Allied action in Iraq in connection with Resolution 688 apart, there is little practice on which to fix, and even there, the aerial action against Iraq has not been taken on a wholly unambiguous basis.[55] Whatever the limits on the right, there has been no suggestion that the British government endorses a claim to intervene in support of democratic government.[56]

D. Conclusion

It would be trite to say that the great expectations engendered by the vision of a New World Order have been disappointed. Even the more modest hopes of the British government have not been realised, though it is right to say that the successes, such as the delivery of humanitarian aid in Bosnia, should not be discounted simply because there have been much graver failures. There could hardly be a starker demonstration of the failure of the aspirations of the New World Order than the events in Bosnia-Herzegovina but even the increasingly modest demands of the Security Council have been thwarted.[57] The experiences of UN forces in Bosnia and Somalia show how hard it is to maintain the limits of tightly defined mandates to use force for peace-keeping purposes. They confirm as well the UN's long experience that peace-keeping must be combined with peace-making if it is to be successful. Peace-keeping may not always be temporary but it is always temporising.[58] The distinction between the peace-keeping under Chapter VII and peace-enforcement, which is at the heart of British policy, may not be so easy to maintain in practice.[59] The development of UN measures is likely to be now on a case-by-case basis. Emphasis will be on technical matters, such as effective command structures, practical rules of engagement and financing, rather than grand principle. The limits, as the Foreign Secretary observes, on what the UN can do are set by the State system in which it operates: it is not a government, and, though it does have coercive powers, it depends on the co-operation of States in order to be able to exercise them. Much has changed but much has stayed the same.

COLIN WARBRICK

II. UK IMPLEMENTATION OF UN ECONOMIC SANCTIONS

AN earlier note examined the UK implementation of economic sanctions against

55. FAC, H.C.235–vi, pp.145–147. See M. Weller, "Intervention Plans Lack Specific UN Sanctions", *The Times*, 20 Aug. 1992, p.8.

56. Cf. M. Halberstam, "The Copenhagen Document: Intervention in Support of Democracy" (1993) 34 Harv. J.I.L. 163.

57. Washington Declaration, 22 May 1993: EC Copenhagen Declaration, *The Times*, 23 June 1993, p.13.

58. Sir David Hannay noted how difficult it was to determine the conditions for the successful withdrawal of a peace-keeping force, FAC, H.C.235–i, p.13. UNFICYP was established by SC Res.186 in 1964. While the Council has recently renewed UNFICYP's mandate (SC Res.839), it had earlier called the status quo "not acceptable" and emphasised the responsibility of the two communities in Cyprus to reach a solution, SC Res.831.

59. *Idem*, p.11; FAC, H.C.235–iii, p.57; FAC, H.C.235–vi, pp.140–141.

Iraq[1] and the present note updates the position as to Iraq and extends the review of UK implementation of UN sanctions to the other countries in respect of which Chapter VII measures have been imposed by the Security Council.

In the period under review the Security Council, having lifted sanctions against Kuwait after the cease-fire in 1991, has kept in place the general trade embargo and freeze of funds imposed on Iraq due to its non-compliance with the conditions set out in Resolution 687(1991) of 3 April 1991. It has imposed arms embargoes on Somalia,[2] Liberia,[3] Libya,[4] Haiti[5] and the former Republic of Yugoslavia[6] (which currently remains in force against all of the various successor States to the former Yugoslavia). In addition to these arms embargoes, it has applied a trade embargo on aircraft, their components and related services against Libya,[7] a comprehensive trade embargo and freeze of funds against Serbia and Montenegro,[8] and a freeze of funds and an embargo on the sale or supply of petroleum and petroleum products against Haiti.[9]

All of these measures have been made under Chapter VII of the UN Charter and are addressed to all States, the member States being obliged by Article 25 to apply them.[10] With the increase in decisions relating to economic measures, greater sophistication in drafting and consolidation of detailed prohibitions is apparent in the Security Council resolutions, which have built on experience gained from enforcement of the sanctions against Kuwait and Iraq.

In this note the scope of the UN resolutions will be first examined, then their implementation into English law, through EC and UK legislation and a final section will cover problems in application.

A. UN Resolutions

Early resolutions, such as those imposed against Southern Rhodesia, were phrased in general unspecific terms, and even those against Kuwait and Iraq, though more complete, required, as a result of difficulties arising from their implementation, subsequent amendment and additions. The later resolutions are much more systematic, with the drafters showing an awareness of the common components which require to be addressed. The remainder of this Section A describes these.

1. (1992) 41 I.C.L.Q. 920. The current note sets out the position as at 1 Aug. 1993.
2. SC Res.733(1992).
3. SC Res.788(1992).
4. SC Res.748(1992).
5. SC Res.840(1993).
6. SC Res.713(1991).
7. SC Res.748(1992).
8. SC Res.757(1992), 760(1992), 787(1992) and 820(1993).
9. SC Res.840(1993).
10. In addition to economic measures, other mandatory sanctions under Chapter VII to bring an end to conflict and restore peace have been made by the Security Council, as e.g. the establishment of an international tribunal for the prosecution of persons responsible for war crimes committed in the territory of former Yugoslavia (Res.808 of 22 Feb. 1993 and Res.827 of 25 May 1993), or the establishment of no-fly zones.

1. Determination of a threat to peace

A threat to or breach of international peace and security must be determined on which to base the Chapter VII mandatory powers of the Security Council. Reference is always made to the Security Council acting "under Chapter VII"; no reference is made either to Article 41 or to Article 42 of the UN Charter.

In Resolution 661(1990) of 6 August 1992 the basis of the Security Council's determination was that "the invasion by Iraq of Kuwait continues with further loss of human life and material destruction"; whilst the occupation of Kuwait necessitated extending the sanctions to the victim as well as the aggressor State. In respect of Somalia, Liberia and Yugoslavia the internal nature of the conflict led to the continuation of "heavy loss of human life and material damage" on its own being determined as a situation which "constitutes a threat to international peace and security". This determination was supported in all cases by reference to the Security Council's primary responsibility for peace-keeping, the requests for action by States and various international organisations (Islamic Conference, Arab League and OAU, in the case of Somalia), and the consequences for "the stability and peace in the region" (Somalia), "international peace and security particularly in West Africa as a whole" (Liberia) or "for the countries of the region, in particular border areas of neighbouring countries" (Serbia and Montenegro). In the Libya and Haiti resolutions the ground was more widely phrased. "The suppression of terrorism" and "the failure of Libya to demonstrate by concrete actions its renunciation of terrorism" were the basis of the determination of Resolution 748(1992) and "the fact that despite the efforts of the international community, the legitimate government of President Aristide has not been reinstated" was the basis of Resolution 841(1993) against Haiti together with "the climate of fear and persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighbouring member States".

2. Timing

Timing is either immediate (Iraq and Kuwait, Serbia and Montenegro) or suspended to a given time for the State to comply with Security Council demands (Libya, Haiti). Provision for automatic lifting on a report by the Secretary General of such compliance is also made. Regular review of the implementation and effect of sanctions is undertaken by the Security Council.

3. Scope

The scope of the restrictions to be imposed must be decided by reference to five criteria.

(a) Area. The trade embargo relates to the territory of the country concerned but the freeze on financial assets and measures relating to halting, inspection and diversion of inward and outward shipping as regards Iraq were worldwide and given no geographical limits. Greater specificity occurs in later resolutions: the Haiti ban on petroleum and petroleum products prohibits all traffic from entering "the territory or territorial sea of Haiti" and Resolution 820(1993) prohibits "all commercial maritime traffic from entering the territorial sea" of Serbia and Montenegro similarly. With the escalation of the fighting in Yugoslavia, the latter

Resolution extends the trade embargo on exports and imports and transshipment relating to Serbia and Montenegro to "UN Protected Areas in the Republic of Croatia and those areas in the Republic of Bosnia and Herzegovina under the control of the Bosnian Serbs".

(b) Subject matter. This may cover commodities, financial assets, diplomatic services, sport, scientific and cultural exchanges. The restrictions as to commodities may be (a) limited, as for arms (including police equipment) and petroleum and petroleum products (Haiti) or arms and supply of aircraft or components (Libya); or (b) general and extend to all commodities and funds (Iraq, Serbia and Montenegro).

In both the resolutions against Libya and Serbia and Montenegro States are required to reduce the level of staff at diplomatic missions and consular posts (paragraphs 6(a) and 8(a) respectively) and in respect of Serbia and Montenegro, novel measures are taken to require States to prevent the participation in sporting events representing Serbia and Montenegro and to suspend scientific and technical co-operation and cultural exchanges (paragraphs 8(b) and (c)).

(c) Type of transaction affecting the restricted items. This may be sale, supply, transhipment, transfer of funds for such transactions, activities promoting sale or supply, or non-financial services relating to such transactions (see *infra* Section E).

(d) The persons with whom dealings are prohibited. This generally extends to the government of the State named in the sanctions measures and to any persons or body in the territory of that State, but wider provisions deal with the problem of foreign branches—"any person or body for the purposes of any business carried on or operated from" Serbia and Montenegro (Resolution 757(1992)). The State, as the situation in Yugoslavia amply demonstrates, itself presents problems of definition; in Somalia absence of a recognised government leads Resolution 733(1992) to address "all parties" ("movements and factions" in Somalia in Resolution 794(1992)), and the Haiti Resolution speaks of "the government of Haiti or the de facto authorities in Haiti". Resolution 757(1992) decrees that any vessel in which a majority or controlling interest is held by a person from Serbia or Montenegro should be considered a vessel of Serbia or Montenegro regardless of the flag under which it sails.

(e) The persons to whom the measures are addressed. This generally includes all States, whether UN members or not, their nationals, whether natural or legal, and flag ships and aircraft. The taking of measures is usually envisaged at the national level but measures to halt ships are to be taken by "States, acting nationally or through regional agencies or arrangements". On occasions the Security Council has gone wider, calling on "parties", "international donors" and "international humanitarian agencies".

4. The exceptions to the restrictions

Foodstuffs and supplies intended strictly for medical or humanitarian purposes (Serbia and Montenegro) are excepted from the restrictions, provided each

transaction relating to supplies is notified or approved by the Security Council Sanctions Committee. Payments for foodstuffs or for strictly medical or humanitarian purposes are also exempted; the implementation of this exemption by the Bank of England pursuant to the Serbia and Montenegro (United Nations Sanctions) Order 1992 has been challenged in *R.* v. *HM Treasury and the Bank of England, ex parte Centro-Com.*[11] Resolution 760(1992) of 18 June 1992 extended in relation to Serbia and Montenegro the exemption to apply "with the approval of the Sanctions Committee under the simplified accelerated 'no objection' procedure to commodities and products for essential humanitarian aid". A similar type of exemption in the case of the Haiti embargo on petroleum imports is made for "cooking and verified essential humanitarian needs". Exemption for the activities of humanitarian aid agencies is also given in respect of Bosnia and Herzegovina.

5. Enforcement

Broadly, the Security Council has required States to enact national measures to give effect to the restrictions and impose appropriate penalties for violation. But at the international level the Security Council has taken additional measures to ensure effective application. First, in each case a Sanctions Committee has been established to obtain information from States as to implementation, and to grant applications for exemption, issue guidelines for compliance and report to the Security Council on violations.

Second, a ban on air flights to or from the country has been imposed. In respect of Iraq, aircraft were permitted to fly to or from Iraq provided that they were not carrying prohibited goods, subject to a special regime (Resolution 670(1990)), whereas in respect of Serbia and Montenegro there was a total ban on flights to or from the country (Resolution 757(1992)). These restrictions are to be distinguished from the imposition, for the purpose of protection of the local population, of "no-fly zones", in the case of Iraq on the basis of the "right of humanitarian intervention" and in the case of Serbia and Montenegro by Resolution 781(1992)).

Finally, shipping has been halted, inspected and diverted. The precedent of Resolution 665(1990) of 25 August 1990 authorising a naval interdiction regime in respect of inward and outward shipping from Kuwait and Iraq has been applied to Serbia and Montenegro in respect of both maritime waters and the Danube River. In respect of both sea and river, States may use force, being authorised under Chapter VII, "to take measures commensurate with the specific circumstances as may be necessary to halt" shipping in order to inspect and verify their cargoes and destinations and ensure strict compliance with the sanctions. The Resolution on Haiti imposes a prohibition on entry of the listed commodities into its territory and territorial sea but no interdiction regime.

6. Existing contracts

States are called on to act in accordance with each resolution, notwithstanding any international agreement, contract, licence or permit granted before the date

11. Judgment 6 Sep. 1993, Divisional Court (Watkins LJ, Auld J).

of the resolution. Some implementing legislation has drawn a distinction between executed and executory contracts (see *infra* Section E.4).

7. Availability of compensation for loss sustained as a result of economic sanctions

Pursuant to Article 50 of the UN Charter the Sanctions Committee is empowered to examine requests for assistance and to make recommendations to the President of the Security Council for appropriate action (some 21 States were reported to have made such requests in respect of the Iraq sanctions).[11A]

In general, however, the Security Council has made no provisions relating to recovery of loss sustained as a result of economic sanctions. Indeed in the one case where to date it has declared the defaulting State, Iraq, to be liable for loss resulting from war damage, the Compensation Commission which the Council set up to determine claims for compensation against Iraq for war damage has expressly enacted a guideline that loss consequent upon the economic embargo pursuant to Resolution 661(1990) and related resolutions is not recoverable under the UN compensation procedure (Decision of Council of UN Compensation Commission, 2 August 1991). Further, in both the sanctions resolutions relating to Kuwait and Iraq (687(1991)) and to Serbia and Montenegro (757(1992)) the Security Council has required States to take the necessary measures to ensure that no claim shall be brought on behalf of the defaulting State or person within its territory for loss as a result of non-performance of a contract or transaction by reason of the measures imposed by the UN sanctions resolutions. EC Regulation 3541/1992 for Iraq (that for Serbia and Montenegro is still in draft) gives effect to this UN provision so far as the laws of EC member States, including the United Kingdom, are concerned.

In one further respect in the case of Iraq, the Security Council has intruded a provision into national laws. It was expected that, after cease-fire and once sanctions were lifted, Iraq would resume its oil exports at the pre-war level. To enable compensation to be awarded against Iraq the Security Council established a fund into which not more than 30 per cent of the proceeds of such exports were to be paid (Resolutions 687(1991) of 3 April 1991, 692(1991) of 20 May 1991 and 705(1991) of 15 August 1991). Various mechanisms were adopted to facilitate payments into the fund though, to date, due to Iraq's refusal to co-operate these have had little success. First, to ensure that the fund would obtain the benefit of any Iraqi oil exports, Resolution 712(1991) of 19 September 1991 decided that petroleum or petroleum products subject to Resolution 706(1991), while under Iraqi title, should be immune from legal proceedings and not subject to attachment, and that the UN escrow account and the fund should enjoy the privileges and immunities of UN status. Second, the ban of Iraqi oil exports was lifted for six months by Resolution 706(1991) of 15 August 1991 to enable the export of Iraqi petroleum and petroleum products up to US$1.6 billion but to date Iraq has refused to consent to any export of oil.

Iraq had, however, continued to export oil from both Iraq and Kuwait after its invasion of Kuwait on 2 August. Third, then, as a measure to provide some temporary funds repayable when the Compensation Fund was operating as intended, the Security Council adopted Resolution 778(1992) of 2 October 1992.

11A. Res.669(1991) (Iraq) and Res.843(1993) (Serbia and Montenegro).

This Resolution required the transfer of all proceeds from sale of Iraqi oil, paid after 6 August 1990, into the UN escrow account; a ceiling was fixed of $200 million or 50 per cent of total funds transferred by each State and funds already released or subject to rights of third parties were exempt from the transfer requirement. Although the resolutions appear to have been implemented by States (for the United Kingdom see the Sequestration of Assets Order 1993, below) replies from 62 countries to a questionnaire of the UN Secretary General indicated there to be few funds available for transfer, the majority of the oil proceeds being held in Japan ($48.88 million) and the United States ($637 million) and subject to third-party rights. As of 28 May 1993 a total of $24 million had been received into the escrow account, half of this being a transfer of frozen assets from the United States and voluntary contributions from Saudi Arabia and Kuwait amounting to $10.5 million and from Japan ($1.5 million).[12]

B. EC Legislation

The application of economic sanctions by the EC gives rise to some fundamental issues of principle. First, if one adopts a more widely defined concept of "economic sanctions", the EC being an economic community has powers of "sanction" additional to those of the UN, in that if a third State has trade privileges or other benefits in its dealings with the EC, then such beneficial arrangements may be withdrawn. They may be withdrawn, provided agreement can be reached within the EC, to induce the compliance of the third State, based on a purely EC initiative, subject to the limitations of the general law of treaties and State responsibility.[13] Alternatively, the EC has shown an increasing willingness to implement mandatory sanctions of the UN, though in the past this has caused some degree of constitutional controversy. This has focused on questions of what the proper role of the EC should be in relation to sanctions, that is to say, should it, at most, be merely a co-ordinating body for national measures taken by its member States when they implement UN sanctions, or should it, itself, though not a party to the UN Charter implement sanctions by EC legislative measures. In this event a second question arises: what is the basis in Community law for the adoption of such measures?

1. Constitutional basis

Clearly, if sanctions are to be effective they will affect trade in the member States of the EC and will therefore affect trade within the Community. States may take national measures to comply with UN sanctions obligations but must consult the other member States. Article 224 of the Treaty of Rome requires that if national measures are to be taken to implement sanctions they should be taken after consultation with the other member States, though in an emergency the national measures may be taken before consultation provided that consultation follows.[14] European Political Co-operation provides the means of such consultation. Whilst reliance solely on Article 224 provides a means for national measures

12. Information supplied by the FCO, 19 July 1993.

13. See the measures in relation to Yugoslavia *infra*, text accompanying nn.21–25.

14. See Treaty of Rome, Art.224: "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

to be taken by the member States on essentially an individual basis, lack of uniformity is likely to result. Although initially this does not seem to have been of concern to the EC, a growth in the EC competence to take its own measures may be observed. In relation to the sanctions against Rhodesia it appeared that the Community considered that it had neither the competence nor indeed any responsibility for implementing Security Council decisions.[15] Article 113, concerning the common commercial policy, was rejected by the Council as a basis for implementing Security Council sanctions, because "although they apply to the commercial field, the measures decided by the United Nations Security Council ... were taken for the purpose of maintaining peace and international security and therefore do not fall within the scope of Article 113".[16]

More recently, however, the EC appears to have had less resort to Article 224 and relied increasingly on a wider interpretation of Article 113, which (a matter of some relevance in rapid decision-making) enables measures to be adopted by a qualified majority. During the Falklands crisis British measures taken immediately in response to the Argentine invasion, but without a Security Council decision under Chapter VII, were discussed by the other members pursuant to Article 224 and subsequently the Council adopted Council Regulation (EEC) 877/82, which cites Article 113 as its authority.[17] The practice since that time is reasonably consistent in that the Council regulations implementing UN sanctions in respect of Iraq, Libya, Serbia and Montenegro and Haiti all cite Article 113 as their Treaty basis, and there appears to have been no formal challenge to them.

In addition, Article 235 allows the Council, after consultation with the European Parliament, to take measures where the necessary powers are not provided for in the Treaty, though again these are limited to the operation of the common market. Council Regulation (EEC) 3541/92, "prohibiting the satisfying of Iraqi claims with regard to contracts and transactions the performance of which was affected by the UN Security Council Resolution 661(1991)", cites as its Treaty authority Article 235 as well as European Political Co-operation and Resolution 687(1991).[18]

Whilst the constitutional basis for EC implementation of sanctions may be the subject of debate,[19] this method of implementation—although incomplete—has considerable benefits. Provided agreement can be reached among the member States, the Council's legislative process in relation to regulations is swift and regulations are of course directly effective from the date of their publication in the *Official Journal*. The uniformity provided by an EC-wide measure goes some way

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."

15. See the answer to written question No.526/75 by Mr Patijn to the Council of EC dated 17 Mar. (1976) O.J. C89/6 (16 Apr.).

16. *Ibid.*

17. See (1982) O.J. L102/1 (16 Apr.). Art.224 was also invoked later in the crisis when Denmark no longer applied the Community legislation but instead applied equivalent national measures: see parliamentary answer quoted in (1982) 53 B.Y.I.L. 518.

18. See (1992) O.J. L361/1 (10 Dec.). In respect of Serbia and Montenegro a proposal for a regulation has been published: see (1993) O.J. C187/12 (9 July).

19. For a recent review of the literature and discussion of this topic see P. Sturma, "La Participation de la Communauté européenne à des 'Sanctions' internationales" (1993) 366 Revue du Marché commun et de l'Union européenne 250. See also *ex parte Centro-Com.*

to simplifying the questions of co-ordination of national measures and competing jurisdictions. For example, whilst a London branch of a US conglomerate may have to study two sets of national implementing legislation, a London branch of a French organisation, both as to the branch and central office activity, will be subject to the same EC regulation. Similarly, a plea of frustration or *force majeure* raised in England or France to excuse non-performance of a contract with an Iraqi enterprise, by non-Iraqi contractors, will be determined by the same regulation.[20]

At the same time, however, it should be remembered that, because of the limited competence of the EC, its measures for implementing Security Council resolutions will be incomplete since the enforcement and penalties for breach of sanctions must be provided for by national measures, there being no EC powers of enforcement via the criminal law. Further, activities such as scientific and technical co-operation, cultural exchanges, participation in sport and reduction in diplomatic missions and consular posts do not fall within the EC's competence. Particularly important, here, is the limitation of the EC's competence in relation to the movement of capital between member States and third countries. In this respect Article 70 of the Treaty of Rome does not provide for a common policy but for the co-ordination of national policies. Thus there is no EC legislation relating to a freeze on financial assets or other limitations on financial services, there being no EC competence.[21]

2. *Scope of EC legislation*

The regulations themselves are notable for their brevity in comparison with the UK measures, which also have to contain detailed provisions on enforcement. They also show some profit from the experience of the imposition of sanctions against Iraq and Kuwait. The sanctions against both Libya and Haiti, both limited sanctions regimes in the transactions they cover, are each contained in a single document.[22] The regulation in respect of Haiti imposes the oil embargo in accordance with Resolution 841(1993), but does not impose the financial assets freeze on the government for the reason given above. This seems to indicate the comparative simplicity of dealing with one area of trade or economic relations which the EC carries on with a single country on a comparatively small scale.

In relation to Yugoslavia a much more complicated picture emerges. First, the EC had already taken some action on its own initiative having suspended the Co-operation Agreement between the EC and Yugoslavia[23] and having withdrawn Yugoslavia from the lists of beneficiaries of the Community generalised

20. I.e. Council Reg.(EEC)3541/92; see *supra* n.18.

21. In this respect see Smit and Herzog, *Commentary on the EEC Treaty*, Vol.2, paras.70.005–70.006: and Megret's *Commentaire, Le Droit de la CEE, Commentaire du Traité et des Textes pris pour son Application*, Vol.3, pp.165–184. Articles 228(a) and 73(g) introduced by the Maastricht Treaty are intended to remedy the constitutional deficiencies, with Article 73(g) enabling Member States to take unilateral financial measures "for serious political reasons and on grounds of urgency", provided that the Community has not taken such measures. See also *ex parte Centro-Com*.

22. See Council Reg.(EEC)945/92 (1992) O.J. L101/53 (15 Apr.) in respect of Libya; and (EEC)1608/92 (1993) O.J. L155/2 (26 June).

23. The Co-operation Agreement is contained in Council Reg.(EEC)288/82 (1983) O.J. L41/1 (14 Feb.); its suspension is contained in Council Reg.(EEC)3300/91 (1991) O.J. L315/1 (15 Nov.). This Regulation is interesting in that it appears to suggest the agreement

tariff preferences scheme.[24] These measures were taken following a meeting within the framework of European Political Co-operation, in response to the failure of the parties to comply with the cease-fire agreement reached at the EC-sponsored Hague Conference on 4 October 1991.[25] However, these benefits were subsequently restored to all of the other former Yugoslav republics save Serbia,[26] though in implementing the UN sanctions later these benefits were effectively removed again from Montenegro.[27]

Since that time the EC has continued to play a major role in the peace process, but the application of economic sanctions has been at the initiative of the UN Security Council. Following the adoption of Resolution 757(1992), Council Regulation (EEC) 1432/92 was made. This regulation prohibited the import into the EC from Serbia and Montenegro and the export from the EC to Serbia and Montenegro of all commodities and products and any transactions whose object or effect is to promote directly or indirectly such imports or exports. Additionally, it prohibits non-financial services whose object or effect is directly or indirectly to promote the economy of Serbia and Montenegro. Resolution 757(1992) does not impose sanctions on non-financial services, but it would appear that it was included in the EC Regulation to anticipate the problems which had arisen in respect of the non-inclusion of services in the Security Council's resolutions in respect of Iraq. The Regulation covers the provision of services for the purpose of any economic activity[28] carried out in or from Serbia and Montenegro or to any Serbian or Montenegran person, natural and juridical, or any other organisation exercising an economic activity controlled by such Serbian or Montenegran persons. When Regulation 1432/92 was consolidated by Council Regulation 990/93,[29] exceptions allowing "telecommunications, postal services and legal services consistent with [the] regulation" were made. The exceptions to these prohibitions not surprisingly include humanitarian supplies, and other goods provided they were exported before 31 May 1992. Also, transshipment of goods through Serbia and Montenegro was initially exempted in accordance with Resolution 757(1992), though this exception was later restricted and all but removed entirely in accordance with Resolutions 787(1992) and

could be suspended for reasons of *rebus sic stantibus*; its preamble contains the words "the pursuit of hostilities and their consequences on economic and trade relations . . . constitute a radical change in the conditions under which the Cooperation Agreement . . . and its Protocols . . . were concluded".

24. Council Reg.(EEC)3302/91 (1991) O.J. L315/46 (15 Nov.). For other measures including decisions of the ECSC see *idem*, pp.47–50.

25. For a full description of EC action at the political and legal level at this stage see C. Lucron, "L'Europe devant la crise yugoslave: mesures restrictives et mesures positives" (1992) 354 Revue du Marché commun et de L'Union européenne 7.

26. See Council Reg.(EEC)3567/91 (1991) O.J. L342/1 (12 Dec.) and (EEC)545/92 (1992) O.J. L63/1 (7 Mar.).

27. See Council Reg.(EEC)1432/92 (1992) O.J. L151/4 (3 June).

28. It is interesting to note that the question of services was not dealt with by the Security Council until Res.820(1993), and therefore in this respect the EC measure goes further than Res.757(1992). In Reg.1432/92 air transport to and from Serbia and Montenegro is prohibited, save where approved for humanitarian or other purposes allowed under the Security Council resolutions. This Reg., as has been said, cites Art.113 of the EEC Treaty as its authority, whereas Art.70 would appear to be a more appropriate basis for taking transportation measures.

29. (1993) O.J. L102/14 (28 Apr.).

820(1993).[30] An additional exception includes activities related to UNPROFOR, to the Conference on Yugoslavia and the EC Monitor Mission. Like the national measures, jurisdiction under this Regulation is taken on the bases both of territoriality, throughout the territory of the Community, and of nationality, over nationals of a member State and bodies incorporated or constituted under the law of a member State.

Additional prohibitions contained in Resolution 820(1993), and implemented in Regulation 990/93, concern the import of all commodities and products into the EC from the UN Protected Areas in Croatia and the territory in Bosnia-Herzegovina controlled by Bosnian Serb forces; the export of all commodities and products to such territories and their transportation through those territories is also prohibited. However, there is an exception for such activities where they are properly authorised by the Bosnian and Croatian governments.

As has been said, for the most part enforcement measures are left to the member States to determine. Regulation 990/93 (implementing Resolution 820 (1993)) provides for the impounding of Serbian and Montenegran vessels, freight vehicles, rolling stock and aircraft by the competent authorities of the member States. Further, it provides that the member States may detain vessels, freight vehicles, rolling stock, aircraft and cargoes suspected of violating the embargo, pending investigation. A violation of the embargo includes "entry into the territorial sea of Serbia and Montenegro by all commercial traffic" and would therefore seem to authorise the detention by force if necessary of ships of nationals of third States, not EC member States, which are suspected of violating the embargo. Whilst the penalties for infringement of the sanctions are left to the member States, the Regulation provides for the forfeiture of vessels, freight vehicles, rolling stock, aircraft and cargoes, whether Serbian or Montenegrin or belonging to third States' nationals, by the member States where violations of the embargo are ascertained.

C. UK Legislation

1. The primary legislation

As with the sanctions imposed against Iraq and Kuwait, the UK practice in the

30. See Council Reg.(EEC)3534/92 (1992) O.J. L358/16 (8 Dec.), consolidated with much restricted provisions in Council Reg.990/93 (1993) O.J. L102/14 (28 Apr.). Reg.990/93 also repeals Council Reg.(EEC)2655/92 (1992) O.J. L266/26 (12 Sept.), Council Reg.(EEC)2656/92, *idem*, p.27. The former sought to prevent diversion of goods being transported through Serbia and Montenegro by not allowing the TIR procedures to apply to such consignments. The latter introduced a system of prior authorisation for the export of goods to Bosnia, Croatia and Macedonia, to be issued by the competent authorities of the member States on the condition that an import licence had been obtained from authorities in Bosnia, Croatia and Macedonia and a guarantee that those authorities would confirm the arrival of the goods. This system was supervised by an EC committee composed of representatives of member States and the Commission and monthly returns of total exports authorised by each member State were required. This system of prior authorisation was later discontinued in respect of Croatia and Macedonia, where it was felt that the Sanctions Assistance Missions (established under the auspices of the CSCE) enabled the authorities of those two republics to prevent the possibility of diversions of goods to Serbia and Montenegro.

implementation of subsequent sanctions regimes has been to pass secondary legislation under three enabling statutes: the Import, Export and Customs Powers (Defence) Act 1939, the Emergency Laws (Re-enactments and Repeals) Act 1964 and the United Nations Act 1946. The powers to make delegated legislation contained in the 1939 and 1964 Acts, which were originally intended to be defence and emergency powers, have previously been employed in the goods embargo and freeze of assets imposed on Argentina at the time of the Falklands conflict.[31] The triggering event required under these statutes before the powers of delegated legislation may be exercised by the relevant minister or department is worthy of attention. Despite its enactment on 1 September 1939 and the references in its short title to "Defence" and in its long title to "trading with the enemy", the 1939 Act gives broad discretionary powers to the Board of Trade to make by order "such provisions as the Board may think expedient"[32] for the regulation of the import, export or transhipment of goods.

The triggering event under the Emergency Laws (Re-enactments and Repeals) Act 1964 is more stringent, providing that the Treasury may make directions prohibiting wholly or in part dealings with the government of any country, where "the Treasury are satisfied that action to the detriment of the economic position of the United Kingdom is being or is likely to be taken by the government of, or persons resident in [that] country".[33] In the Falklands conflict and after Iraq's invasion of Kuwait the detriment to the United Kingdom was likely; however, in respect of the conflict in the former Yugoslavia, it seems more questionable whether such economic detriment was likely, and consequently justified the making of directions by the Treasury.[34]

The United Nations Act 1946 provides that:

> If, under Article 41 of the Charter of the United Nations . . . (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of the Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied.

As has been already stated, none of the relevant Security Council decisions makes any mention of Article 41, though it may be arguable that the words in parenthesis may moderate too literal a construction of the requirement of an Article 41

31. See Control of Gold, Securities, Payments and Credits (Argentine Republic) Directions 1982 (S.I. 1982 No.512) made under the Emergency Laws (Re-enactments and Repeals Act) 1964, and the amendments to the open general licences for imports and exports under the Import of Goods (Control) Order 1954 and the Export of Goods (Control) Order 1981 (made on 6 and 3 Apr. 1982 respectively), both of which were made in exercise of the enabling powers in the Import, Export and Customs Powers (Defence) Act 1939.

32. See s.1.

33. See s.2(1).

34. It should be noted that the directions made under the 1964 Act were fairly swiftly superseded by the Serbia and Montenegro (United Nations Sanctions) Order 1992 (S.I. 1992 No.1302); see Bank of England Notice, 8 June 1992.

decision. In any event each of the sanctions Orders and the Order for sequestration of Iraqi assets begins with the words:[35]

> Whereas under Article 41 of the Charter of the United Nations the Security Council of the United Nations have, by a resolution adopted on [date], called upon Her Majesty's Government in the United Kingdom and all other States to apply certain measures to give effect to a decision of that Council in relation to [country].

In implementing the sanctions resolutions the United Kingdom has used the United Nations Act in respect of the sanctions against Libya, Haiti and Serbia and Montenegro (though in respect of the latter, as has been said, an asset freeze was initially imposed by Treasury directions under the 1939 Act). The arms embargoes in respect of Yugoslavia and Somalia were initially implemented by the Department of Trade and Industry, revoking and modifying the licensing system established under the 1939 Act, but subsequently the U.N. Arms Embargoes (Liberia, Somalia and the Former Yugoslavia) Order 1993, has been made under the 1946 Act. The oil embargo against Haiti had initially been enacted by the Secretary of State for Trade and Industry by an Order under the 1939 Act.[36]

A question was raised as to the proper exercise of these powers to make delegated legislation in the case of *Wahda Bank* v. *Arab Bank plc*,[37] in which it was suggested by counsel, though not argued in full, that in so far as the Libya (United Nations Sanctions) Order 1992 went beyond the measures of Resolution 748(1992), by prohibiting dealings which were not necessary or expedient for giving effect to that Resolution, it would be *ultra vires*. Phillips J, in deciding as a preliminary issue the question of the applicability of the Order to the case, referred to the UN resolutions as an aid to interpretation. However, in so far as he considered the question of *ultra vires* the judge saw "no reason to question" the legality of the Order.

2. *Secondary legislation*

Some of the sanctions regimes imposed by the Security Council have effect forthwith, for example those relating to Iraq and Kuwait and to Serbia and Montenegro, whereas the resolutions relating to Libya and Haiti provided that the sanctions were to come into force if the State at which they were directed had not complied with Security Council demands by a given time in the future. In relation to the sanctions against Libya, the delay of just over two weeks after the passing of Resolution 748(1992) and the date on which it stipulated that sanctions were to take effect, enabled detailed Orders in Council under the United Nations Act 1946 to be prepared and to come into effect on 15 April 1992,[38] as specified in the Resolution. The week provided for in Resolution 841(1993) before the imposition of sanctions against Haiti appears not to have been quite sufficient,

35. If the 1946 Act is used for the implementation of the Security Council decision to establish an international tribunal for the prosecution of war crimes in the former Yugoslavia this would certainly be an extension of the enabling powers of the Act into new territory and may raise the question of *ultra vires*.

36. The Export of Goods (Control) (Haiti) Order 1993, S.I. 1993 No.1677.

37. *The Times*, 16 Dec. 1992; for further discussion see *infra* Section E.

38. See S.I. 1992 Nos.973 and 975.

though the legislation imposing the oil embargo[39] came into force on 26 June 1993, three days after the date specified by the Resolution, and the assets freeze was implemented only on 27 July 1993.[40]

The sanctions imposed on Serbia and Montenegro were to take effect immediately on the passing of Resolution 757(1992) on 30 May 1992. The United Kingdom, adopting similar emergency procedures to those which it had adopted to implement sanctions against Iraq and Kuwait,[41] was able to take initial action to implement the sanctions on 31 May 1992 (which was, after all, a Sunday). Initially, the assets freeze and suspension of all financial dealings with Serbia and Montenegro were effected by the Treasury in the Control of Gold, Securities, Payments and Credits (Serbia and Montenegro) Directions 1992, passed under the Emergency Laws (Re-enactments and Repeals) Act 1964 and made on 31 May, coming into effect at 00.01 hours BST on 1 June 1992.[42] A rudimentary trade embargo was imposed in relation to exports by the making of the Export of Goods (Control) (Serbia and Montenegro Sanctions) Order 1992 with immediate effect from 11.30 a.m. on 31 May 1992. Its effect was to prohibit the export of all goods from the United Kingdom directly or indirectly to any destination in Serbia and Montenegro, and any pre-existing licences granted by the Secretary of State were subject to this prohibition. There was, however, provision for exceptions to the prohibition to be made by way of individual licence under this Order. In relation to imports, using his powers derived from the 1939 Act, the Secretary of State amended the open general licence on 31 May 1992 to exclude the importation of goods from Serbia and Montenegro.[43] Further, pre-existing individual import licences were modified to exclude the importation of goods from Serbia and Montenegro after the deadline of 11.30 a.m. on 31 May 1992.[44] However, provided that it could be shown "by satisfactory evidence (e.g. bill of lading)" that goods were in transit at the time of the deadline, importers could apply for a licence for the importation of such goods. Thus, as had happened with the sanctions against Iraq and Kuwait, the exercise of emergency powers by the Treasury and the DTI enabled almost immediate effect to be given to the Security Council's decision, though these measures were later revoked having been superseded by the more detailed Orders in Council made under the United Nations Act 1946.

The 1939 Act powers have been used recently in the implementation of Resolution 820(1993) in respect of the prohibition of the export of all commodities and products to the UN Protected Areas in Croatia and the territory of Bosnia which is held by the Bosnian Serb forces.[45] In respect of imports from those areas an

39. I.e. the Export of Goods (Control) (Haiti) Order 1993, and Council Reg. (EEC)1608/93 (1993) O.J. L155/2 (26 June).

40. I.e. the Haiti (UN Sanctions) Order 1993, S.I. 1993 No.1677, but see S.C. Res.861 (1993) of 27 Aug. 1993.

41. See D. L. Bethlehem, *The Kuwait Crisis Sanctions and their Economic Consequences Part I* (Cambridge International Documents Series, Vol.2, 1991), pp.327–341.

42. More detailed explanation of how this order was to be applied was provided in the Bank of England Press Notice, 1 June 1992.

43. See Amendment No.73 to the Open General Import Licence.

44. See DTI Notice to Importers 2349: Import Sanctions against Serbia and Montenegro, published in *Lloyd's List International*, 4 June 1992.

45. The Export of Goods (Control) (Croatian and Bosnian Territories) Order 1993, S.I. 1993 No.1189.

amendment to the open general licence implements the prohibition.[46] A further order prohibits transportation by land in or through those areas.

3. *Orders under the United Nations Act*

The sanctions imposed on Libya, Haiti and Serbia and Montenegro have been implemented in their fullest form by Orders in Council made under the United Nations Act 1946. Interestingly, an Order in Council made under the Act must be "laid before Parliament forthwith after it is made",[47] but Parliament does not appear to have power to amend such Orders.[48] The Act not only provides enabling powers to take a broad range of measures in terms of the types of transactions which may be covered, but also enables measures to be taken with a wider geographic scope than the emergency powers,[49] since they may also be used to make orders extending to the Isle of Man, the Channel Islands and the UK dependent territories.[50] This Act was used in respect of the sanctions against Iraq and Kuwait and, given that both those sanctions and the sanctions imposed against Serbia and Montenegro aim at a comprehensive trade embargo and financial assets freeze, it is not surprising that there are considerable similarities between the two sets of Orders in Council. The Serbia and Montenegro (United Nations Sanctions) Order 1992 was made on 4 June 1992 to come into effect at 00.01 hours BST the following day. It was intended that this Order should not only supersede the measures described above taken under the 1939 Act,[51] but also (unlike the Iraq and Kuwait (United Nations Sanctions) Order 1990) the Treasury

46. Amendment No.96 to the Open General Import Licence, coming into force 26 Apr. 1993 (made by the Secretary of State in exercise of his powers under Arts.2 and 5 of the Import of Goods (Control) Order 1954, which was made under the Import, Export and Customs Powers (Defence) Act 1939).

47. S.1(4), United Nations Act 1946.

48. During the passage of the Act the Minister of State steering it through the Commons, Mr Noel-Baker, made the following comment: "the Orders must be laid. That does not mean that Parliament has the power to revoke or amend the Orders, but it does mean that it can see in detail what are the measures proposed, and hon. Members can ask and have a discussion on the matter, and make certain that the order really carries out what is intended" *Hansard* H.C., col.1524, 15 Apr. 1946.

49. I.e. the powers under the Import, Export and Customs Powers (Defence) Act 1939 and the Emergency Laws (Re-enactments and Repeals) Act 1964.

50. See S.I. 1992 Nos.976 and 977, extending the sanctions against Libya to the Dependent Territories and the Channel Islands, and S.I. 1992 No.974 extending the prohibition of flights to the Dependent Territories (the Order covering the rest of the UK in respect of flights covered the Channel Islands and the Isle of Man). In respect of Serbia and Montenegro S.I. 1993 Nos.1303 and 1308 extend the sanctions orders to the Dependent Territories and the Channel Islands, and S.I. 1992 No.1305 extends the prohibition on flights to the Dependent Territories; these were supplemented following the adoption of SC Res.820 by S.I. 1993 Nos.1195, 1253 and 1254 in respect of the Dependent Territories, the Channel Islands and the Isle of Man, respectively. The sequestration of Iraqi assets is provided for in respect of the Dependent Territories in S.I. 1993 No.1245. The Dependent Territories to which these Orders apply: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Gibraltar, Hong Kong, Montserrat, Pitcairn, St Helena and its dependencies, sovereign base areas of Akrotiri and Dhekalia, Turks and Caicos and the Virgin Islands.

51. See the Export of Goods (Control) (Serbia and Montenegro Sanctions) (Revocation) Order 1992, S.I. 1992 No.1419 (made 11 June).

directions made under the 1964 Act.[52] Thus the Order contains additional provisions in respect of financial assets and services over and above the types of activities prohibited by the Iraq and Kuwait (United Nations Sanctions) Order 1990, which thus enabled all the legal implementation measures of Resolution 757(1992) for the territory of the United Kingdom and the Isle of Man to be contained in a single document.[53]

In its substantive prohibitions on trade, the Serbia and Montenegro (UN Sanctions) Order 1992 demonstrates the benefits gained from the experience of sanctions against both Iraq and Kuwait and, to a lesser extent, Libya. As with the Iraq sanctions order, the prohibition on the supply of goods to Serbia and Montenegro includes (i) the supply or delivery of goods to, or to the order of, any person connected with Serbia and Montenegro, (ii) any agreement to do so, and (iii) any act calculated to promote any such supply or delivery. However, exceptions are provided for such activities where a licence has been obtained from the Secretary of State.[54] Whereas to achieve a comprehensive embargo on exportation from Iraq and Kuwait, the initial sanctions order had to be amended by a later order to include certain additional types of dealings and processing of goods exported from these countries, in the case of Serbia and Montenegro these additional types of activities were covered from the start. The prohibition covers goods exported from Serbia and Montenegro after 30 May 1992 and includes the following activities where carried out by way of trade or otherwise for profit: (i) the acquisition or disposal of such goods, or any property or interest in them or any right to charge upon them; (ii) any processing of such goods; and (iii) any act calculated to promote such dealings or processing by the person himself or by any other person. Again, exceptionally, the Secretary of State may grant a licence for such activities.

In relation to the Iraq sanctions it was necessary to include in a later amendment a prohibition of payments under bonds whereas the Serbia and Montenegro (UN Sanctions) Order 1992 included such a provision from the outset. Further, in respect of Serbia and Montenegro, the 1992 Order, following the greater detail contained in Resolution 757(1992), also prohibits the maintenance servicing and insurance of Serbian and Montenegrin aircraft. A prohibition on flights to or from Serbia and Montenegro (including a ban on the overflight of UK territory if it is bound for or has taken off from Serbia and Montenegro) is

52. Control of Gold Securities, Payments and Credits (Serbia and Montenegro) (Revocation) Order 1992. The application of the provisions of the Serbia and Montenegro (UN Sanctions) Order 1992 concerning financial assets, is explained in the Bank of England Notice of 8 June 1992 to which there are two Supplements of 26 June 1992 and 26 Apr. 1993 respectively.

53. It also solved the potential problem adverted to above, that since directions can be made under the 1964 Act only where there is a likelihood of economic detriment to the UK, it might be questionable whether there was any likelihood of such detriment from Serbia and Montenegro. Of course a further Order in Council, the Serbia and Montenegro (UN Sanctions) Order 1993, was made to give effect to SC Res.820(1993)—see *infra*.

54. In a written parliamentary answer a Minister of State at the DTI stated that in the first year since sanctions were imposed the DTI had granted 762 import licences for goods from the former Yugoslavia, of which 210 related to imports from Serbia and Montenegro, mainly covering small personal items. *Hansard* H.C., col.207, 6 May 1993.

contained in a separate order, the Serbia and Montenegro (UN Prohibition on Flights) Order 1992.

As with the Iraq sanctions, the Serbia and Montenegro (UN Sanctions) Order provides that it shall be a criminal offence to commit any of the prohibited activities listed above or to use any ship, aircraft or other vehicle for carriage of goods to or from Serbia or Montenegro except under licence. These offences (and the offences in relation to violations of the assets freeze or prohibition on aircraft servicing and insurance and the prohibition on payments under bonds) are triable either way but the maximum sentence on trial on indictment is seven years, whereas in respect of Iraq it was five years. However, as with the Iraq sanctions order, a defence is provided by which the accused must prove that he had no knowledge or that he had no reason to suppose that the goods he carried or otherwise dealt with were embargoed.

Also at the level of enforcement the Serbia and Montenegro (UN Sanctions) Order 1992 is considerably more detailed than the Iraq sanctions order. A number of additional offences are provided for (for example, making false statements in relation to licence applications or to investigating officers) and broader customs powers of investigation are specified, for example including the power to demand evidence of the destination which goods reach. Further details of legal procedure for prosecutions are also elaborated.

However, even stronger powers of enforcement are granted to "authorised" investigating officers under the Serbia and Montenegro (United Nations Sanctions) Order 1993 ("the 1993 Order"). The 1993 Order was made following the adoption of Resolution 820(1993), and shows, in places, a rather different approach to implementation from that of the previous orders. The 1993 Order introduces certain prohibitions including the provision of "any services (except telecommunications and postal services) to any person or body for the purposes of any business carried on in Serbia and Montenegro, except under a licence granted by the Secretary of State". Also prohibited is the entry into the territorial sea of Montenegro by any ship being used for commercial purposes and either registered in the United Kingdom or majority owned by a UK citizen or body corporate. Similar penalties and legal proceedings for breach are provided as under the 1992 Order.

In accordance with Resolution 820 the enforcement provisions are the strongest provided for in any of the sanctions regimes considered here.[55] The enforcing authorities are empowered to impound vessels, aircraft and vehicles "either majority owned or effectively controlled by any person connected with Serbia and Montenegro". Powers of investigation by authorised officers are provided for where they reasonably suspect that the vessel, aircraft or vehicle has been or is being operated "in violation of the United Nations resolutions". For the purposes of defining "violation of the UN sanctions" parts of Resolutions 757, 760 and 820 are scheduled to the Order; thus, for the first time, the Security Council resolutions (or, at least, parts of them) are themselves incorporated into UK law and to that extent may be judicially construed and interpreted. Further, the authorised officer may request ships to halt, to remain in port or to divert to

55. Similar provisions appear in Council Reg.(EEC)990/93—see *supra*.

another place and may authorise such steps, including the use of reasonable force, as he considers necessary to secure compliance. Similar powers to board and detain aircraft and land vehicles are also provided. Where such a request has been made of ships or such detention is made of aircraft or land vehicles and the Secretary of State determines that they have been operated in violation of the UN resolutions, then the ship, aircraft or vehicle in question may be impounded. The Secretary of State's determination may be made by a certificate, the issue of which shall be "conclusive evidence of that matter".

An impounded vessel or vehicle or its cargo or both may be forfeited by the Secretary of State and sold for the best available price that can be obtained. After deduction of expenses of forfeiture, sale, impounding or VAT due on import, the proceeds of sale are to be paid into the Consolidated Fund. Innocent third parties, i.e. persons whose interests in the vessel or vehicle have been divested by reason of the forfeiture and sale and who the Secretary of State considers were not party or privy to a violation of the UN resolutions, may also be entitled to payment out of the proceeds.

Given the draconian nature of these powers of the Secretary of State, the procedure for making certificates or orders of forfeiture is clearly defined, though the rights of affected persons appear to be restricted to the very minimum levels required by natural justice, and there is no automatic right to determination of the issue by an independent third party or judge. Before making a determination of violation of the UN resolutions or order of forfeiture, the Secretary of State must serve written notice of his intention to do so on the owner of the ship or goods vehicle, or the owner or operator of the aircraft. The notice will invite its addressee to make representations within a given period, not less than 21 days from the date of the notice, and if that person so requests then he shall be given a hearing by the Secretary of State. At the same time the Secretary of State shall publish a notice in the London, Edinburgh and Belfast *Gazettes* inviting persons claiming an interest in the vessel or vehicle or the cargo to make written representations, or if he so requests he shall be given a hearing by the Secretary of State. The owner of a ship or vehicle or the owner or operator of an aircraft may institute proceedings to set aside an order of forfeiture, on the grounds that the conditions for forfeiture set out in the Order have not been met.

4. *The sequestration of Iraqi assets*

The Iraq (United Nations) (Sequestration of Assets) Order 1993, made under the enabling Act, the United Nations Act 1946, implements Resolution 778(1992) of 2 December 1992 for the transfer of Iraqi oil exports or their proceeds to the UN escrow account, set up under Resolutions 706(1991) and 712(1991) for the purpose, *inter alia*, of establishing a fund out of which compensation for war damage caused by Iraq could be obtained. The transfer is not an outright requisition in that retransfer is contemplated in the event of Iraq's compliance with UN requirements. The Order empowers the Treasury to require UK banks and deposit holders to remit to the UN escrow account funds to which the Iraqi government is entitled, derived from "the sale of Iraqi petroleum or petroleum products paid for after 6 August 1990" (Article 15); exemption from the Treasury direction is given for funds already paid over to the supplier, subject to third-party

rights (Article 15(3)(a) and (b))[56] or to which the entitlement of the Iraqi government is in issue in legal proceedings in the United Kingdom or elsewhere (Article 2(2)). A similar power with some exemptions is given to the DTI in respect of any petroleum or petroleum products held in the United Kingdom to which the Iraqi government is entitled; the DTI may direct such petroleum to be sold and the proceeds to be remitted to the escrow account. The Order provides an unusual administrative procedure whereby after service of notices, and notification in the official *Gazettes*, the Treasury or DTI may determine Iraqi entitlement or third-party rights, after a hearing, if requested, in private. Legal representation is allowed but reasons for the determinations are not required to be disclosed to the extent that they would be likely (in the Secretary of State's opinion) to cause damage to national security or involve disclosure of information obtained by compulsory powers. Article 14 deals with the resolution of differences between the Bank of England and the Treasury as to the assessment of the facts, with permission for interested persons to participate in such re-assessment.

The Order empowers the Treasury and the DTI to obtain information and documents by search warrant if necessary, and to take criminal proceedings to ensure compliance with the requirements of the Order.

In the event, as provided in paragraph 6 of Resolution 778(1992), of oil exports taking place pursuant to the UN system as provided in Resolutions 706 and 712(1991) or the lifting of economic sanctions, remitted proceeds will become repayable out of the escrow account. Article 20 of the Order provides for restitution to the persons entitled of any monies received by the Treasury or the DTI from the UN Secretary-General representing monies transferred to the escrow account.

This Order appears to be a legal minefield if persons affected seriously challenge Treasury or DTI determinations but if it turns out, as the replies to the UN Secretary General's request seem to indicate, that no State other than the United States holds any petroleum or petroleum products or frozen assets subject to Resolution 778(1992), the Order may prove a dead letter, particularly as it is not the UK government's policy to make payments out of taxpayers' money to compensation funds.[57] However, in conformity with the Order the Bank of England has commenced investigations into Iraqi oil proceeds held in the United Kingdom and a questionnaire to all banks and deposit-holders which it supervises has been issued in the Bank of England Notice of 26 May 1993. Further, £1 million humanitarian relief funds provided to Oxfam by the British government through UNICEF has been paid into the escrow account, and this should enable the United States to release a further $450,000 from sequestered assets into the escrow account.

As referred to in Section A.7 *supra*, pursuant to Security Council Resolution 692 of 20 May 1991, the UN Compensation Commission is now established in Geneva to determine claims presented by governments in respect of loss suffered as a result of the invasion and occupation of Kuwait by Iraq. Commissioners have

56. Third-party rights "without prejudice to the existence of third party rights in other circumstances" are defined as including persons claiming as creditors of the Iraqi government and who have commenced insolvency proceedings to enforce this debt.

57. Information supplied by the FCO, 19 July 1993.

been appointed to deal with Category A, B, C and D claims. The United Kingdom has submitted to the Commission 2,896 claims relating to war damage payable by Iraq; these claims concern some 2,204 claimants under categories A, B, C and D and total US$113,975,444.[58]

D. International Law

As discussed in the earlier note relating to implementation of UN sanctions against Iraq, self-defence, individual or collective, was considered an inadequate basis to halt and inspect cargoes of vessels flying the flag of third States (that is, of neither Iraq or Kuwait nor the allied States taking action in defence of Kuwait). Resolution 665(1990) was, therefore, adopted authorising the use of reasonable force and a similar Resolution 787 of November 1992 was adopted in respect of Serbia and Montenegro by the Security Council, authorising "such measures as may be commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt inward and outward maritime shipping . . . and to ensure strict implementation" of the UN trade embargo. This Resolution differed from Resolution 665(1990), relating to Iraq, in that it gave express authority to States "acting nationally or through regional organisations or arrangements". The EC, CSCE, NATO and the WEU have all been involved in the implementation of sanctions against Serbia and Montenegro. Naval forces co-ordinated by NATO and the WEU (including Royal Navy vessels) are involved in enforcement of sanctions in the Adriatic Sea. Their powers of stop and search are "drawn very largely on . . . experiences in the Gulf".[59] The respect to be given to territorial waters, such as of Albania, has required consideration and express authority to enter the territorial sea of the former Yugoslavia was given in Resolution 820(1993). Rules of engagement, both national and regional, reflect the requirements of necessity and proportionality: any interception is usually made by forces drawn from more than one nation to ensure the international nature of the implementation "under the authority of the Security Council", though not by a UN force under UN command. In the period from 22 November 1992 to 21 April 1993 these forces had challenged 9,396 vessels, of which 599 were boarded and 137 were diverted for closer inspection.[60] The United Kingdom has also contributed personnel and equipment to the Sanctions Assistance Missions, set up within the framework of the CSCE, whereby the member States of the EC make available assistance to customs offices of some of the States sharing borders with Serbia and Montenegro.

E. Problems of Implementation

Disruptions of trade which UN sanctions are designed to cause inevitably have consequences for the private law rights of traders and others who had business

58. *Ibid.* The Foreign Compensation Commission is now empowered to distribute payments of compensation received in this way, since the passing of the Foreign Compensation (Amendment) Act 1993, which received Royal Assent on 27 May 1993.

59. See evidence of D. Hogg to the Foreign Affairs Committee 2 Dec. 1992: The Expanding Role of the UN and its Implications for UK Policy: Minutes of Evidence.

60. See *Hansard* H.C., cols.244 *et seq.* (23 Apr. 1993) and cols.600 *et seq.* (30 Apr.).

dealings with the targeted State. In this section some consideration is given to the consequences which sanctions have had in English law and the problems arising.

1. Non-financial services

The problems which, as indicated in the earlier note concerning Iraq, arose over insurance and legal services have been largely anticipated and overcome in the later sanctions legislation relating to other countries. Thus, in respect of Libya both resolution and UK legislation were much more specific, with the particular types of prohibited services being stated expressly, namely engineering and maintenance servicing of Libyan aircraft and aircraft components, certification of airworthiness, and any new direct insurance or payment of new claims against existing insurance contracts for Libyan aircraft.

Again in relation to Serbia and Montenegro, without specific UN authorisation the EC in Council Regulation (EEC) 1432/92 prohibited non-financial services with the exception of "telecommunications, postal services and legal services consistent with [the] regulation". The UK 1992 and 1993 UN Sanctions Orders relating to Serbia and Montenegro enact similar prohibitions but, in prohibiting the provision of "any service" except by licence of the Secretary of State, Article 11 of the 1993 Order omits legal services from the list of excepted services. However, on 1 May 1993 the Secretary of State, pursuant to his powers under Article 11, granted an Open General Services Licence to provide legal services to Serbian or Montenegran interests, where to do so would be consistent with the Security Council resolutions scheduled to the 1993 Order. The question whether legal services supplied to Serbian and Montenegran interests violate the UN resolutions appears to be open to interpretation in individual cases, and presumably legal advisers to such interests would be prudent to seek clarification from the DTI before acting.

Due to the prolonged and complex nature of the Yugoslav conflict, it is to be expected that there will be further problems in relation to non-financial services. Under US legislation problems have arisen in respect of payments relating to copyright, patent and other intellectual property rights registered in Belgrade; proceedings in the Netherlands during the period from September 1992 to March 1993 have concerned the refusal of the Rotterdam port authorities to allow *MV Crna Gora*, a ship carrying a cargo from Colombia and operated by a Serbian national, to unload and receive other shipping services. Finally, a question has arisen in respect of a dispute involving Serbian parties and subject matter, whether a clause requiring arbitration in England can be given effect, including obtaining security for costs and orders for discovery of documents. Whilst each of these types of service can, if properly documented, probably receive a licence from the DTI or the Bank of England, the inconvenience to business is obvious.

2. Constitutional basis of implementation of sanctions

For the United Kingdom as an EC member State, implementation by EC regulation ensures uniformity of application of the trade embargo throughout the Community in a manner which no national legislation, with its different wording and method of implementation, could achieve. This need for uniformity has indeed been given as one of the main reasons for the enactment of EC regulations,

particularly in respect of impounding of vessels and aircraft breaching the UN restrictions (Regulation 990/93 relating to Serbia and Montenegro) and the claims by the defaulting State or persons in its territory for barring non-performance of contracts (Regulation (EEC) 354/92 relating to Iraq). These are matters which would seem to be more properly within the competence of the member States themselves. The benefits of this approach have already been outlined in Section B *supra*.

But the requirement of uniformity may also introduce the Community's conditions relating to trade in the manner of implementation of the sanctions. This may produce the somewhat paradoxical situation that legislation taken with the purpose of disrupting trade is to be construed—as regards the officials who enforce it and the traders who are required to comply—as imposing conditions of free movement in goods and of non-discrimination by nationality. In this context a conflict between UN and EC law to be applied by the English court may also arise.

A recent application for a declaration that the Bank of England's policy in implementing sanctions was *ultra vires* illustrates the problems. In *Reg.* v. *HM Treasury and the Bank of England, ex parte Centro-Com*[60A] an Italian supplier of pharmaceutical goods, exported from Italy to Serbia under UN and Italian authorisation as an exception to the trade embargo, challenged a decision of the Bank of England refusing payment for the medical supplies out of a blocked Serbian account in the UK. Payment had been so authorised for some earlier consignments but in February 1993, due to reports of abuse of the UN system, the Bank of England notified a change of policy. It stated it would not authorise payment for export of exempted goods to Serbia from any country other than the UK. (Bank of England Notice dated 8 June 1992, Serbia and Montenegro Supplement No.2, 26 April 1993, 9B). The Italian supplier challenged the Bank's policy as discriminatory and contrary to the common commercial policy as required by EC7, 30 and 113 and further challenged the retrospective application of the policy—medical supplies had already been exported—as unfair, irrational, in breach of the applicant's legitimate expectations and *ultra vires* UN Resolution 757 as implemented by UK legislation, and EC Regulation 1432/92. The Divisional Court (Watkins LJ and Auld J) dismissed the application on all grounds, holding the Bank's new policy not to be *ultra vires* as the effect of the humanitarian exception to the general obligatory sanctions prohibition in both the UN and EC regimes was "to allow, not to oblige" the member States, giving them a discretion as to the application of the exception. The court construed the EC regulation as "concerned primarily with the implication of UN sanctions rather than the establishment of a common commercial policy", and indicated, in the event of a conflict, save for some uncertainty about EC30, UN obligations would prevail over EC law.

Concerning direct national implementation by UK legislation, it has been generally assumed to date that the enabling provision in section 1 of the United Nations Act 1946 is broad enough to authorise the prohibitions, offences and powers enacted. But section 1 refers to Article 41 as "the article which relates to measures not involving the use of force" and UN Resolution 665(1990) relating to Iraq and Resolutions 787(1992) and 820(1993) relating to Serbia and Montenegro

60A. Judgment 6 Sep. 1993.

have all been interpreted by the naval forces implementing them as justifying the use of reasonable force against all shipping, under whatever flag, to ensure compliance with the UN trade embargoes. It is to be noted that the language in these resolutions, "to use such measures commensurate to the specific circumstances as may be necessary", is not dissimilar to that used in Security Council Resolution 678 of 19 November 1990 under which the allied military campaign Desert Storm was launched against Iraq in January 1991, States there being authorised "to use all necessary means to uphold and implement Resolution 660(1990) and all subsequent relevant resolutions and to restore international peace and security in the area". In these circumstances it may be questioned whether, if measures are taken to impound and sell ships or aircraft registered or operated by third States under Articles 5–10 of the Serbia and Montenegro (UN Sanctions) Order 1993, there is sufficient constitutional basis for such action under section 1 of the United Nations Act 1946.

3. *Existing contracts*

The trade embargoes imposed by the UN against Iraq, Serbia and Montenegro, Libya and Haiti call on all States, including non-UN member States, to act strictly in accordance with them "notwithstanding the existence of any rights or obligations conferred or imposed by any international agreements or any contract entered into or any licence or permit granted prior to the date of the present resolution". This date was 6 August 1990 in the case of Iraq and 31 May 1992 in the case of Serbia and Montenegro.

The terms of the relevant EC regulations and UK orders implemented this requirement by distinguishing between goods exported before 6 August 1990 and 31 May 1992 respectively, those exported before these dates being excluded from the scope of the sanctions.

4. *Executed and executory contracts*

An unsuccessful attempt to broaden this distinction between executed and executory contracts was made in *Wahda Bank* v. *Arab Bank plc*.[61] Suppliers to the Libyan armed forces directorate of military procurement went into liquidation; the latter made a call on a performance bond issued by its bank, the plaintiff, which in turn sought to enforce the counter-guarantee given by the suppliers' bank, the defendant. The contracts for the supply of goods to the Libyan directorate were prohibited by Article 3 of the Libya (United Nations Sanctions) Order 1992, Article 10 of which prohibited the payment of any bond given in respect of a contract the performance of which was unlawful wholly or in part by virtue of the Order.

On the assumption that the supply contracts were still executory, the plaintiff bank argued that Article 10 of the Libyan Sanctions Order had no application as it prohibited only the payment of bonds in respect of contracts capable of being performed and, as the supplier was incapacitated by insolvency, payment of the bonds was lawful. The plaintiff maintained that to construe the Libyan Sanctions Order more widely would render the Order *ultra vires* Resolution 748(1992) since

61. Phillips J, transcript 11 Dec. 1992, *The Times*, 23 Dec. 1992.

it was not "necessary or expedient to give effect to the Resolution" within the meaning of the enabling United Nations Act 1946, to prohibit payment of bonds in respect of contracts otherwise incapable of performance. Phillips J considered that the effect of the Order must be judged as a whole and not simply having regard to the exceptional facts of the present case. He held that "the fact that performance is not merely prohibited but is rendered impossible by insolvency" did not have the effect of removing them from the category of those "the performance of which is unlawful by virtue of [the] Order". Further, if the contracts remained executory, other obligations might remain to be performed and the words in the Order "wholly or in part" made plain that their existence rendered the whole bond unlawful under the Order. "There is no scope in this article for drawing a distinction between obligations under the contract which are lawful and obligations which are not."

It may be concluded from this decision and that in *ex parte Centro-Com* that an English court will not lightly entertain a challenge to the validity of a sanctions order by reference to the terms of the enabling Act or the UN resolution, that a broad construction of the scope of sanctions and the illegality of the acts which they prohibit is likely to be made, and that no severance of obligations under the prohibited contract will be allowed.

5. *Contracts rendered non-performable by reason of the sanctions measures*

Many part-performed, executed contracts or standing arrangements have been affected by the application of the sanctions legislation. According to the individual circumstances, pleas of illegality, impossibility, *force majeure* or frustration may be available in national courts to mitigate the consequences for claims for breach of contract resulting from the trade embargo.

In an attempt to anticipate and prevent legal proceedings being brought at the instance of the defaulting State against foreign traders, both UN resolutions relating to Iraq and Serbia and Montenegro contain a requirement that all States (including Iraq and Serbia and Montenegro) shall take measures to ensure that no claim shall lie at the instance of Iraq or Serbia or Montenegro or other persons in Iraq or Serbia and Montenegro or of any person claiming through or for the benefit of such person in connection with any contract or other transaction where its performance was affected by reason of the sanctions measures.

As discussed in the earlier note, difficulties have been encountered in implementing this provision into national law. The EC member States eventually decided, acting in Political Co-operation, to adopt a regulation in relation to Iraq relying on Article 235 of the Treaty of Rome as the only available article. This Article empowers the Community to adopt measures in fields not covered by the Treaty, provided the measures are agreed unanimously following consultation with the European Parliament; these procedural requirements no doubt explain the delay of some 18 months after Resolution 687(1991) before Regulation 3541/92 was adopted in respect of Iraq; a similar draft regulation in respect of

Serbia and Montenegro has not yet been adopted.[62] In explaining the Regulation to the European Parliament, M. Matutes of the European Commission stated:

> ad hoc Community legislation is appropriate because if the question is simply left in the hands of the national legislative powers of Member States distortions of competence will occur amongst the economic operators of the various Member States and which will have negative repercussions on common trade policy. Moreover this purely national approach will allow the Iraqi regime to try and confront and divide Member States from each other and the economic operators.[63]

The Regulation is widely drafted, covering

> any transaction of whatever form and whatever the applicable law, whether comprising one or more contracts or similar obligations made between the same or different parties and for this purpose "contract" includes financial guarantees and indemnity or credit whether legally independent or not and any related provision arising under or in connection with the transaction.

It would appear, therefore, to debar a contractual remedy in the private law of member States even in respect of contracts not made or to be performed within the Community or by EC nationals.

By the Regulation, satisfaction or the taking of any step to obtain satisfaction of any claim, whether asserted by legal proceedings, and whether made before or after the date of the Regulation, under or in connection with such a broadly defined contract, is prohibited. Contracts of goods exported prior to the date of the UN resolution, or claims admitted or payments due in respect of an event under an insurance contract or under a loan prior to the date of the UN resolution are excepted from the prohibition as are also claims for salary under employment contracts subject to the law of the member State.

The broad effect of this EC legislation is to prevent parties subrogated to the position of the defaulting State, its agencies or persons in its territories, from enforcing their contractual rights: this falls particularly harshly on insurers and banks where the transaction, though arising out of the primary contract for supply of goods, is treated under national law as separate and independent. It is also to be noted that the definition of the sanctions measures which prevent the non-performance of the transaction is sufficiently wide to debar a claim for defective construction work of a building in Iraq, if it has been damaged by military action authorised by the Security Council.

F. Conclusion

It is hoped that the increasing complexity of implementation of UN sanctions has been amply demonstrated in this note. The greater particularity in sanctions which the Security Council now adopts in its resolutions and the consequent complex implementation by EC and national legislation adds to the body of regulatory law with which a trader must comply in running his business. In any balance sheet relating to the effectiveness of sanctions account must be taken, not only of the reduction in trade of the defaulting State, but also the resultant

62. Com(93)283 final (1993) O.J. C187/12. It is to be noted that the Maastricht Treaty provides for a new Art.228(a) of the EC Treaty which will dispense with the need to consult the European Parliament.

63. Debates of the European Parliament 17 Nov. 1992 No.3–424/90.

unfavourable climate for commercial relations and change in the patterns of economic activities among the business communities required to comply with the sanctions.

As UN resolutions through EC and UK legislation make greater impact on English commercial law their constitutional basis is likely to come under closer scrutiny.[64] Here the deficient scope of the United Nations Act 1946 is particularly striking. Has the time not come for Parliament to review and revise the authorisation given in primary legislation to the government to implement resolutions of the Security Council, and should such revision not contain a procedure for closer scrutiny than is at present provided by the Orders in Council made thereunder?

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III. THE 1992 PROTOCOL TO THE 1988 ANGLO-IRISH AGREEMENT ON THE CONTINENTAL SHELF

IN 1991 the Irish government approved the construction of a pipeline extending some 147 miles from Loughshinny in north County Dublin to Moffat on the west coast of Scotland,[1] which will eventually link Bord Gais's network in Ireland with the United Kingdom's natural gas grid.[2] An immediate problem arising was that the projected route of the pipeline would enter (at about 53°44'N) a significant area of non-delimited and non-designated "no-man's-land" which was northwards of the most northerly then-existing agreed continental shelf boundary point (No.1) at latitude 53°39'N. This area east of Carlingford Lough had been left untouched by the 1988 UK/Irish Agreement on Delimitation of the Continental Shelf (in force on 11 January 1990) for good political reasons, namely the Irish constitutional claim to Northern Irish waters.[3] As was said in the Irish Dáil at the time of the 1988 Agreement, such a maritime zone could not have been dealt with separately from the question of Northern Ireland as a whole, as any delimitation in that area would have been "further complicated by the political factors".[4]

64. In this respect it should be noted that Australia has recently found it necessary to enact the Charter of the United Nations (Amendment) Act 1993, to provide for a more appropriate means of implementing sanctions, than had been possible under the pre-existing charter of United Nations Act 1945.

1. Department of Foreign Affairs Press Release, 8 Dec. 1992. The decision was welcomed by the Anglo-Irish Conference meeting on 6 Mar. 1992. Some pre-construction work on the pipeline had already begun at the end of 1992, with the main construction work due to begin in Feb. 1993. The targeted completion date is Oct. 1993.

2. See *Irish Times*, 9 Dec. 1992.

3. See Symmons, "Who Owns the Territorial Waters of Northern Ireland?" (1976) 27 N.I.L.Q. 48. The 1988 Agreement is set out in *Law of the Sea Bulletin*, No.13 (May 1988), p.48; and is commented on in "Current Developments" (1989) 38 I.C.L.Q. 413–416. See also the review of the 1988 Agreement in Report 9–5 in Charney and Alexander (Eds), *International Maritime Boundaries*.

4. *Dáil Debates*, Vol.384, col.2177. See Symmons, "The UK/Ireland Continental Shelf Agreement, 1988: A Model for Compromise in Maritime Delimitation", in Grundy-Warr (Ed.), *International Boundaries and Boundary Conflict Resolution* (1990), pp.388, 403.