which requested appropriate measures to protect the assets of the legal Kuwaiti Government and its institutions.

In accordance with SC Res. 687(1991), the Council adopted Regulation 3541/91 rejecting Iraqi claims with regard to contracts and transactions which had been frustrated by SC Res. 661 and the related documents.

Libya

In order to implement SC Res. 748(1992) – which imposed a selective trade embargo on arms and services against Libya – the EC adopted regulation 945/92 banning the supply of certain goods and services to Libya.

Former Yugoslavia

The UNSC decided sanctions against the former Yugoslavia between Sept. 1991 and April 1993 through resolutions 713(1991); 724(1991); 752(1992); 757(1992); 787(1992) and 820(1993).

In particular, Res. 757(1992) was implemented by Regulation 1432/92 of June 1st, 2002 and Res. 787(1992) by Regulation 3534/92 of Dec. 7, 1992. Res. 820(1993), which further strengthened sanctions, was implemented by Regulation 990/93 of April 26, 1993.

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The TEU has in substance codified existing practice of the Member States within EPC and of the EC.
Since the entry into force of the TUE, recourse by member States to EU and EC measures in order to implement their international obligations under UNSCR has become more and more frequent.[2] While full examination of all such cases would obviously exceed the purpose of these

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[1] This practice was discussed, with a view to establish whether the EC is bound by public international law and/or EC law to implement UNSCR, by BOHR, *Sanctions by the United Nations Security Council and the European Community*, EJIL (1993) 256-268.

[2] See "Liste des mesures négatives appliquées par l'Union à l'égard de pays tiers", which includes all – but is not limited to – measures adopted pursuant to UNSCR up to June 18, 2004.

comments, a few have been selected for the purpose of showing emerging trends in the EU-EC practice of implementation of UNSCR.

Afghanistan

UNSCR 1267(1999) deciding sanctions against the Taliban was implemented – through Common Position 727/1999/PESC – by Regulation 337/00 (later modified by Regulation 1272/00). Resolution 1333(2000), which further decided an arms embargo against the Taliban, was implemented by Regulation 467/01. Regulation 467/01 also provides for the freezing of all capital assets and other financial resources belonging to any individual or legal person or organization designated by the Security Council Committee concerning Afghanistan issues (art. 2). This Regulation was subsequently modified nine times by a series of regulations adopted by the European Commission.

Similar courses of actions were taken in the case of *Angola* regarding sanctions against UNITA as well as for restrictive measures adopted in relation to *Somalia*, *Sierra Leone* and *Sudan*.

Among most recent practices, one may also recall Regulation 1727/03 imposing restrictive against the *Democratic Republic of the Congo*, in implementation of the arms embargo decided by UNSCR 1493(2003).

Concerning the *Fight against Terrorism*, UNSCR 1373(2001) sets outs three types of obligations: the obligation to criminalize individual conduct amounting to the financing of terrorism, the obligation to cooperate in the prosecution and punishment of such conducts; and, finally, the obligation to freeze funds and other financial assets or economic resources of persons or entities who commit terrorist acts.

In implementation thereof, the EU first adopted Common Positions 2001/930/CFSP and 2001/931/CFSP. Both common positions are based upon articles 15 and 35 of the TEU.

Common position 930 "on combating terrorism" reproduces almost verbatim several paragraphs of Res. 1373.

Common position 931 "on the application of specific measures to combat terrorism" defines terrorist organizations and persons linked to terrorist activities. A list of terrorist organizations and persons linked to terrorist activities is annexed to the Common position. This list has been updated by means of subsequent Common positions and Decisions. Measures provided for include: freezing of funds, ensuring that funds are not made available for the benefit of specified persons and entities, police and judicial cooperation among the member States.

Regulation 2580/01 "on specific restrictive measures directed against certain persons and entities with a view to combating terrorism" was adopted for the purpose of implementing both common positions, pursuant to Article 301 of the ECT.

Council Regulation 881/02 "on specific restrictive measures directed against certain persons or entities with a view to combating terrorism" also implements operative paragraphs of Resolution 1373.

Framework decision 2003/577/JHA "on the execution in the European Union of orders freezing property or evidence" sets out the procedure that member States are under a Community obligation to follow when requested to freeze assets or seize property for the purpose of preserving evidence or with the final aim of forfeiture. Among the requirements, it is provided that the freezing order be issued by a judicial authority (art. 4) and that the member States shall ensure that adequate and effective remedies are available to potentially affected individuals (art. 11).

Question 2.

EC regulations implementing UNSCR imposing restrictive measures – the most usual form of which is the embargo – or other restrictive measures do not directly provide for sanctions to be applied in case of their being infringed.

Although sanctions are not directly provided for at the Community level, EC Regulations typically set out an obligation for member States to lay down the rules on sanctions applicable to infringements and to take all measures necessary to ensure that they are implemented.

As to their nature, it is usually provided that sanctions be effective, proportionate and dissuasive. The choice between the criminal and administrative sanctions is left to the discretion of each member State.

Member States are generally under a Community obligation also to notify to the Commission without delay of the rules adopted as well as of any subsequent amendments thereto.

E.g. Regulations 2580/01 referred to above allows for punishment of infringements of measures prescribed therein but leaves it to each member State to determine sanctions, provided they are "effective, proportionate and dissuasive" (art. 9).

As to measures adopted by Italy in this as in other instances, see *infra* Question 2, sub (B).

Even in the case where a UNSCR states an international obligation to incriminate a certain individual conduct – as does, for instance, UNSCR 1373 – the EU or EC measure only restates the obligation to prohibit and punish with a criminal sanction the criminal behaviour in question. Implementation of this obligation is required from the member States.

Question 3.

As to the elapse of measures adopted in implementation of a binding decision of the SC, there is an emerging trend to the effect that EC Regulations (or European measures) tend to reproduce the content of the relevant UNSCR also with regard to the duration of the measures established therein (and the sanctions attached thereto).

Therefore, where sanctions are imposed by the UNSC for a set period of time (e.g. for twelve months, as it was the case in Res. 1333(2002), the Regulation also provides for the same period. It follows that when the time period elapses, the Regulation – as the UNSCR – also ceases to be in force – unless a new act provides to further extend their life – automatically, without any explicit act of abrogation being needed. This practice may raise some problems from the point of view of legal certainty.

If, instead, there is no time-limit to the measures decided by the UNSCR – as it is the case for all measures envisaged by Res. 1373(2001) – measures taken by the Council of the EU in implementation thereof are also unlimited as to their duration of application (see e.g. Regulation 2580/01 adopted in implementation of Res. 1373). In such instances, when measures are suspended or ended by the SC, the corresponding Community measures need to be explicitly repealed or suspended through a specific act.

E.g., with regards to sanctions against Former Yugoslavia, UNSCR 943(1994), which relaxed sanctions for a period of 100 days, was implemented by EC Regulation 2472/99 of October 10, 1994. Several UNSCR, which further extended the relaxation of sanctions, were each implemented by a EC regulation. Res. 1022(1995), which suspended sanctions indefinitely, was implemented by Regulations 462/96 and 2382/96 (the first with regard to the Federal republic of Yugoslavia, the latter to the Bosnian Serbs.

Also, in the Iraq/Kuwait crisis, when UNSCR 686(1991) suspended the embargo against Kuwait, Regulations 2340/90 and 3155/90 were modified accordingly by Regulations 811/91 and 542/91, respectively. Following UNSCR 1483(2003), which ended the embargo against Iraq, Regulation 1210/03 was adopted for the purpose of abrogating Regulation 2465/96.

The same course of action was taken with respect to Angola, as regards sanctions decided at various stages by the UNSC against UNITA through the years 1993-2000 and at all times implemented through EC regulations: UNSCR 1448(2002) ending sanctions against UNITA was implemented through EC Reg. 146/03, which repealed EC Reg. 1705/98.

Question 4.

To date, no existing European or Community institution or organ has been endowed with the power to authorize trade or other action in derogation of embargos established by UNSCR and implemented through Community measures. Nor has any new body been instituted for this purpose.

This power rests with the member States, which exercise it through their Government Departments.

EC regulations, however, often provide that derogations or exceptions to the general prohibitions laid down therein be authorized by the "competent authorities of member States" and contain an annexed list of competent authorities to be referred to. See e.g. the List of competent authorities referred to in Articles 3, 4 and 5 of Annex to Regulation 2580/01. For Italy, see *infra* question 4 *sub* (B).

Question 5.

This question should be answered, in principle, in the negative. The Committees of sanctions are generally not endowed with the power to issue binding decisions. It is at the enforcement level that conformity with a Committee's interpretation of measures already implemented should be ensured. However, when decisions of a Committee of sanctions amount to a change in the regime of sanctions, Community measures need to be, and indeed are, accordingly modified through specific acts.

See e.g. UNSCR 1452(2002), which explicitly sets out a regime of exceptions to the restrictive measures adopted against Usama bin Laden, members of the Al-Qaida organization and the Taliban, implemented with a series of EC Regulations, pursuant to Common position 03/140/CFSP.

(B) Under Italian law

Question 1.

According to a doctrinal view, binding acts of an international organization are given effect, in principle, through the *ordine di esecuzione* ("order of execution"; "ordre d'exécution") that implemented the constituent treaty; therefore, to the extent that they are self-executing, would not need an *ad hoc* act of implementation. In practice, however, UNSCR are always implemented through a specific act, irrespective of their content and their self- (or non self) executing character.

The normal instrument implementing UNSCR is a legislative act. In many instances, urgency requires resort by the Government to decrees having the same effects as statutes (so-called *decreti leggi*, "law-decrees"), which need subsequent confirmation by Parliament.

According to Article 77 of the Italian Constitution,[3] law-decrees are enacted by the Government and have the same normative force as a statute. They need to be converted into a statute (*legge*, "law) within 60 days from their enactment; if they are not, they cease to be in force retroactively (unless a law is passed for the purpose to save the effects they produced while they were into force).

Instead, delegated legislation – which is the normal instrument for implementing EC directives (as well as other acts of EU law – is never resorted to for the purpose of implementing UNSCR.

Question 2.

To date, no general provision has been introduced into Italian law for the purpose of sanctioning violations of measures provided for under national instruments implementing a UNSCR *directly*.

Therefore, laws and law-decrees implementing restrictive measures decided by UNSCR usually expressly provide for the sanctions that shall apply for the case they are violated.

Typically, sanctions provided for are of an administrative, not of a criminal nature, and generally consist of a fine the amount of which is a measure of the economic value of the good or service traded or the transaction operated in violation of the embargo.

This is the also the rule as regard sanctions for the violation of restrictive measures implemented through Community acts. As shown above, EC Regulations do not directly provide

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[3] Article 77 of the Italian Const. reads as follows:

(1) The Government shall not, unless properly delegated by the Chambers, issue decrees having the value of law.

(2) "When, in exceptional circumstances, the Government issues, on its own responsibility, provisional measures having the force of law, it shall on the same day submit them for conversion into law to the Chambers [...]-

(3) "Law-decrees shall loose effect as of the date of issue if they are not converted into law within sixty days of their publication. The Chambers, may, however, approve laws to regulate rights and obligations arising out of decrees that have not been converted into law".

for sanctions but mandate member State to lay down rules for the application of sanctions that are effective, proportionate and dissuasive.

These sanctions complement the general civil law provision according to which any transaction illegally operated shall be null and void. This is usually already provided for in UNSCR and restated in the relevant Community and national act of implementation.

An example may be illustrative of this pattern.

As referred to above, the EC adopted Regulation 467/01 and subsequent amendments thereto in implementation of UNSCR 1267/1999 and 1333/2000. For the purpose of providing sanctions for infringements of the measures adopted against the Taliban, Italy enacted Law-Decree No. 353/2001, converted into Law No. 415/2001.

Law-decree No. 353/2001, converted into Law No. 415/2001, provided for administrative fines in implementation of Regulation 467/01 and subsequent amendments thereto, referred to the lists of names to which these provisions and subsequent updates apply, and established penalties in conformity with Articles 247 and 250 of the Criminal Code. These penalties, relating to acts committed against the personality of the State, concern respectively "aiding and abetting acts of war" and "trading with the enemy".

The same instrument also provided that any acts performed in violation of the provisions banning export of goods and services and of the provisions calling for the freezing of capital and other financial resources, as set out in relevant EC Regulations, including in implementation of UNSCR, are null and void.

This statute is no longer in force (see *infra*, *sub* question 3).

Two major innovations, however, deserve mention. They were both introduced by Law-decree No. 369 of October 12, 2001, converted into Law No. 431 of December 14, 2001.

As regards sanctions, Art. 2 introduced penalties for all breaches of EU regulations aimed at preventing and suppressing the financing of terrorism, also in implementation of the UNSCR, rendering them null and void. The Decree also makes it possible in future – and here lies its main innovative character – to avoid the need of enacting specific legislative instruments in order to lay down penalties for violation of EU regulations banning exports of goods and services or calling for the freezing of capital and other financial resources, including in implementation of UNSC. Administrative penalties will henceforth be automatically applicable. Violations are punished through administrative sanctions amounting to at least half of the value of the transaction and up to the double of the same value.

This provision has been modified by the statute implementing the International Convention for the Suppression of the Financing of Terrorism (Law No. 7/2003) to the effect that not only "acts in violation of provisions concerning a ban on export of goods and services or the freezing of funds or other financial assets" are null and void, but also acts in violation of provisions on "bans of provision of financial services".

At the institutional level, Art. 1 of Law-decree No. 369 of 12 October 2001, converted into Law No. 431 of 14 December 2001, provided for the establishment of the *Financial Security Committee* (CSF) – chaired by the Director General of the Treasury and made up of representatives of the Home Affairs, Foreign Affairs, Justice and defence Ministries, as well as the Bank of Italy, CONSOB (the Stock Exchange Commission), IUC (Italian Exchange Office), Guardia di Finanza (Customs and Excise Police), DIA (Anti-Mafia Directorate) and the Carabinieri.

The Committee has the task of monitoring the way in which the prevention system operates and the sanctions are imposed on persons violating national legislation, with particular reference to EC Regulations prohibiting the export of goods and services, bans on flights, and the freezing of capital assets.

Through CSF, Italy has acquired the instruments for applying the European procedure for imposing penalties in implementation of UNSCR 1373(2001) but also for complying with its international obligations arising under subsequent UNSCR, including, for instance, Resolution 1455(2003).

When the UNSCR lay down an international obligation to criminalize a certain individual conduct, a legislative instrument has to be adopted in order to define the crime to which a criminal sanction applies. E.g., Law-decree No. 374/2001, converted into Law No. 438/2001 (art. 1) introduced into Italian law the crime of the unlawful financing of association in the pursuit of both international and domestic terrorist activities, by updating Article 270-bis ("Conspiracy for the purposes of domestic or international terrorism or for subverting the democratic order") and article 270-ter ("providing assistance to associated persons") of the Criminal Code. The Decree also extends the provisions of Anti-Mafia legislation to international terrorism as regards restrictions on personal freedom, investigation of economic and financial assets, seizure and confiscation of goods.

Question 3.

As noted with regard to EU-EC measures of implementation, national measures provided for as temporary cease to be in force once the period for which they were set up expires (unless their duration is extended or they are renewed by an *ad hoc* act).

However, most measures introduced for the purpose of implementing UNSCR (including sanctions attached to them) are adopted for an indefinite time. In these cases, the problem of their duration is dealt with under Italian law in two different ways.

Where the law (or other act) implementing a measure at the national level is silent on this point, an *ad hoc* act – with (at least) the same legal force of the act to be repealed – is needed for the measure to cease to be applied. Instances therefore may occur that national measures are not expressly repealed, while the international and/or EU-EC measures they were intended to implement, are no longer in force.

Italian legislation seldom states that provisions will cease to be in force when the measures that are implemented are no more in effect – or are suspended – at the international level.

This was the case, for instance, of Law No. 415/2001, providing for administrative sanctions in implementation of Regulation 467/01 and subsequent amendments thereto. Article 4 of this Law stated that that its provisions would cease to be in force when the measures established in the regulation was suspended or terminated. As Reg. 467/01 (together with Reg. 1354/01) was repealed by Reg. 881/02, the law is no more in force.

The problem of the duration of potentially permanent national measures is solved in cases of an express provision that those measures elapse automatically together with the international and/or EU-EC sanctions they implement. However, this may give rise to the difficulty of finding out at which date – or up to when – a certain measure has ceased to be – or actually is – in force.

Question 4.

To date, the institution of an *ad hoc* authority endowed with the power to authorize the exportation of goods or other action in derogation to the sanctions decided by UNSCR has been very exceptional. See in this section *supra*, Question 2.

In some cases – in particular, where an express indication is required by the relevant EC Regulation – this task is entrusted with an already existing authority. The Italian competent authorities are the Ministry for Foreign Affairs, the Ministry for Productive Activities, the Ministry for Infrastructures and Transportation, the Ministry of Finance – or a particular office thereof – depending of the subject matter of the measures concerned. See *supra*, Question 4 *sub* (A).

Where no specific body is instituted or designated among existing Government Departments, the competent national authority is to be determined in accordance with the general rules allocating competence among the different branches of the State's apparatus. E.g., the authority competent to authorize trade of common goods or services is the Ministry for Productive Activities, while the competent authority with a view to authorizing export in derogation to an arms embargo is the Ministry of Defence.

Question 5.

See *supra*, question 5 *sub* (A).

There is no practice of *ad hoc* acts of implementation with respect to binding decisions of Committees of sanctions. It is to be deemed, therefore, that such decisions are given effect through the measures enacted for implementing the UNSCR under which the Committee was established.

Part II. – Judicial protection of fundamental human rights

Question 6.

1. Constitutional challenges against UNSCR and EU-EC measures (or the national measures of implementation thereof)

UNSCR have in principle the same legal force as the act which provides to their introduction into the national legal order. As the order of execution of the UN Charter was given by a statute and resolutions are generally implemented by way of a statute or an act having the force of a statute, implementing measures generally also have the force of a statute.

By virtue of Article 117 of the Italian Constitution, however, the Italian legislator is bound to respect all international obligations in force for the Italian State. This means that while legislation implementing UNSCR prevail over conflicting (previous or subsequent) legislation, they cannot run counter the provisions of the Constitution.

National measures of implementation could thus be challenged before the Italian Constitutional Court for the purpose of establishing whether they are consistent with the Constitution.

Indeed, albeit in few cases, statutes giving effect to international treaties have been successfully challenged. No such challenge, however, has ever been brought with respect to the statute giving effect to the Charter of the United Nations or a statute (or an act having the force of a statute) implementing a UNSCR.

As to EC regulations, which – as recalled above – are the only acts endowed with direct applicability, it is a well established principle that they "prevail" over conflicting national legislation and, as a consequence thereof, determine the inapplicability of the latter. According to the Italian Constitutional Court, they remain subject to the "fundamental principles" of the Italian Constitution and, within these limits, may be subject to the judicial review of the Constitutional Court, possibly by way of a challenge of constitutionality raised against the law which gave effect to the EC treaty (and subsequent amendments thereto). This theoretical assertion, however, is unlikely to be ever applied by the Court.

Acts adopted within the CFSP or the JHA pillars, instead, cannot be challenged *per se* before the Constitutional Court.[4] National statutes (or acts having the force of statutes) implementing them, if any, could however be challenged (possibly by raising the question of their constitutionality together with the constitutionality of the law implementing the TEU). The obvious case would seems to be that of a national statute implementing a EU framework decision. There are no instances so far of such challenges.

2. Judicial protection under the TEU and the ECT

Under Article 6, para. 2, of the TEU, measures adopted by the EU and the EC have to conform to fundamental rights and freedoms. However, one has to take into account the following:

- EU acts adopted under the II pillar are excluded by Article 46 from the judicial review of the ECJ
- EU acts under the III pillar are subject to the Court's powers of judicial review only to the limited extent provided for in Article 35.
- EC regulations are subject to the full judicial control of the ECJ.

With respect to EC regulations, however, it must be noted that private parties adversely affected can directly challenge a regulation before the Court of First Instance only in so far as they are "directly and individually concerned" by the regulation in question. This will rarely occur.

A regulation could, of course, come before the ECJ through a preliminary reference.

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[4] Under Article 134 of the Constitution, the Constitutional Court is endowed with the power to decide on "disputes concerning the constitutional legitimacy of laws and acts having the force of law, adopted by the State and the Regions."

There are a few instances in which the ECJ has ruled with respect to a regulation implementing sanctions decided by UNSCR. One of such instances is the case *Bosphorus hava Yollari Turizmve Ticaret AS* vs. *Minister for Transport, Energy and Communications and others*, on reference for a preliminary ruling by the Supreme Court of Ireland. In its judgment given on July 30, 1996, the Court interpreted Article 8 of Council Reg. 990/93 on trade between Serbia and Montenegro and the European Community, implementing SC Res. 820(1993), to the effect that it applied to an aircraft owned by Yugoslav airlines but operated by a Turkish charter company.[5]

3. Judicial protection before the ECHR

The scarce number of venues for private parties to enforce effectively their rights allegedly impinged upon by national and/or EC-EU measures adopted for the purpose of implementing UNSCR is only partially remedied by the existence of the system of judicial protection established under the European Convention for the Protection of Human Rights and Fundamental Freedom.[6]

Under the European Convention, an individual or group of individuals who claims to be a victim of a violation of its rights under the Convention may lodge an application against the State allegedly responsible before the European Court of Human Rights (ECHR).

In the *Matthews* judgment, the Court stressed the principle that the Convention does not *per se* exclude the transfer of competence by a contracting State to an international organization as long as "equivalent human rights protection" is maintained. However, where the alleged violation arises directly from a measure of EC or EU law, the Court would lack jurisdiction *ratione personae*.

The case brought before the Court by two Basque organizations (*SEGI and others* and *Gestoras Pro-Amnistia and others* vs. *Germany and others (15 Member States of the European Union)* is illustrative of this point concerning <u>common positions</u> adopted under Titles V and/or VI of the TEU.

SEGI and Gestora Pro Amnistia (two organizations close to ETA) filed an application after they were included in the list to be the subject of strengthened police and judicial cooperation on the basis of Common Position 2001/930/CESP on the fight against terrorism and Common Position 2001/931/CESP on the application of specific measures to combat terrorism, both of December 27, 2001. They alleged a violation of their rights under Articles 6, 10, 11 and 13 of the Convention and Article 1 of Protocol 1.

The ECHR declared their applications inadmissible as they lacked capacity as "victim" within the meaning of Article 14 of the Convention. According to the Court, the common positions adopted in the context of CFSP are not, as such, directly applicable in the Member

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[5] European Court of the Justice, *Bosphorus hava Yollari Turizmve Ticaret AS* vs. *Minister for Transport, Energy and Communications and others* (Case C-84/95), Judgment of July 30, 1996, in *European Court reports 1996 p. I-3953*. On the parallel proceedings lodged – and still pending – before the European Court of Human Rights see the next paragraph.

[6] Or under other – less effective – human rights monitoring mechanisms. See e.g. the Human Rights Committee's Concluding Observations on the United Kingdom and Northern Ireland of December 6, 2002, scrutinizing some national measures taken pursuant to SC res. 1373(2001) (UN Doc. CCPR/CO73/UK).

States and their implementation requires adoption of specific provisions in national law in the appropriate legal form in each member State.[7]

A parallel action against the Decision of the Council of the EU including them on the list of terrorist organizations was introduced by the same organizations before the Court of First Instance of the European Communities. The case is still pending. Indeed, were the Court to consider that it is not competent to retain these applications, it would be difficult not to conclude that the legal protection of individuals is insufficient with regard to the potential consequences of common positions or actions adopted under Title V (and possibly Title VI) of the TEU.

As to regulations, if one were to apply the reasoning of the Court in the *Matthews* case, one would have to conclude that a State cannot be held accountable for human rights violations arising out of acts not "freely entered into" by the State concerned only to the extent that the existence of a system of "equivalent protection" can be established. As shown above, the ECT does not guarantee the right to judicial review with respect to regulations.

In *Bosphorus Hava Yollari Turizmve Ticaret AS* vs. *Ireland*, the applicant, an airline charter company, contends that the impounding of an aircraft leased by it is a disproportionate interference with its peaceful enjoyment of its possession. The impounding was brought about by Ireland in furtherance of its obligations under EC Regulation 990/93.[8] The ECHR has yet to rule on the question as to whether "the impugned acts can be considered to fall within the jurisdiction of the Irish State within the meaning of Article 1 of the Convention, when that State claims that it was obliged to act in furtherance of a directly effective and obligatory EC Regulation". The Court held that it did not have sufficient information and that the issue was closely linked with the merit of the case to be deal with at the stage of admissibility.[9] The case is still pending before the ECHR.

4. Filling the gaps in the judicial protection of fundamental rights.

As the previous analysis has shown, there may be instances in which no effective protection is available to individuals whose rights are impinged upon by measures adopted pursuant to UNSCR.

The most sensitive issues arise in regard to the implementation of – and judicial protection against – measures impinging upon individual rights in the criminal field. Other rights that are likely to be especially affected are the right to property and the freedom to pursue a commercial activity.[10]

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7 European Court of Human Rights (Third Section), *SEGI and others* and *Gestoras Pro-Amnistia and others* vs. *Germany and others (15 Member States of the European Union)*, Decision on admissibility (Joint Applications 6422/02 and 9916/02), May 23, 2002.

8 On EC regulation 990/93, adopted in implementation of UNSC Res. 820(1993) see supra Part I, Question 1 *sub* (A).

9 European Court of Human Rights (Forth Section), *Bosphorus Hava Yollari Turizmve Ticaret AS* vs. *Ireland*, Decision on admissibility (Application 45036/98), September 13, 2001.

10 See the Thematic Comment on "The Balance Between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats" issued last year by the Network of Independent Experts in Fundamental Rights – a group set up by the European Commission at the request of the European Parliament in 2002, in order to assist it in the development of a EU policy relating to human rights. The Report stresses a number of sensitive areas in which violation of human rights may arise (in the field of fundamental

In these fields at least, there is an apparent need to fill the gaps in the judicial protection of fundamental rights both at the national and the EU-EC level.

principles of criminal law, personal data protection etc.) and puts forward possible venues to reconcile the measures of the EU and/or the member States with human rights (available at: http://www.europa.eu).