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On 'Middle Ground'.
The European Community and
Public International Law

Robert Schütze

**EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW**

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Abstract

Does the Community legal order constitute a closed ‘self-contained regime’ or will it be an ‘open system’? While founded on the basis of an international treaty, the European Community still had to determine – not unlike national legal orders – the effects of public international law in its ‘domestic’ sphere. Has the Community legal order thus assumed an ‘autonomous’ position *vis-à-vis* general international law? And if so, what is the status and effect of international norms in the Community legal order? This chapter discusses these issues by analysing the constitutional regime developed for international treaties concluded by the Community and customary international law. The second part changes perspective and investigates when the Community has considered itself materially bound by international agreements concluded by its Member States *via* the doctrine of functional succession. In general, the Community’s constitutional choice *vis-à-vis* public international law has a federal dimension: placed on systemic ‘middle ground’, the EC legal order may potentially operate as a conduit for the incorporation of international law in the national legal orders of its Member States.

Keywords

CFSP, Direct effect, European law, fundamental/human rights, international agreements, international relations, judicial review, United Nations, WTO

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1. Introduction: Foreign Affairs and European Constitutional law

Foreign affairs are ‘border’ affairs – in a geographical and a constitutional sense. Traditionally, they are subject to distinct legal principles, for the political questions posed might not be susceptible to judicial answers.¹ In a similar vein, international law may not automatically be domestic law, for a national legal order might require prior domestic ‘validation’ before it could pass the national legal border.² In our globalized world of intense international economic interdependence, the traditional distinction between ‘internal’ and ‘external’ affairs has lost much of its nineteenth century clarity. Today, international treaties play a decisive role in international co-ordination and the establishment of international organisations solidified the transition from an international law of co-existence to a co-operative international law.³ The constitutional response of many national legal orders – in particular: of their Supreme Courts – has, therefore, been to ‘open up’ to international law.

The European Community embodies that cooperative spirit on a regional international scale. The Treaty of Rome (1957) formed part of international law, although the European Court of Justice was eager to emphasise that the “Community constitutes a new legal order of international law”.⁴ “By contrast with ordinary international treaties, the E[C] Treaty has created its own legal system which, on the entry into force became an integral part of the legal systems of the Member States and which their Courts are

* In honour of Sir F. G. Jacobs. This is an amended version of a paper given on 30 June 2006 at the Second Hague Colloquium on Fundamental Principles of Law: “Supreme Courts in an Internationalised World: challenges for the *trias politica* and the coherency of law?”. Thanks go to C. Warbrick, J. Murkens, A. Dashwood, B. de Witte, M. Cremona, A. Antoniadis and the organisers of the Hague Colloquium.

¹ T. M. Franck, *Political Questions/Judicial Answers* (Princeton University Press, 1992)

² H. Triepel, *Völkerrecht und Landesrecht* (Hirschfeldt, 1899)

³ W. G. Friedmann, *The Changing Structure of International Law* (Stevens, 1964)

⁴ *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26/62, [1963] E.C.R. 1, 12

bound to apply.”⁵ However, what was the relationship between the new legal order and the *old* legal order of international law? “[T]he Community’s founding fathers ha[d] kept silent about the effects of international law in the Community legal order.”⁶ Would the Community legal order constitute a closed “self-contained regime” or would it be an “open system”?⁷ “If Community law were merely regional international law, the question of status and effect of international law within the Community legal order would have to be answered by international rules on the conflict of treaties and by principles governing the internal law of international organizations. *In contrast, the conception of Community law as distinct body of law compels an altogether different approach.*”⁸ Has the Community legal order, thus, assumed an “autonomous” position *vis-à-vis* international law?

This chapter will analyse the European Community’s relationship to public international law. Importantly, the Community’s constitutional choice will have a federal dimension: “interposing itself, in many areas, between municipal law and traditional international law, Community law [could] become a conduit for the incorporation and application of international law in the municipal sphere”.⁹ Placed on systemic ‘middle ground’ between the international and the national legal orders, the EC legal system may profoundly transform the status of international norms before they enter into the domestic legal orders of the Member States. The first part of this chapter will analyse the status and effect of international norms that are formally binding on the Community. The two legal sources discussed are international treaties concluded by the Community and customary international law. The second part changes perspective and investigates when the Community has considered itself materially bound by international agreements concluded by its Member States. The Community legal order had originally developed a doctrine of functional succession for GATT (1947), which has recently been extended to United Nations Security Council Resolutions. A third part will finally try to assess the ‘middle ground’ position of the Community legal order.

⁵ *Flaminio Costa v E.N.E.L.*, Case 6/64, [1964] E.C.R. 585, 593.

⁶ J. Klabbbers, *International law in Community law : the law and politics of direct effect*, [2001-2] 21 Yearbook of European Law, 263-298, 271

⁷ On the theory of self-contained regimes in international law, see: B. Simma, *Self-Contained Regimes*, [1985] 16 Netherlands Yearbook of International Law 111-136 defining them as “a category of agreements, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules” (*ibid.*, 117).

⁸ A. Peters, *The Position of International Law within the European Community Legal Order*, [1997] 40 German Yearbook of International Law, 9-78, 11 (emphasis added). For the view that considers Community law as part of traditional international law, see: D. Wyatt, *New Legal Order, or old?*, [1982] 7 European Law Review 147-166 arguing that the Community legal order is “quite explicable in terms of traditional international legal theory and practice” (*ibid.*, 148). For a strong response, see: F.G. Jacobs, *European Community Law and Public International Law – Two Different Legal Orders?* (Vortrag am Institut für Internationales Recht an der Universität Kiel, 20. April 1983) 6 (emphasis added): “[I]t seems to me that those writers who have stressed the resemblance of the E[C Treaty to ordinary international treaties have really missed the point. It is not the provisions of the Treaty, taken in themselves, but the Community legal system, as developed by the Court, that is novel[.]”

⁹ D. Bethlehem, *International Law, European Community Law, National Law: Three Systems in Search of a Framework – Systemic Relativity in the Interaction of Law in the European Union*, in M. Koskeniemi (ed.), *International Law Aspects of the European Union* (Kluwer Law International, 1998), 169-196, 172.

2. International Norms formally binding on the Community: Monism and the Politics of Direct Effect

a) International Agreements as direct Sources of Community Law

The capacity of international organizations to engage in treaty-making was recognized as long ago as 1949 for the United Nations and seems today universally accepted.¹⁰ The Treaty of Rome did acknowledge the legal personality of the European Community; yet the Community's capacity to establish contractual links with third countries was not taken to imply its treaty-making competence for all matters falling within the scope of the EC Treaty. Prior to the Single European Act (1986), the Community's treaty-making powers were confined to international agreements under the Common Commercial Policy and Association Agreements with third countries or international organizations.¹¹ The restrictive attribution of treaty-making powers to the Community level protected a *status quo* in which the Member States were the protagonists on the international relations scene.

This picture has dramatically changed. In the past three decades, the European Courts have led – and won – a remarkable campaign to expand the Community's treaty-making powers through the doctrine of parallel external powers.¹² The classic version of the doctrine recognizes an implied competence to enter into international agreements wherever the EC enjoys an internal legislative competence: in *foro interno in foro externo*.¹³ External powers run 'parallel' to internal powers. This widening of the Community's treaty-making powers has a significant 'internationalist' dimension. The Community's international treaties will not only be binding on the Community; they will – within Community law – bind the Member States of the Community.¹⁴ International obligations of the Community will operate on the Member States *qua* Community law and will, consequently, enjoy supremacy over all national law – including national constitutional law.¹⁵ International treaties will, however, not be absolutely supreme over Community law. While the Community legal order has accepted the priority of international treaties over secondary Community law, it continues to place international treaty norms below its "constitutional charter": the EC Treaty.¹⁶

¹⁰ Cf. *Reparation for Injuries suffered in the Service of the UN*, Advisory Opinion [1949] ICJ 174

¹¹ Cf. Articles 113 and 238 of the original EEC Treaty

¹² R. Schütze, *Parallel External Powers in the European Community: From 'Cubist' Perspectives Towards 'Naturalist' Constitutional Principles?*, [2004] 23 Yearbook of European Law 225-274.

¹³ D. McGoldrick, *International Relations Law of the European Union* (Longman, 1997) 48

¹⁴ Article 300(7) EC reads: "Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States."

¹⁵ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] ECR 1125.

¹⁶ *Opinion 1/91 (EEA Agreement)*, [1991] E.C.R. 6079, para.21. Consider also Article 300 (6) EC: "The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union."

aa) The Direct Effect of International Agreements – A Political Question?

Today, international agreements have become important legislative instruments. Many legal orders have ‘opened-up’ to a monist position. Under monism, international treaties are *constitutionally* recognized as an autonomous legal source of domestic law. The European Court of Justice has, early on, chosen a monist road: international agreements concluded by the Community enter the Community legal order without the need for additional transposition or validation. International treaties “form an integral part of the Community legal system” from the date of their entry into force.¹⁷ Community agreements are, therefore, directly applicable in the Community legal order. The capacity of international treaties to directly and generally affect the lives of European citizens permitted an external form of Community legislation.¹⁸

Yet, even in a monist legal order, not all international treaties will be directly effective. Particular treaties may lack direct effect for “when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the Court”.¹⁹ Where a treaty is addressed to the legislative branch, it will not be self-executing as its norms will not be operational for the executive or the judiciary. The doctrine of self-execution or direct effect is a ‘monist’ doctrine. Dualist systems deny the legal validity of an international treaty within the domestic legal order *a priori*. Dualism insists on a validating domestic act and international agreements are, therefore, not direct instruments of domestic legislation. Monist legal systems, on the other hand, recognize the legal validity of (properly concluded) international treaties in the national legal order. However, the *effectiveness* of a particular international treaty in the national legal order will depend on the extent to which it has been given direct effect.²⁰ The doctrine of direct effect represents, therefore, a yardstick for the actual openness of a legal system: it is a *chiffre* for the intensity of its monist creed.

The question whether a Community agreement has direct effect has been monopolized by the European Court of Justice. The Court has justified the ‘centralisation’ of the direct effect question by reference to the uniformity of the Community legal order. The effects of the Community’s international agreements “may not be allowed to vary ... according to the effects in the internal legal order of each Member State which the law

¹⁷ *Haegemann v Belgium*, Case 181/73, [1974] E.C.R. 449, para.5

¹⁸ For an analysis of legislative quality of international agreements in the Community legal order, see: R. Schütze, *The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers*, [2007] 25 Yearbook of European Law 91-151 at 131-144.

¹⁹ *Foster v Neilson*, [1829] 27 U.S. (2 Pet.) 253 at 314

²⁰ The direct effect of an international treaty within the domestic legal order is a domestic decision. See: Y. Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, [1985–6] 26 Virginia Journal of International Law 627–692 at 651: ‘States determine how to implement their international legal obligations on the municipal level. It is well recognized that domestic law determines the ‘validity’ and ‘rank’ of treaties in domestic law. If this is so, domestic law should also determine the ‘direct applicability’ of treaties in domestic law.’ This corresponds to the position of the European Court of Justice: “Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means” (*Portugal v Council*, 149/96, [1999] E.C.R. 8395, para.35).

of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure the uniform application throughout the Community".²¹ Once an agreement has been considered to unfold direct effect, it will thus also be directly effective in the national legal orders of the Member States. Individuals will be able to challenge Community as well as national legislation on the ground that it violates an international treaty.

What are the conditions for direct effect in the Community legal order? The signatory parties to the agreement may have positively settled this issue themselves and the Community Courts have recognized the binding effect of that political decision.²² If the political authorities have not expressly decided the issue, the Court has devised a two-stage test.²³ In a first stage, the Court examines whether the agreement *as a whole* is capable of containing directly effective provisions. Here, the Court employs a policy test that looks at the nature, aim, purpose, spirit or general scheme of the treaty.²⁴ This evaluation is as much political in nature as it will have political effects. Direct effect is a 'political question'. Once the political question hurdle has been crossed, the Court turns to examining the possible direct effect of a specific provision of the agreement.²⁵ Individual provisions must represent a "clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures".²⁶

The Community Courts have, overall, been "favourably disposed towards direct effect" and created an atmosphere of "general receptiveness to international agreements".²⁷ The exception to this constitutional rule is the WTO agreement, where the Community Courts persist in denying that multilateral agreement a safe passage through the Community policy test. The most famous judicial ruling in this respect is, without doubt, *Germany v Council (Bananas)*;²⁸ yet, it was only in a later decision of the Court of Justice that a clear constitutional rationale for the refusal of direct effect emerged. In *Portugal v Council*, the Court found it crucial to note that

"some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.

Admittedly, the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement[.]

²¹ *Hauptzollamt Mainz v Kupferberg & Cie.*, Case 104/81, [1982] E.C.R. 3641, para.14

²² *Kupferberg*, *ibid.*, para.17

²³ For an excellent analysis, see: A. Peters, *The Position of International Law within the European Community Legal Order*, [1997] 40 German Yearbook of International Law 9–77 at 53–4 and 58–66.

²⁴ Cf. *International Fruit Company and others v Produktschap voor Groenten en Fruit*, Case 21–24/72, [1972] E.C.R. 1219, para.20 as well as *Germany v Council*, Case 280/93, [1993] E.C.R. 3667, para. 105

²⁵ The two prongs of the test can be seen in *Kupferberg*. In paras.18–22, the Court undertook the global policy test, while in paras.23–27 it looked at the conditions for direct effective of a specific provision.

²⁶ *Demirel v Stadt Schwäbisch Gmünd*, Case 12/86, [1987] E.C.R. 3719, para.14.

²⁷ P. Eeckhout, *External Relations of the European Union* (OUP, 2004), 301

²⁸ *Germany v Council*, Case 280/93, [1994] E.C.R. 4973

However, the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on reciprocal and mutually advantageous arrangements and which must *ipso facto* be distinguished from agreements concluded by the Community ... may lead to disuniform application of the WTO rules.

To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.”²⁹

While confirming the monist philosophy of the EC legal order, the Court – rightly or wrongly – tempered the full effect of its monist creed.³⁰ In light of the economic consequences of granting direct effect to the WTO agreement, this was too “fundamental” a political question for the Court to decide. The judicial self-restraint acknowledged a constitutional prerogative of the legislative and executive branch of the Community to answer this question. The judgment equally demonstrated that the very concept of direct effect “is itself inherently political, in the sense that its meaning, in any given case, is contested, and is indeed bound to be contested”.³¹

bb) Indirect Effects of International Agreements in the Community Legal Order

Norms may have direct or indirect legal effects. An international treaty lacking direct effect may still enjoy an indirect effect in a legal order.³² From this perspective, a Community treaty lacking direct effect can still be seen as an integral part of Community law. The lack of direct effect simply means exactly that: the treaty has no *direct* effect. It cannot be directly relied upon as a source of rights or a standard of review in the Community legal order. A treaty without direct effect requires a medium – an internal Community measure – to unfold its effect in the Community legal order.

Which are the indirect effects a Community agreement can unfold? Two constitutional principles spring to mind in this context. First, there is the principle of “consistent interpretation”.³³ In *Commission v Germany (IDA)*,³⁴ the Court defined the principle in the following terms: “*When the wording of secondary Community legislation is open to more than one interpretation ... the primacy of international agreements concluded by the Community over provisions of secondary legislation means that such provisions*

²⁹ *Portuguese Republic v Council of the European Union*, Case C-149/96, ECR [1999] 8395, paras.43-6 (emphasis added).

³⁰ The academic response to the Court’s position vis-à-vis the WTO has been mixed. Compare the negative assessment by S. Griller, *Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, Portugal v Council*, [2000] 3 *Journal of International Economic Law* 441-472 with the response and positive evaluation by P. Eeckhout, *Judicial Enforcement of WTO Law in the European Union: Some further Reflections*, [2002] 5 *Journal of International Economic Law* 91-110.

³¹ J. Klabbbers, *International Law in Community law : the Law and Politics of Direct Effect*, [2001-2] 21 *Yearbook of European Law*, 263-298 at 264

³² These indirect effects pose serious difficulties for the view that identifies direct effect with “incorporation”.

³³ For a discussion of the principle, see: P. Eeckhout, *External Relations of the European Union: legal and constitutional Foundations* (OUP, 2004) 314-316.

³⁴ *Commission v Germany (IDA)*, Case 61/94, [1996] E.C.R. 3989

must, *so far as possible, be interpreted in manner that is consistent with those agreements.*"³⁵ Secondly, there is the "principle of implementation".³⁶ In two exceptional circumstances an international agreement that lacks direct effect – typically: an agreement related to the WTO – will provide an *indirect* standard of review for the legality of a Community measure. This indirect review occurs "where the Community *intended to implement a particular obligation* assumed in the context of the WTO, or where the *Community measure refers expressly to the precise provisions* of the WTO agreements".³⁷ The legality of the internal Community measure is reviewed "in the light of" the international treaty.³⁸

According to the first prong of the implementation principle, established in *Nakajima*,³⁹ a WTO agreement will prevail over inconsistent Community legislation, where the latter intends to implement the former. In that case, the Anti-Dumping Code of the WTO was at stake. The Court pointed out that the applicant was "not relying on the direct effect of those provisions", but on Article 230 EC, i.e. on an "*infringement of the Treaty or any rule of law relating to its application*".⁴⁰ The Community measure had been adopted in order to comply with the international obligations of the Community, and therefore it was judged "necessary to examine whether the Council went beyond the legal framework thus laid down".⁴¹ We encounter a variation on that theme in *Fediol*.⁴² A Community regulation had been adopted in the aftermath of "the conclusions of the European Council of June 1982, which considered that it was of the highest importance to defend vigorously the legitimate interests of the Community in the appropriate bodies, in particular GATT".⁴³ Its Article 2(1) prohibited all "illicit commercial practices" as "any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules". The specific reference to international law in the Community measure, so the Court claimed, did entitle it to review the actions of the Commission in the light of the GATT rules. As the Community legislator had instructed the Commission to let its action be guided by the international norms, judicial review of these actions would also involve the interpretation and indirect application of GATT.⁴⁴

What is the constitutional rationale behind these cases? What is clear is that it was not the international agreements *themselves* that provided the direct basis for review. The treaties were only an *indirect* standard, since the Community measures were reviewed 'in the light of' these treaties. The international norms were mediated through a Community measure. Could one, therefore, not argue that *through the act of*

³⁵ *Ibid.*, para.52 (emphasis added)

³⁶ P. Eeckhout, *supra* n.33 at 316

³⁷ *Portugal v Council*, Case C-149/96, [1999] E.C.R. 8395, para.49 (emphasis added).

³⁸ *Ibid.* In *Germany v Council*, Case 280/93, [1994] E.C.R. 4973, para.111, the Court uses the phrase "from the point of view of".

³⁹ *Nakajima All Precision v Council*, Case 69/89, [1991] E.C.R. 2069

⁴⁰ *Ibid.*, para.28

⁴¹ *Ibid.*, para.32

⁴² *FEDIOL v Commission*, Case 70/87, [1989] E.C.R. 1781

⁴³ Preamble of Council Regulation No 2641/84 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices (O.J. L 252, 1)

⁴⁴ *FEDIOL v Commission*, Case 70/87, para. 20

implementation the EC institutions have “used and forfeited the international scope of manoeuvre”⁴⁵ According to this view, it is the self-binding of the Community institutions – manifested in a specific domestic act by the Community – that provides the intellectual basis for the judicial review of the Community acts.⁴⁶ The review of the Community rules will be determined by the intention of the Community legislator to implement the international norms. Only “*because of that intention*, the international rule can be directly invoked to control the validity of the implementing legislation”. This approach is “*midway* between a monist and a dualist system of integrating international law”.⁴⁷ (However, it seems closer to the monist than the dualist end of the spectrum.)

b) Customary International Law in the Community Legal Order

International treaties are not the only source of public international law. They are complemented by custom and general principles of law.⁴⁸ In contrast to the express provision under Article 300 (7) EC for Community treaties, no similar constitutional commitment existed for customary international rules. Yet, it seemed uncontested that the European Community, endowed with international legal personality – and as such subject to international law – “must respect international law in the exercise of its powers” including internationally recognized custom.⁴⁹ What, however, is the *internal* legal status of customary rules in the Community legal order? Has the monist stance adopted in relation to international treaties been extended to this second source of international law?

⁴⁵ P. Eeckhout, *supra* n.33 at 319

⁴⁶ The constitutional concept of ‘self-binding’, albeit in the context of the executive branch, is well known in German public law.

⁴⁷ C. Timmermans, *The EU and Public International Law*, [1999] 4 *European Foreign Affairs Review*, 181–194 at 190 (emphasis added). P. Eeckhout neatly refers to the ‘dualist streak’ of the Court’s approach: “Whether one calls that type of effect direct or indirect, it is clear that, in theory at least, it involves more than mere consistent interpretation” (P. Eeckhout, *The domestic legal status of the WTO Agreement: Interconnecting legal system*, [1997] 37 *Common Market Law Review* 11–58 at 44 and 42).

⁴⁸ For the concepts of international custom and general principles of law, see: I. Brownlie, *Principles of Public International Law* (OUP, 2003) 6-12, 15-18.

⁴⁹ *Poulsen and Diva Navigation Corp.*, Case C-286/90, [1992] E.C.R. 6019, para.9. Some consider that there exists “[a]n unwritten Community rule which corresponds to [Article 300 (7)] [that] foresees the incorporation of customary international law into the Community legal order” (A. Peters, *The Position of International Law within the European Community Legal Order*, [1997] 40 *German Yearbook of International Law*, 9-78 at 21).

After a period of sibylline ambiguity on the issue,⁵⁰ the European Courts had to deal with the issue more squarely. In *Opel Austria*, the Court of First Instance (CFI) was asked to annul a Community measure on the ground that it violated the customary international law principle of good faith. The CFI referred to Article 18 of the first Vienna Convention and held that it codified “the principle of good faith [as] a rule of customary international law whose existence is recognized by the International Court of Justice” and “is therefore binding on the Community”.⁵¹ This principle, however, seemed not sufficient a ground for invalidation, for the Court considered it necessary to add: “the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case-law, forms part of the Community legal order.”⁵² Indeed, in the subsequent analysis, the Court would exclusively refer to the *Community* general principle of legitimate expectations.⁵³ Customary public international law did not operate directly, but was applied indirectly *via the medium* of Community law. This mediated application of international custom betrayed a judicial preference to regard the latter as mere “source of inspiration”. Customary international norms were “channelled” into a Community principle.⁵⁴ However, this “transformation approach”⁵⁵ did not answer the question whether international custom could have direct effects within the Community legal order.

⁵⁰ In one of the first cases dealing with the status of customary international in the Community legal order, the Court found that “it is a principle of [customary] international law, which the [EC] Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence” (*Van Duyn v Home Office*, Case 41-74, [1974] ECR 1337, para.22). In *Ahlstrom Osakeyhtio and others v Commission of the European Communities* (Wood-pulp), Joined cases 89, 104, 114, 116, 117 and 125 to 129/85, [1988] ECR 5193, non-Community undertakings had challenged the validity of a Commission decision on the ground that it breached the international legal principles limiting the jurisdiction of the Community. It was argued that “the application of the competition rules in this case was founded exclusively on the economic repercussions within the common market of conduct restricting competition which was adopted outside the Community”. The ECJ did not analyse the substance of the customary rules on territorial jurisdiction. It was content in finding that “the Community’s jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law” (*ibid.*, paras.15, 18). For a panoramic view over the European Court’s references to general principles of international law during this period, see: J.-P. Puissechet, *La Place du Droit international dans la Jurisprudence de la Cour de Justice des Communautés Européennes*, in: Scritti in onore di Giuseppe Federico Mancini (Giuffrè, 1998), 781-788.

⁵¹ *Opel Austria GmbH v Council of the European Union*, Case T-115/94, [1997] E.C.R. II-39, para.90. The Court of First Instance referred to PCIJ judgment of 25 May 1926, German interests in Polish Upper Silesia, CPJI, Series A, No 7, 30 and 39. Article 18 Vienna Convention on the Law of Treaties reads: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or; (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

⁵² *Opel Austria GmbH*, paras.123-4

⁵³ The Court would additionally mention the principle of legal certainty, see: *ibid.*

⁵⁴ P. Eeckhout, *External Relations of the European Union* (OUP, 2004) 327

⁵⁵ J. Wouters & D. van Eeckhoutte, *Giving Effect to Customary International law through European Community Law*, in: J.M. Prinssen & A. Schrauwen (eds.), *Direct Effect – Rethinking a Classic of EC Legal Doctrine* (Europa Law, 2002) 183-234 at 210

The status and effect of customary international norms was again at issue in *Racke*.⁵⁶ The Community had concluded a Cooperation Agreement with the Federal Republic of Yugoslavia for an unlimited period of time, which nonetheless allowed either party to terminate the agreement six months after having notified the other party of its unilateral denouncement. Claiming that the war in the Federal Republic constituted a radical change in the conditions under which the agreement had been concluded, the Community had adopted a series of measures to suspend the agreement without having complied with the six months rule. The questions posed in this preliminary reference from the German Federal Finance Court related, thus, to the validity of the Community legislation suspending the agreement. Was the Community entitled to terminate unilaterally the agreement by reference to the customary international rule of *rebus sic stantibus*?

The European Court of Justice affirmed its jurisdiction to examine the Community measure against international custom binding on the Community: “rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order”.⁵⁷ The Court, hereby, confirmed the monist relationship between the Community legal order and customary international rules binding on the Community. But when would these rules have direct effect? Once more, the Court tried to evade this very issue.⁵⁸ It acknowledged that Article 62 (1) of the Vienna Convention codified international custom,⁵⁹ but referred to

⁵⁶ *Racke GmbH & Co. v Hauptzollamt Mainz*, Case C-162/96, [1998] E.C.R. 3655

⁵⁷ *Ibid.*, para.46

⁵⁸ How difficult the question of direct effect of customary international law would have been can be seen in the Opinion of Advocate General F. Jacobs. Pointing out that “most rules of customary international law do not create rights for individuals and therefore do not have direct effect”, the Advocate General turned to the law of treaties: “In the light of those principles, there must also be limits to the effect of rules of customary international law relating to treaties. The overall nature and purpose of the law of treaties is to lay down rules applying in the relations between States (and international organisations). The law of treaties is clearly not intended to create rights for individuals. It is true that its application may have the effect of creating such rights, namely in those cases where a domestic legal system accepts that international agreements concluded in conformity with the law of treaties are capable of conferring rights on individuals. However, that is but an indirect effect, by no means intended at the level of international law. It is the provision of the agreement (lawfully concluded) which has direct effect. The overall nature and purpose of the law of treaties would therefore seem not to be conducive to direct effect. (It may be noted in passing that there may be other types of rules of customary international law which do intend to confer rights on individuals, for example rules of international humanitarian law.) In addition, the particular rules in issue must contain clear and precise obligations. In the circumstances of the present case, it is not obvious that that condition is satisfied. The notion of *rebus sic stantibus* is notoriously difficult and contested; indeed it has often been described as the *enfant terrible* of international law. Its scope has perhaps been formulated more clearly in Article 62 of the Vienna Convention, but even that provision contains concepts which easily lend themselves to widely diverging interpretations. What is a fundamental change of circumstances? What are circumstances which constituted an essential basis of the consent of the parties? And when does the change in circumstances radically (...) transform the extent of obligations still to be performed? It may therefore be doubted whether the conditions for the application of the doctrine of *rebus sic stantibus* are sufficiently clear and precise to confer rights on individuals” (*ibid.*, paras.80, 84-5).

⁵⁹ The provision reads: “A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

the “complexity” of the customary rules that would allow the Community a margin of discretion in applying these rules. Hence, only where the Council had made “manifest errors of assessment concerning the conditions for applying those rules” would the Court invalidate the (suspending) Community measure.⁶⁰ The Court, thereby, reconciled – at least rhetorically – two contradictory wishes: while on the one hand accepting that an individual can “invoke[], in order to challenge the validity of the suspending regulation, obligations deriving from rules of customary international law which govern the termination and suspension of treaty relations”,⁶¹ it nonetheless wished to recognize a discretionary power of the Community to (mis-)interpret the meaning and scope of international custom. This desire to allow for a margin of discretion, while wishing to exercise *some* judicial review, may explain why the Court was so eager to separate its analysis from the question of the direct effect of the customary international rules.

From this, we may conclude the following: while recent jurisprudence has confirmed that rules of customary international law “form part of the Community legal order”, the European Courts have yet to provide a clear dogmatic response to the question of direct effect. Some even see a “clear determination of the Courts to avoid the issue of direct effect”.⁶² However, this evasive strategy did ultimately fail in *Racke*, where the Court of Justice allowed an individual to *invoke* customary international law. This is, in spite of all judicial protestations to the contrary, the doctrine of direct effect.⁶³ However, a host of questions remains unresolved. Will international custom only bind the Community, or will it – as part of the Community legal order – equally bind the Member States?⁶⁴

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.”

⁶⁰ *Racke*, para.52. As regards the procedural rules laid down in Article 65 of the Vienna Convention, the Court simply held that “the specific procedural requirements there laid down do not form part of customary international law” (*ibid.*, para.59).

⁶¹ *Racke*, para.51

⁶² P. Koutrakos, *EU International Relations Law* (Hart, 2006) 248. K. Lenaerts & E. de Smijter, *The European Union as an Actor under International law*, [1999-2000] 19 Yearbook of European Law 95-138 at 126 argue that in *Racke* “the Court appears to have qualified its earlier case law to the extent that it no longer made reliance on a provision codifying a rule of customary international law conditional on the relevant provision’s being directly effective. Rather, it considered that circumstance to be irrelevant where the purpose of reliance on the particular provision is to obtain the enforcement by the Court of rights claimed under a directly effective rule of Community law, which in *Racke* was the relevant provision of the EEC-Yugoslav Agreement. A rule of customary international law can thus always be invoked by an individual in the framework of a claim based in another rule of Community law.” Interestingly, some of the Court’s pronouncements have been interpreted along the *Nakajima* case law: “[I]t seems as if the invocability of a rule of customary international law to review the legality of a Community act is furthermore restricted to the situation in which this Community act is, in fact, an implementation of the invoked rule of customary international law. After all, the contested regulation explicitly stated to have been taken account on the basis of *rebus sic stantibus*. Therefore, one may wonder whether the *Racke* case does not in any way boil down to an application of the *Nakajima* case law vis-à-vis customary international law” (J. Wouters & D. van Eeckhoutte, *supra* n. 55 at 203).

⁶³ P. Pescatore, *The doctrine of ‘direct effect’: an infant disease of Community law*, [1983] 8 European Law Review 155-177

⁶⁴ A. Epiney has argued in favour of the restrictive first alternative: “Denn die Grundsätze des allgemeinen Völkerrechts sind zwar Bestandteil der Gemeinschaftsrechtsordnung im oben genannten Sinn; für die Mitgliedstaaten unmittelbar als solche verbindlich sind sie jedoch insofern nicht, als sie (nur) die Gemeinschaft als Völkerrechtssubjekt binden; eine „Durchgriffswirkung“ auf die

What is the hierarchical rank that customary international law enjoys in the Community legal order? It could be argued that the Community Courts should extend the constitutional principles governing the status of international treaties to international custom;⁶⁵ yet, this is not a matter of constitutional necessity.⁶⁶

3. 'External' International Treaties and Community Succession: From the GATT to the United Nations?

What is the relationship between the Community legal order and international treaties to which the European Community is not a party? While not formally binding on the Community, these treaties may overlap with the competences of the Community and thus come into the "orbit" of the Community legal order.⁶⁷ The Court of Justice has held that "[b]efore the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision".⁶⁸ However, this raises an important question: has the Community *considered itself to be bound* by international treaties to which it has not formally consented to? The question will only arise for international treaties to which all the Member States are parties. In the past, the European Court had accepted a "succession doctrine" in relation to GATT (1947). The famous passage in *International Fruit* reads:

"The Community has assumed the functions inherent in the tariff and trade policy, progressively during the transitional period and in their entirety on the expiry of that period, by virtue of [Articles 131 and 133] of the Treaty. *By conferring those powers on the Community, the Member States showed their wish to bind it by the obligations entered into under the general agreement.* Since the entry into force of the E[C] Treaty and more particularly, since the setting up of the common external tariff, the transfer of powers which has occurred in the relations between Member States and the Community has been put into concrete form in different ways within the framework of the General Agreement and has been recognized by the other contracting parties ... *It therefore appears that, in so far as under the E[C] Treaty the Community has assumed the powers previously exercised by Member States in the area covered by the General Agreement, the provisions of that agreement have taken effect of binding the Community.*"⁶⁹

Mitgliedstaaten dürfte zu verneinen sein." (Cf. A. Epiney, *Zur Stellung des Völkerrechts in der EU*, [1999] 10 Europäische Zeitschrift für Wirtschaftsrecht 5-11 at 8)

⁶⁵ *Ibid.*

⁶⁶ The status of international law in the German legal order, for example, differs depending on its legal source. While general principles of international law assume a hierarchical position between the German Constitution and federal legislation, the transformed or implemented international treaty has traditionally been placed at the hierarchical rank of normal legislation.

⁶⁷ I borrow this expression from N. Lavranos, who – in turn – borrowed it from B. de Witte.

⁶⁸ *International Fruit Company NV v Produktschap voor Groenten en Fruit*, Joined Cases 21–24/72, [1972] E.C.R. 1219, para.7

⁶⁹ *Ibid.*, paras.14-16 and 18 (emphasis added). In *Amministrazione delle Finanze dello Stato v Societa Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*, Joined Cases 267/81, 268/81 and 269/81, [1983] E.C.R. 801, para.17, the ECJ clarified that following the introduction of the common

Functional succession emanated from the exclusive nature of the Community's powers under the Common Commercial Policy (CCP).⁷⁰ With the Community today being formally bound by GATT under the WTO Agreement, the succession doctrine seemed a dead letter. For three long decades it had not been extended to either of the two other major legal "satellites" of the Community legal order: the European Convention of Human Rights (ECHR) and the United Nations (UN). Recent developments, however, indicate a change of direction in relation to the latter. The second part of this chapter will, therefore, concentrate on the status and effect of United Nations Security Council Resolutions in the Community legal order.

a) Constitutional Design: The United Nations and the Community Legal Order

The European Community is not a member of the United Nations.⁷¹ All Member States of the European Community are, however, members of the United Nations. According to Article 48 (2) of the UN Charter, decisions of the Security Council "shall be carried out by the Members of the United Nations directly and through action in the appropriate international agencies of which they are members".⁷² The fulfilment of United Nations obligations is, thereby, mandatory. Article 103 of the UN Charter specifies that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

What is the legal relationship between the United Nations and the Community legal order? Sandwiched between the United Nations and the national legal orders, how will the Community layer affect the obligations under the United Nations Charter? Have the Community Courts considered United Nations law binding on the Community, even if "the singular and independent nature of the Community legal order, which has been made clear from the beginning by the case law of the Court of Justice, points in the opposite direction"?⁷³

customs tariff on July 1, 1968 the Community had "assumed its full powers in relation to the sphere covered by GATT".

⁷⁰ The Court of Justice had not yet 'officially' declared the CCP as an exclusive competence of the Community. The doctrine of succession was rather a precursor to that development, see: R. Schütze, *Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order*, [2007] 32 *European Law Review* 3-28 at 6-10. On the application of the idea of "succession" in the Community legal order generally, see: R. Schütze, *EC Law and International Agreements of the Member States – An Ambivalent Relationship?*, [2006-7] 9 *Cambridge Yearbook of European Legal Studies* (forthcoming).

⁷¹ According to Article 4 UN Charter only States can become full members. Before formal amendment of the UN Charter, the Community must "settle for a more modest participation in the work of the world organization" (P. Brückner, *The European Community and the United Nations*, [1990] 1 *European Journal of International Law* 174-192 at 176).

⁷² Article 48 (2) UN Charter

⁷³ J.P. Puissechot, *The Court of Justice and International Action by the European Community: The Example of the Embargo against the Former Yugoslavia*, [1996-7] 20 *Fordham International Law Journal* 1557-1576 at 1568

The potential competence overlap between the United Nations and the Community legal orders has principally materialised in the form of economic sanctions adopted by the United Nations Security Council. These measures have a commercial nature and may, thus, fall within the Community's common commercial policy competence. However, because of their foreign policy objective, economic sanctions were originally regarded to have remained within the exclusive foreign affairs competence of the Member States.⁷⁴ Under the "Rhodesia doctrine",⁷⁵ economic sanctions were considered to be beyond the scope of the CCP. They were adopted under Article 297 EC allowing a Member State to adopt national measures "to carry out obligations it has accepted for the purpose of maintaining peace and international security".⁷⁶

The pitfalls of a missing harmonised approach for economic sanctions soon led to a second constitutional formula. The Member States would attempt to coordinate their national foreign policies within the framework of the European Political Cooperation (EPC). If a unanimous diplomatic decision to impose sanctions emerged, it would, then, be 'translated' into a Community measure based on Article 133 EC.⁷⁷ The *Community* character of these measures remained, however, ambivalent. Indeed, the standard formula in the preambles of the EC sanctions regulations adopted during this phase would refer to "the Community and its Member States hav[ing] agreed to have recourse to a *Community instrument* in order to ensure uniform implementation throughout the Community".⁷⁸ Did this mean that the Member States had only 'borrowed' the Community organs to adopt a "sui generis" legal instrument?⁷⁹ With the constitutional relationship between the European Political Cooperation (EPC) and Article 133 EC not

⁷⁴ An excellent historical overview of the European Community's approach towards economic sanctions can be found in P. Koutrakos, *Trade, foreign policy and defence in EU constitutional law: the legal regulation of sanctions, exports of dual-use goods and armaments* (Hart, 2001), 58-91.

⁷⁵ P.J. Kuyper, *Sanctions against Rhodesia: the EEC and the implementation of general international legal rules*, [1975] *Common Market Law Review* 231-244

⁷⁶ The article reads: "Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in 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."

⁷⁷ Under this original two-step process, "the EPC mechanism under international law principles precede[d] the proper legislative process within Community law". It has been taken to "reflect the compromise between the Member States' interests to preserve their sovereignty as to matters of security policy on the one hand, and the interests of the EC to guarantee the uniform application of law within the whole of the Community on the other" (S. Bohr, *Sanctions by the United Nations Security Council and the European Community*, [1993] 4 *European Journal of International Law* 256-268 at 266).

⁷⁸ E.g. Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait (O. J. L 213, 09/08/1990 at 1) Recital 4.

⁷⁹ On this point, see: P. Koutrakos (supra n. at 74) arguing that "trade sanctions against third countries were treated as a *sui generis* category of measures". According to the author this gave rise to the paradox that economic sanctions, while actually being imposed on the basis of Article 133 EC were "in effect being dissociated from the Common Commercial Policy". "In effect, the arrangement under consideration negated the Community's exclusive competence over the Common Commercial Policy as far as the imposition of sanctions was concerned" (*ibid.*, 66). Interestingly, the Member States even adopted a declaration to the effect that recourse to Article 133 "did not constitute a precedent" which "finally enabled the Council to adopt the regulation[s] on sanctions" (P. J. Kuyper, supra n.75 at 398).

clarified, it was “not surprising that the question of the legal foundation or basis for Community action in relation to economic sanctions has been much debated”.⁸⁰

More solid constitutional foundations were given during a third phase. Setting up a “Common Foreign and Security Policy” (CFSP) for the newly erected European Union, the Maastricht Treaty cemented the constitutional practice for economic sanctions in Article 301 EC. The article stipulates the following:

Where 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.”

Today, virtually all UN Security Council Resolutions imposing economic sanctions will be implemented on the basis of this provision.⁸¹ Yet, the nature of the competence – as well as the character of the measures adopted under it –⁸² has remained mysterious. Commentators are divided on whether the article provides for an exclusive competence of the Community.⁸³ Its relationship with Articles 133 is not clarified.⁸⁴ The same holds true for its relationship with Article 297 EC.⁸⁵ The constitutional design for economic

⁸⁰ J.P. Puissechet, *supra* n.73 at 1561

⁸¹ K. Lenaerts and E. De Smijter, *The United Nations and the European Union: Living Apart Together*, in K. Wellens (ed.) *International Law: Theory and Practice. Essays in Honour of Eric Suy* (Nijhoff, The Hague, 1998), pp. 439-458) at 448 even assert that “the Member States introduced a Community law obligation for the Community institutions to implement UN economic sanctions into [Article 301] EC”.

⁸² In line with the pre-Maastricht *status quo*, Koutrakos considers measures adopted under Article 301 EC as “a *sui generis* genre of measures”. The “political genesis” of these measures within the Second Pillar “attributes a quality to the measure adopted under Article 301 EC that distinguishes it from all other Community measures” (*supra* n. 74 at 77).

⁸³ In favour of an exclusive competence are K. Lenaerts and E. De Smijter, *supra* n.81: “Within the European legal order the Community enjoys exclusive competence in this area [economic sanctions]” (*ibid.*, at 454) as well as N. Lavranos, *Legal interaction between decisions of international organizations and European law* (Europa Law, 2004), 100. Against exclusivity is P. Eeckhout, *External Relations of the European Union* (OUP, 2004) pointing out that “[t]here are no indications in Article 301 that this will be the case; on the contrary, the reference to the prior decision under the CFSP suggests that Community competence is conditional. That is clearly a strong argument against exclusivity: if there is no CFSP sanctions decision, for example because there is no unanimity, the Community cannot adopt sanctions. Surely, this signifies that the Member States, which as the Court recognized remain competent in the area of foreign and security policy, have the power to adopt sanctions” (*ibid.*, 448). In the light of the constitutional relationship between the CFSP and the First Pillar, the case against exclusivity is much stronger.

⁸⁴ The question at issue is whether Article 133 EC continues to provide an alternative legal basis for economic sanctions where Article 301 EC is inapplicable because Member States reached no agreement within the CFSP provisions of the TEU. For an affirmative answer, see: K. Lenaerts & E. de Smijter, *supra* n.81 at 449: “It is therefore safe to state that when the Council does not come to a unanimous CFSP decision on the implementation of UN economic sanctions, this does not prevent the EC from taking the necessary action against a third State. The absence of such CFSP decision merely excludes the applicability of [Article 301] EC. It does not paralyse the Community, since the latter remains free to use its *normal* competence on the common commercial policy laid down in [Article 133], *juncto* [Article 300] EC.”

⁸⁵ The case has been made that “Article 301 EC has not precluded a Member State from relying upon Article 297 EC in order to justify national measures imposing unilateral sanctions on a third country” (P. Koutrakos, *Trade, foreign policy and defence in EU constitutional law: the legal regulation of*

sanctions, therefore, still raised many questions that the Community Courts would eventually have to answer.

b) The Community Judiciary and UN Security Council Resolutions

aa) The traditional Approach: Community Autonomy with an “internationalist” Streak

The normative positioning of the European judiciary began with the European Court’s decision in *Bosphorus*.⁸⁶ This first case dealing with a Community sanctions regulation concerned the UN embargo against the Federal Republic of Yugoslavia. Adopted before the European Union Treaty entered into force, the regulation was still based on Article 133 EC.⁸⁷ Executing the Community measure, Ireland impounded an aircraft belonging to Bosphorus, a Turkish company, on the ground that it had been leased from a “person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro)”.⁸⁸ Claiming, *inter alia*, that its fundamental right to property was violated, Bosphorus argued that the Community Regulation that implemented the UN obligations of the Member States was void. The European Court, referring to its case law on fundamental rights in the Community legal order, approached its legality review in the following way:

Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions.

Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators.

The provisions of Regulation No 990/93 contribute in particular to the implementation at Community level of the sanctions against the Federal Republic of Yugoslavia adopted, and later strengthened, by several resolutions of the Security Council of the United Nations ...

As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate.⁸⁹

sanctions, exports of dual-use goods and armaments (Hart, 2001), 86). For a discussion of Article 297 EC generally, see: P. Koutrakos, *Is Article 297 EC a “Reserve of Sovereignty”?*, [2000] 37 Common Market Law Review 1339-1362 at 1339).

⁸⁶ *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, Case C-84/95, ECR [1996] 3953

⁸⁷ Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) (OJ 1993 L 102, 14) was based on UN Security Council Resolution 820 (1993).

⁸⁸ Article 8 Regulation No 990/93

⁸⁹ *Bosphorus*, paras.21-26

The Court showed respect for the autonomy of the Community legal order. It did not address the legal status of UN Security Council Resolutions in the Community legal order, but focused on the Community measure's legality. Importantly, the Court seemed to treat the Sanctions Regulation as a "real" Community measure. First, the Court had no difficulty in establishing its jurisdiction. Second, the Court reviewed the measure in the light of the Community standard of fundamental rights. Finding that fundamental rights are "not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community",⁹⁰ the ECJ nonetheless considered the balance struck between the foreign policy objective and the adverse interference with individual rights reasonable. Even if a lower degree of judicial scrutiny was applied,⁹¹ the Court had thus no qualms to review indirectly the substance of the UN Security Council Resolution.

The message seemed clear: where the Member States decided to have recourse to a Community instrument to fulfil their obligations arising under the United Nations *qua* Community law, they would have to comply with the constitutional principles of the Community legal order. The solution would safeguard the autonomy of the Community legal order in an approach that paralleled the Community legal order's relationship to the European Convention of Human Rights.⁹²

This judicial approach was confirmed in *Centro-Com*.⁹³ In a preliminary reference from the English Court of Appeal, the European Court was requested to interpret the relationship between the UN Security Council Resolution 757 (1992) and the implementing Community measure in the form of Council Regulation 1432/92 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro. The Sanctions Regulation had exempted products for medical purposes from the prohibition, but required prior authorization "issued by the competent authorities of the Member States".⁹⁴ The United Kingdom, in accordance with its 1946 United Nations Act, had adopted the Serbia and Montenegro (United Nations Sanctions) Order 1992. The Order prohibited any person from supplying or delivering any goods to a person connected with Serbia or Montenegro, except under the authority of a licence granted by the Secretary of State.

⁹⁰ *Ibid.*, para.21

⁹¹ For a critique of the standard of review, see I. Canor, *Can two walk together, except be agreed? The relationship between international law and European law : The incorporation of United Nations sanctions against Yugoslavia into European Community law through the perspective of the European Court of Justice*, [1998] 35 Common Market Law Review 137-187 at 162: "However, it can be sensed from the decision of the Court that it was so "impressed" by the importance of the aims of the Regulation, that it was prepared to justify any negative consequences ... This attitude implies that no serious balancing test was carried out by the Court, and that it expressed an almost total indifference to the way the Community organs exercised their discretion in the political – foreign affairs – sphere when implementing the Resolution. It should not be the case that by invoking foreign affairs needs, the Council and the Commission is given *carte blanche* to infringe individual rights."

⁹² J.P. Puissechet, *The Court of Justice and International Action by the European Community: The Example of the Embargo against the Former Yugoslavia*, [1996-7] 20 Fordham International Law Journal 1557-1576 at 1571

⁹³ *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, Case C-124/95, [1997] ECR 81

⁹⁴ Article 3 Council Regulation 1432/92 (O.J. 1992 L 151, 4)

Centro-Com, an Italian undertaking, had exported fifteen consignments of pharmaceutical goods and blood-testing equipment to Montenegro. The payments for those exports were to be debited to a bank account held by the National Bank of Yugoslavia with Barclays Bank. While eleven consignments had been duly paid, reports of abuse of the authorization procedure led to a change of United Kingdom policy. Henceforth, the British authorities would only authorize payment for those medical products that were exported from the United Kingdom. This was claimed to better allow control over goods exported to Serbia and Montenegro. The question submitted to the European Court of Justice was whether the Community's Common Commercial Policy, as implemented by the Community Sanctions Regulation, precluded the United Kingdom from adopting such a scheme – even if it was designed to ensure the national implementation of United Nations Security Council Resolution 757 (1992).

The Court analysed the three-layer problem in two steps. In a first part of the judgment it focused on the relationship between national foreign security measures and the Common Commercial Policy. The British government had argued that the national measures had been taken by virtue of its competence in the field of foreign and security policy and that the validity of these measures “cannot be affected by the exclusive competence of the Community in relation to the common commercial policy”.⁹⁵ While accepting the competence of the Member States in the field of foreign policy, the Court significantly added that “the powers retained by the Member States must be exercised in a matter consistent with Community law”.⁹⁶ Moreover, this time, the Court showed colours and provided the constitutional rationale behind its reasoning:

“[W]hile it is for the Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions adopted by the Community in the field of the common commercial policy provided for by [Article 133] of the Treaty.

It was indeed in the exercise of their national competence in matters of foreign and security policy that the Member States expressly decided to have recourse to a Community measure, which became the Sanctions Regulation, based on [Article 133] of the Treaty.

As the preamble to the Sanctions Regulation shows, that regulation ensued from a decision of the Community and its Member States which was taken within the framework of political cooperation and which marked their willingness to have recourse to a Community instrument in order to implement in the Community certain aspects of the sanctions imposed on the Republics of Serbia and Montenegro by the United Nations Security Council.

It follows from the foregoing that, even where measures such as those in issue in the main proceedings have been adopted in the exercise of national competence in matters of foreign and security policy, they must respect the Community rules adopted under the common commercial policy.”⁹⁷

In essence, the Court recognized that the Member States had “retained” powers as regards foreign and security policy. Thus, even if these measures fell within Article 133 EC, the Member States would not be excluded *a priori* in spite of the exclusive nature of the CCP. The Court thereby gave an implicit judicial blessing to the constitutional

⁹⁵ *Centro-Com*, para.23

⁹⁶ *Ibid.*, para.25

⁹⁷ *Ibid.*, paras.27-30

symbiosis between the intergovernmental EPC and the supranational CCP.⁹⁸ Significantly, however, it found that where the Member States wilfully use the Community's legal instruments to fulfil *their* obligations within the United Nations legal order, they must equally wilfully submit to the constitutional logics of the Community legal order. (From there, the Court moved on to the second step in its analysis. The Court found that the Community legislation on the matter was exhaustive. The Sanction Regulation had been "designed to implement, uniformly throughout the Community" the relevant aspects of the sanctions imposed by the United Nations Security Council.⁹⁹ The United Kingdom was, therefore, precluded from adopting stricter national measures.¹⁰⁰)

In sum, under the traditional approach, the following constitutional picture emerged: the Community did not consider itself materially bound by the United Nations Charter and Security Council Resolutions were not part of the Community legal order. When Member States 'had recourse' to Community instruments to implement UN Resolutions, they could use Article 133 EC, but this 'communitarisation' also implied the obligation to adhere to the Community's constitutional rules. The constitutional message was thus: if "transposing international law into Community law strengthens international rules by allowing them to partake in the special effects of Community law",¹⁰¹ these rules must equally partake in the special obligations of Community law – including fundamental human rights recognized in the Community legal order.

bb) A new Approach? Yusuf and the Subordination of the Community Legal Order

The judicial commentary on the pre-Maastricht constitutional design protected the autonomy of the Community legal order, while paying attention to the international obligations of the Member States. This metaphorical 'middle ground' stance has

⁹⁸ "The Court could afford to dispense with lengthy discussions, as the constitutional development of the Community ha[d] rendered this point moot. With the coming into force of the Maastricht Treaty in European Union, [Article 301] EC ha[d] introduced a legal basis for a *Community embargo*" (C. Vedder & H.-P. Folz, *Case Note on Centro-Com and Ebony Maritime*, [1998] 35 *Common Market Law Review* 209-226 at 215),

⁹⁹ *Centro-Com*, para.47

¹⁰⁰ The Court, however, did not fully close the door in relation to Article 307 EC. While pointing out that "when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure" (para.60), it nonetheless admitted that – at least under the preliminary proceedings procedure – it was for the national courts to "to determine which obligations are imposed by an earlier agreement on the Member State concerned and to ascertain their ambit so as to be able to determine the extent to which they thwart application of the provisions of Community law in question" (*ibid.*, para.58). In the final analysis, it was for the national court to decide on "whether, in the circumstances of the case before it, in which exports were approved by the United Nations Sanctions Committee and authorized by the competent authorities in the country of export, both the change of policy and the four decisions refusing to allow funds to be released are necessary in order to ensure that the Member State concerned performs its obligations under the Charter of the United Nations and United Nations Security Council Resolution 757 (1992)" (*ibid.*, para.59).

¹⁰¹ A. Peters, *The position of international law within the European Community legal order*, [1997] 40 *German Yearbook of International Law*, 9-78 at 34

recently been abandoned by the Court of First Instance. In *Yusuf*,¹⁰² the Court established a significantly different position when interpreting the constitutional provisions inserted by the European Union Treaty.

The case was brought by alleged Taliban terrorists, whose assets had been frozen. The contested Community regulations – as well as the CFSP common position – had reproduced the relevant UN Security Council Resolutions.¹⁰³ The Community measures had been based on Articles 301, 60 and 308 EC.¹⁰⁴ The applicants had challenged the legality of these measures, *inter alia*, on the ground that their fundamental rights had been violated. The Community organs, having intervened in the proceedings, argued that “the Charter of the United Nations prevail[s] over every other obligation of international, Community or domestic law” to the effect that Community human rights standards should be inoperative.¹⁰⁵

How did the CFI re-position the Community legal order? While admitting that under public international law, the EC was not bound by UN Security Council Resolutions, the Court still found that “the Community *must be considered to be bound* by the obligations under the Charter of the United Nations in the same way as its Member States, *by virtue of the Treaty establishing it*”.¹⁰⁶ How did the Court come to this novel interpretation? The Court repeated that all the Member States of the Community were bound under Chapter VII of the Charter and, referring to Articles 297 and 307 EC, it considered that the Community “must, therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect”.¹⁰⁷ The Court reasoning goes as follows:

¹⁰² *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*, Case T-306/01, [2005] E.C.R. II-3533

¹⁰³ *Cf.* UN Security Council Resolution 1390/2002 laying down the measures to be directed against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities

¹⁰⁴ Common Position 2002/402/CFSP led to the adoption of Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 (O.J. 2002 L 139, 9). Article 2 of the Regulation reads: “All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.”. Annex 1 wrongly mentioned a certain “Ali, Yusuf Ahmed” and in May 2003, the Commission adopted (Commission) Regulation 866/2003 amending Council Regulation 881/2002 (O.J. L 124, 19), whose Annex I now mentioned the correct name of “Ali Ahmed Yusuf (alias Ali Galoul), Kralingegränd 33, S-16362 Spanga, Sweden; date of birth 20 November 1974; place of birth: Garbaharey, Somalia; nationality: Swedish; passport No: Swedish passport 1041635; national identification No: 741120-1093”. The Council Regulation had been adopted under a triple legal base. Recourse to Article 308 EC was deemed necessary as the Community legislator believed that Articles 301 and 60 would not allow for smart sanctions. For an analysis of the competence aspect of the cases, see: A.Garde, *Casenote on Yusuf and Kadi*, [2006] 65 Cambridge Law Journal 281-284.

¹⁰⁵ *Yusuf*, para.227

¹⁰⁶ *Yusuf*, para. 243 (emphasis added)

¹⁰⁷ *Yusuf*, para.239

“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 countries under that Charter. On the contrary, their desire to fulfil their obligations under that Charter follows from the very provisions of the Treaty establishing the European Economic Community and is made clear in particular by [Article 297] and the first paragraph of [Article 307]...

By conferring those powers on the Community, the Member States demonstrated their will to bind it by the obligations entered into by them under the Charter of the United Nations. Since the entry into force of the Treaty establishing the European Economic Community, the transfer of powers which has occurred in the relations between Member States and the Community has been put into concrete form in different ways within the framework of the performance of their obligations under the Charter of the United Nations ...

It therefore appears that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community[.]”¹⁰⁸

This is, if confirmed by the European Court of Justice, a radical change in the three-level relationship between the United Nations, the Community and the national legal orders. The Court imposed a positive obligation on the Community legislator to implement UN Security Council Resolutions by invoking the functional succession doctrine. The doctrine, established in *International Fruit* for GATT, had long been thought dead. *Yusuf* revives and extends it “by analogy” to the United Nations Charter. This extension is highly debatable.¹⁰⁹ While it is true that all the Member States of the European Community are also members of the United Nations, the Community has not replaced the Member States in foreign affairs by assuming an exclusive competence within this area.

The references to Articles 297 and 307 EC are spurious.¹¹⁰ The former provision is addressed to the Member States – not the Community,¹¹¹ while the latter allows

¹⁰⁸ *Yusuf*, paras.245 – 253 (references omitted). Significantly, the Court did not refer to the exclusive nature of the Community competence to adopt economic sanctions (under Article 133 EC).

¹⁰⁹ Analysing the European Court’s relationship to GATT in *International Fruit* before the CFI had decided *Yusuf*, P. Eeckhout (*External Relations of the European Union* (OUP, 2004), 439) claimed that “[m]uch of that reasoning can be transposed to the relationship between the UN Charter and the EC, in so far as Security Council resolutions are concerned.” Therefore, “the Court might well, if the question were ever to come before it, be inclined to recognize the binding character of the UN Charter and of Security Council resolutions, and find support for such recognition in its own case law”. However, there are heavy arguments against such a position: First, as Eeckhout himself admits, the Community has not replaced the Member States in the UN or in the Security Council. Second, the idea that the Member States “could not transfer to the Community more powers than they possessed” (“*nemo dat quod non habet*”) had been rejected by the majority of Community commentators considering “that the establishment of the Community had led to the emergence of a new governmental power centre which could not be conceptualised as being made up of fragments or splinters of national sovereign authority” (C. Tomuschat, *Case Note on Yusuf and Kadi*, [2006] 43 *Common Market Law Review* 537-551 at 543). See also: E. Stein, *European Political Cooperation (EPC) as a Component of the European Foreign Affairs System*, [1983] 43 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 49-69 at 66: “[I]t is widely agreed that, in contrast with its position in GATT, the Community has not “replaced” the Member States in the United Nations and thus is not bound as such by a Security Council Resolution.”

¹¹⁰ For the opposite view, see: C. Tomuschat arguing that in relation to Articles 307 and 297 “the exposition of the Court does not show any weakness” (*ibid.*, at 542).

Member States to suspend *temporarily* (!) the supremacy of Community law to fulfil their prior international legal obligations. In fact, even an analogous application of Article 307 EC could hardly explain why the annulment of a *Community* measure would prevent the *Member States* from fulfilling *their* obligations under the UN Charter.¹¹² The traditional constitutional rationale behind Article 307 EC has always been to permit Member States to satisfy their international commitments *against* Community law.¹¹³ The ‘internationalist’ reading suggested by the CFI would seem to force Member States into fulfilment of their international obligations *qua* Community law!

The Community legal order’s self-binding vis-à-vis United Nations law remains, therefore, highly contestable. Yet, the most astonishing and dangerous part of the judgment relates to the consequences the Court drew from its normative positioning. After a rhetorical concession that the European Community was “based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether their acts are in conformity with the basic constitutional charter, the Treaty”, the CFI then – swiftly – raised the question of “whether there exist any structural limits, imposed by general international law or by the EC Treaty itself, on the judicial review”. Surprisingly, the Court indeed found the Community “acted under circumscribed powers”, with the result that the Community legislator had “no autonomous discretion” and could “neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration”.¹¹⁴ What were these structural limits? The Court answers this question in the following way:

“Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would [] imply that the Court is to consider, indirectly, the lawfulness of those resolutions. In that hypothetical situation, in fact, the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of

¹¹¹ Article 297 EC allows a Member State, *inter alia*, “to carry out obligations it has accepted for the purpose of maintaining peace and international security” and, therefore, represents a specification of Article 307 EC: “Whereas [Article 307] of the Treaty of Rome regulates the solution of possible conflicts between two legal order, [Article 297] confers in a special situation, wide derogative powers to the Member States concerned which can affect all Treaty provisions within the limits set by [Article 298]... Under the strict terms of [Article 297] Member States therefore were empowered to adopt measures in order to implement Security Council resolutions on economic sanctions against, for example, Southern Rhodesia. Measures were taken by Member States in this regard which were designated by the Council and Commission as legal. The derogation clause of [Article 297] of the treaty of Rome itself provides, however, for consultation among all Member States ... When these discussions occur they may lead to the adoption of a Community act.” (S. Bohr, *Sanctions by the United Nations Security Council and the European Community*, [1993] 4 *European Journal of International Law* 256-268 at 265-6)

¹¹² “But if the Court were to strike down those regulations, why would that impede the performance by the Member States of their UN obligations? Those obligations would remain intact, and surely every Member State could itself decide to take the action (freezing of assets) which is required by the relevant resolutions. (...) Surely there might be some Member States where it would be possible to have review of the domestic measures on human-rights grounds in domestic constitutional law. But that cannot be of concern to the CFI” (P. Eeckhout, *Does Europe’s Constitution Stop at the Water’s Edge: Law and Policy in the EU’s External Relations*, Fifth Walter van Gerven Lecture, 22).

¹¹³ On Article 307 EC generally, see: P. Eeckhout, *supra* n.109 at 333-342, P. Koutrakos, *EU International Relations Law* (Hart, 2006) 301-328 and R. Schütze, *supra* n.70

¹¹⁴ *Yusuf*, paras.260-265

the contested regulation but in the resolutions of the Security Council which imposed the sanctions [.]

In particular, if the Court were to annul the contested regulation, as the applicants claim it should, although that regulation seems to be imposed by international law, on the ground that that act infringes their fundamental rights which are protected by the Community legal order, *such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicants ask the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.*"¹¹⁵

The Court, thus, declined all jurisdiction to review the Community regulation *because it would entail an indirect review of the Security Council Resolutions*. The justification for this generous self-abdication was that UN law would be binding for all Community institutions, including the Community Courts.

There are at least two objections to this argument. First, when the Court claims that the UN Charter prevails over every other international and domestic obligation of the Member States,¹¹⁶ this is definitely wrong as regards the "domestic law" part.¹¹⁷ International law – not even United Nations law – has ever claimed automatic supremacy within the national legal orders. Will the international legal order's neutrality towards the dualism-monism debate not, *mutatis mutandis*, extend to the Community legal order? Interestingly, the Court of First Instance spoke of "the domestic or Community legal order",¹¹⁸ and this might indeed be taken as an acknowledgement "that *vis-à-vis* the UN system the Community constitutes nothing other than a "domestic" regime, to which the rules can be applied which generally regulate the relationship between international and national law".¹¹⁹ This dogmatic problem may partly be evaded by invoking "structural" auto-limitations of the Community legal order. Yet, the internationalist solution – which would subject Community *primary* law to compliance with international law – would come at a high price: it effectively downgrades the EC Treaty to an "ordinary international treat[y]".¹²⁰ This vision may explain why the CFI – paradoxically – felt more confident to apply *international* human

¹¹⁵ *Yusuf*, paras. 266-7 (references omitted, emphasis added)

¹¹⁶ *Yusuf*, para 231: "From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty."

¹¹⁷ The CFI invokes Article 27 Vienna Convention on the Law of Treaties – prohibiting a State from invoking its internal law as a *justification* for a failure to perform a treaty. This provision cannot, however, be interpreted to codify the primacy of international law over domestic law. "[N]o rule of international law tells the subjects of international law which hierarchical status they should attribute to international law *within* their internal legal system", for "international law respects the decision as pertaining to the *domaine réservé*" (A. Peters, *supra* n.101 at 35). Compare also the discussion on direct effect above: *supra* n.20.

¹¹⁸ *Yusuf*, para.228

¹¹⁹ C. Tomuschat, *Case Note on Yusuf and Kadi*, [2006] 43 Common Market Law Review 537-551 at 541

¹²⁰ *Flaminio Costa v E.N.E.L.*, Case 6/64, [1964] E.C.R. 585, 593, by way of contrast, had proclaimed that "[b]y contrast with ordinary international treaties, the E[C] Treaty has created its own legal system".

rights law (in the form of *jus cogens*) than *Community* human rights law.¹²¹ While abdicating its function as a *Community* court, the CFI was happy to assume its function as a decentralised international court!¹²²

There is a second objection to the primacy of United Nations law as pronounced by the CFI. The traditional approach had been based on a conscious reflection of the *Community* legal order's 'middle ground' position. The European Court was neutral towards the use of a *Community* instrument by the Member States. However, once the Member States had recourse to *Community* law to implement UN economic sanctions, they would have to exercise this power in conformity with *Community* law. This approach translated the systemic middle ground position of the *Community* legal order into a normative *argumentum ad temperantiam*. The CFI judgment changes this balance on either side of the scales: the *Community* legal order would now seem to *require* the Member States to implement their UN obligations *qua* *Community* law, while it refuses to impose the traditional *quid pro quo* in the form of judicial review in the light of *Community* human rights.

This reasoning has dangerous *federal* repercussions. These result from the *Community* legal order's claim to absolute supremacy over the national law of its Member States.¹²³ As national Supreme Courts are prevented from challenging a *Community* measure in the light of their national human rights standards, the judicial abdication of the *Community* judiciary *vis-à-vis* international law will simultaneously tie the hands of the *national* judiciaries of the Member States. The CFI's refusal to review indirectly the UN Security Council Resolutions immunizes them from legal challenges in every single national legal order of the European *Community*. This will be bad news for those Member States that have not accepted the direct effect and supremacy of UN measures in their domestic legal orders.¹²⁴ Moreover, in the future, it may also be bad news for the *Community* legal order, for the lack of judicial stomach on the part of the CFI may erode the *Community* legal order's legitimacy in the national legal orders. National Supreme Courts may well decide to suspend an EC Sanctions Regulations "as long as" the *Community* legal order refuses to safeguard an adequate level of fundamental human rights.¹²⁵ *Yusuf* thus endangers the autonomy of the *Community* legal order on

¹²¹ Having refused to indirectly review the UN measure against *Community* law, the CFI found that it was nonetheless "empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible" (*Yusuf*, para.277).

¹²² For a discussion of G. Scelle's theory of *dédoublement fonctionnel*, see: A. Cassese, *Remarks on Scelle's Theory of "Role Splitting"* (*dédoublement fonctionnel*) in *International law*, [1990] 1 *European Journal of International Law*, 210-231

¹²³ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] ECR 1125

¹²⁴ For an analysis of the German, Dutch and French legal order's relationship to UN Security Council Resolutions, see: N. Lavranos, *Legal Interaction between Decisions of International Organizations and European Law* (*Europa Law*, 2004) 100-110.

¹²⁵ The famous gesture of defiance of the German Supreme Court in BVerGE 37, 271 (*Solange I*) may come to mind: "Solange der Integrationsprozeß der Gemeinschaft nicht so weit fortgeschritten ist, daß das Gemeinschaftsrecht auch einen von einem Parlament beschlossenen und in Geltung stehenden formulierten Katalog von Grundrechten enthält, der dem Grundrechtskatalog des Grundgesetzes adäquat ist, ist nach Einholung der in Art. 177 des Vertrags geforderten Entscheidung des Europäischen Gerichtshofs die Vorlage eines Gerichts der Bundesrepublik Deutschland an das

either side: it subordinates the Community legal order to United Nations law and risks a serious judicial rebellion from the national legal orders.

4. Conclusion: The Community Legal Order on 'Middle Ground'

The Community legal order is an autonomous legal order and, as such, had to define its relationship towards international law. Early on, the Community Courts chose a monist road: international norms binding on the Community will enter the Community legal order without an additional Community act introducing them into the 'domestic' legal order.

The openness of the Community system is, nonetheless, tempered by the doctrine of direct effect: only self-executing rules can be used as a source of rights or obligations and as a standard of review. The direct effect question is a 'political question' and the European Courts refuse giving direct effect to an international treaty, where doing so "would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners".¹²⁶ We encountered a similar constitutional filter in the context of international custom. While affirming the monist creed and considering international custom to "*form part of the Community legal order*",¹²⁷ the Courts have also granted the Council the power to make "manifest errors of assessment concerning the conditions for applying those rules".¹²⁸ Customary international law can, consequently, only be used as a ground for invalidating conflicting Community rules in limited circumstances.

However, to soften the consequences of a lack of direct effect, Community constitutionalism recognizes a doctrine of indirect effects, the most important element of which is the duty of consistent interpretation *pro* international law. Community legislation "must be interpreted, and its scope limited, in the light of the relevant rules of the international law" "so as to give it the greatest practical effect, within the limits of international law".¹²⁹

The Community's choice to "open up" towards the international legal order has significant federal repercussions. When the European Court of Justice pierced the dualist veil between the Community and the national legal orders in *Van Gend en Loos*, the Community's constitutional position towards international law would automatically determine the status of these norms in the Member States' legal orders. International norms thus 'incorporated' will automatically enter every single national legal order and will partake in the constitutional effects of Community law. From the perspective of

Bundesverfassungsgericht im Normenkontrollverfahren zulässig und geboten, wenn das Gericht die für es entscheidungserhebliche Vorschrift des Gemeinschaftsrechts in der vom Europäischen Gerichtshof gegebenen Auslegung für unanwendbar hält, weil und soweit sie mit einem der Grundrechte des Grundgesetzes kollidiert" (*ibid.*, 285 (emphasis added)).

¹²⁶ *Portuguese Republic v Council of the European Union*, Case C-149/96, ECR [1999] 8395, paras.46

¹²⁷ *Racke GmbH & Co. v Hauptzollamt Mainz*, Case C-162/96, [1998] E.C.R. 3655, para.46

¹²⁸ *Ibid.*, para.52

¹²⁹ *Poulsen and Diva Navigation Corp.*, Case C-286/90, [1992] ECR I-6019, paras.9 and 11

national legal orders, these international norms are communitarized. They enjoy absolute supremacy over national law. Community law, thus, not only “interpose[s] itself, in many areas, between municipal law and traditional international law”, it also “become[s] a conduit for the incorporation and application of international law in the municipal sphere”.¹³⁰

In the second part of this chapter, we investigated to what extent the Community has considered itself bound by international agreements concluded by all of its Member States. The Community legal order has recognised a doctrine of functional succession. The doctrine had been developed in the context of GATT (1947) and has recently been extended to the United Nations Charter. This is, in itself, a highly contested and contestable decision. More problematic, however, were the conclusions that the CFI drew from this judicial choice in *Yusuf*. The succession doctrine in *International Fruit* never meant that GATT law was hierarchically superior to primary Community law. The Court of Justice simply found the Community legal order materially bound by that multilateral agreement. GATT law would then share the hierarchical rank of all international agreements – that is, *below* Europe’s constitutional charter. The superiority of the EC Treaty would safeguard the autonomy of the Community legal order.

How then did the CFI justify the “primacy” of United Nations law *in the Community legal order*? The Court misinterpreted Article 103 UN Charter as mandating the supremacy of international law over Community law. The subordination of the Community under the UN Security Council may please some international lawyers; the pro-international law stance will, however, have a high price: the Community legal order would lose its autonomy and identity in a move that would contradict the very spirit of the constitutional reforms agreed at Maastricht. Had the TEU not obliged the European Union “to assert *its* identity on the international scene, in particular through the implementation of a common foreign and security policy”;¹³¹ an identity that should be “founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”?¹³²

The unconditional surrender to the supremacy of the UN Security Council may, ironically, re-open the debate on the ultimate arbiter of constitutionality in Europe.¹³³ The relationship between the Community Courts and the national Supreme Courts had been gradually settled in favour of the supremacy of Community law due to the adequate constitutional guarantees offered in exchange by the latter. Yet, “this type of primacy cannot as a matter of course be extended to the international level. No such

¹³⁰ D. Bethlehem, *International Law, European Community Law, National Law: Three Systems in Search of a Framework – Systemic Relativity in the Interaction of Law in the European Union*, in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (Kluwer Law International, 1998), 169-196, 172

¹³¹ Article 2 TEU (emphasis added). According to Article 11 (1) TEU the EU is required to “define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be”, *inter alia*, “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”.

¹³² Article 6 (1) TEU

¹³³ Cf. M. Kumm, *Who is the final arbiter of constitutionality in Europe?: three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, [1999] 36 *Common Market Law Review* 351-386

guarantees are present at the UN level. Respect for international law cannot mean that core precepts of constitutionalism are abandoned.”¹³⁴

In conclusion, ‘as long as’ the international level has not generated an equivalent standard of human rights protection, the Community legal order should be entitled to review United Nations law against its *European* constitutional standard. Apart from safeguarding the autonomy of the Community legal order, this would also follow from the Community’s precious ‘middle ground’ position. Where Member States decide under the CFSP to ‘communitarize’ these international norms, they cannot only give them the benefits of supremacy and direct effect. They must equally accept the constitutional responsibilities that come along with the EC – in particular, respect for *Community* human rights.

¹³⁴ P. Eeckhout, *Does Europe’s Constitution Stop at the Water’s Edge: Law and Policy in the EU’s External Relations*, Fifth Walter van Gerven Lecture, 25. For the (moderately) opposite view, see: C. Tomuschat, *Case Note on Yusuf and Kadi*, [2006] 43 *Common Market Law Review* 537-551: “The reader is positively impressed by the willingness of the Court to apply the same standards that govern the relationship between the Community legal order and the domestic legal orders of the Member States also to the relationship between the UN System and the Community system ... However, it should not be overlooked that already at that stage, precisely in *Internationale Handelsgesellschaft*, the existence of fundamental rights as an integral element of the Community legal order was affirmed; furthermore, there existed a full-fledged judicial procedure through which individuals who were victims of Community measures could assert rights which had already been infringed. None of that can currently be found in the UN legal system, or in any event very little. Therefore, what is at stage is not the rivalry between two legal systems each of which satisfies the legitimate needs of individuals as they are recognized ... but rather the choice between a fully developed legal system for the protection of individual rights, on the one hand, and, on the other hand, an embryonic system which is ill-equipped to deal with instances of direct individual grievances” (*ibid.*, 544) However, a little later, Tomuschat congratulates the Court for not having shied away from the responsibility by claiming that only the Member States were bound by the UN Charter: “What obviously the Court of First Instance wished to achieve was full harmony between the requirements of the UN system and the legal position within the Community system. The Court is to be congratulated for having rejected such *finesseries* and for accepting [i.e. *ius cogens*]” (*ibid.*, 545).