Some Theoretical Foundations of EU Criminal Law: An International Law and International Organisations Perspective

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A. Introduction

Some years ago there was doubt whether an EC/EU criminal law existed at all. Now this question is moot in the case of the EU's Third Pillar, although arguably an indirect criminalisation policy may be set to exist in the EC as well, although this matter should be approached with caution.[1] What is unclear is the international legal nature of instruments adopted at EU/EC level with regard to criminal law and the relationship between Community institutions and general international law in the criminal sphere. As a matter of focus, we examine in this article the relationship between the EU and the UN Security Council, with particular attention to the otherwise binding nature of Security Council resolutions, and whether this is the case in the Community internal order. Moreover, we take a glance at the relationship between obligations arising for EU member states under EU law and their obligations under general multilateral treaties with third States.

B. A Matter of Competence

No doubt, criminal law was never even an issue in the early years of the European Communities. Criminal law has traditionally been a matter reserved for the exclusive reserve of individual States. In fact, the delineation and regulation of criminal laws, both substantive and procedural, reflects to a very large degree the particular financial, cultural and other attitudes of every country. Take for example countries on the two extremes; those that allow for the consumption of some otherwise narcotic substances, de-criminalisation of homosexuality and freedom of religion and the other extreme, countries that criminalise some or all of these acts. Criminal law is, therefore, largely reflective of social development and this state of affairs is expressed more than in any other field of law in the

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1 *See, for example*, I. Bantekas, *Criminal Enforcement Against International Cartels in the European Communities, the UK and the USA*, *in* I. Bantekas & G. Keramidas (Eds.), International and European Financial Criminal Law (2006).

European Journal of Law Reform, Vol. VIII, no. 2/3, pp 343-357.

criminal legislation of every State. If social development was not reflected in the law in such a manner and was thus obscured from legislative drafting, a significant imbalance would exist between societal and legal rules and mores.

But despite these observations upon which legislative drafting should be premised, it may also prove expedient for States to harmonise or approximate their criminal laws. One reason for embarking on a venture to do so is that crime is no longer purely domestic, but it is increasingly transnational, particularly with the advance of Internet-related technologies and transactions that take place across international frontiers. Whereas the investigation and prosecution of such transnatonal crime would otherwise involve multiple legal systems and a good number of staff in all the countries where the act constituted an offence – in most cases involving duplication of efforts – harmonisation could ensure that only a single police or prosecuting authority would investigate a crime of this nature, at least as regards its various phases. Certainly, transnational offences raise issues of conflict of criminal jurisdiction, as well as issues of cooperation.[2] States may argue about jurisdictional competence, but no concrete rules exist under international law to grant jurisdiction and the only avenue to resolve such disputes is to settle them amicably through negotiations. Cooperation of States in criminal matters has generally centred in two fields: mutual legal assistance (MLA) and extradition. The former refers to all aspects of cooperation between States in criminal matters, such as exchange of information, police cooperation, requests for assistance to collect evidence, surveillance and others. Extradition refers to requests for surrender of persons by a State in order for such persons to face trial in the requesting State. It is evident that in order for such forms of cooperation to materialise, it would be useful if some degree of uniformity could be established between the cooperating States. Thus, the closer the criminal justice system of two States are, the better and more efficient their cooperation will be. It is for this reason that extradition treaties, at least, are only effective if agreed at the bilateral rather than the multilateral level. The same is true of MLA treaties, although in Europe because of the proximity of legal traditions it has been easier to reach agreement on multilateral MLA treaties through the Council of Europe and more recently under the aegis of the European Union.[3]

Let us examine some of the intricacies of international cooperation. Take for example two States wishing to set up an agreement for the extradition of accused persons. The first thing they are required to settle is the range of criminal offences covered by the treaty. As States will refuse to extradite persons for acts which do not constitute criminal offences in their criminal laws (double criminality requirement), it is evident that the starting point of negotiations for such a treaty would be existing offences that are the same or similar in both States. The number of such similar offences may vary significantly from very few to many. The most obvious way of lessening the impact of the double criminality requirement in order to facilitate a more efficient mechanism of criminal cooperation is to find a

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2 *See* I. Bantekas & S. Nash, International Criminal Law, 2nd edition, (2003), chapters 2, 9 & 10.

3 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, Council Act of 29 May 2000, OJ 2000 C 197/2000; 2001 Additional Protocol to the Convention, Council Act of 16 October 2001, OJ 2001 C 326/2001.

way of harmonising criminal offences between States. This will also help avoid criminal forum shopping. As we shall see, however, the adoption of complex criminal legislation aiming at mutual recognition of criminal judgments in the EU, such as the European Arrest Warrant (EAW),[4] were not predicated on pre-existing harmonisation, neither did they require this, although some did in fact exist.[5]

The European Communities did not possess competence to adopt a pan-European criminal policy, although we shall see that some action was taken in this regard. Although the EC does not have competence to adopt legislation in the criminal sphere, it has taken some indirect action as in the case of money laundering. The relevant directives did not oblige States to adopt criminal sanctions, but indirectly this was considered a cogent deterrent measure. It was with the signing of the Maastricht Treaty in 1993 that a need was recognised to set up an Area of Freedom and Security, such that would enhance the free movement of persons, goods and services and that would mitigate all restrictions to this end. States would still of course retain their own criminal competences but enhanced cooperation was the objective of the criminal elements of the Third Pillar (the Justice and Home Affairs Pillar [JHA]) of the European Union. The Commission set about to achieve a very ambitious task, albeit with caution and no haste. This would involve elimination of all those problems related to the double criminality principle, as well as a high degree of coherency in the criminal field. Unlike the competence of the Commission under the First Pillar, the inter-governmental pillar, the Third Pillar authorises the relevant institutions to adopt criminal legislation.[6]

The methods by which EU member states have so far utilised and which have harmonised significant parts of their criminal legislations, whether advertently towards that purpose or otherwise, have varied. Traditionally, States become parties to multilateral treaties that criminalise particular behaviour at the international or transnational level, rendering such behaviour an international or transnational crime. This is true for a number of international offences such as piracy *jure gentium*, torture, genocide, war crimes and crimes against humanity, to name just a few. Thus, since member states of the European Union are parties to such treaties, or customary law that establishes these international crimes, and moreover since they have transposed these international crimes into their domestic legislation, they share at least some approximation with regard to these offences. It is unlikely that there will exist major discrepancies in the definitions of international offences between domestic legislations, given that the source of these crimes are treaties and custom and that relevant definitions have been consolidated and harmonised by the jurisprudence of international criminal tribunals or the practice of States. The same is true even with regard to more recent international offences, such as organised crime and terrorism, not only because

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4 Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, OJ 2002 L 190.

5 *See* S. Peers, *Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong*? 41 CMLR 5 (2004).

6 *See* M. Andrerson *et al*., Policing the European Union (1995), chp. 6.

these have featured in international treaties,[7] but also because the UN Security Council has imposed a significant degree of harmonisation through the adoption of Resolution 1373 in 2001, immediately following the terrorist attacks in the United States. Thus, the Security Council is also a potential factor of international criminal harmonisation and the EU, while not obliged *per se* to adhere to Security Council resolutions,[8] has demonstrated an acute willingness to cooperate with the Council. This matter will be examined in more detail in another section.

For those offences that are not subject to coherent and concrete definition by international treaties, the Commission acting under the Third Pillar has engaged in criminalisation at the EU level. Let us examine how this has been achieved and implemented thus far.

I. The Need for EU Criminalisation

Even though the Maastricht Treaty provided for competence in the criminal field, it was agreed that the Commission and the relevant instruments of the JHA pillar could not simply proceed to criminalise particular behaviour on the basis of the legal instruments and practice provided for in the First Pillar, nor allow the European Court of Justice (ECJ) the competence to deal with these issues. On the one hand, the major legal instruments contained in the First Pillar, Regulations and Directives can be very intrusive, particularly since they are subject to direct application and direct effect – although with regard to Directives this is not always the case. Direct effect was definitely sought to be avoided and a significant amount of autonomy was to be allowed to national institutions. Equally, member states were naturally weary of the ECJ's role in the interpretation and development of EC law generally. It was after all the ECJ which transformed a mere commercial union of States into a Community where very few restrictions were placed on the basic freedoms enshrined in the EC Convention. Whenever the Court had the opportunity to investigate a matter of Community law, it never lost the chance to open the floodgates and render member states susceptible to even more losses of national sovereignty. Thus, it was crucial that the new Third Pillar avoid the intrusion of the Court's revolutionary and unpredictable invasion and that the choice of instruments would allow member states a considerable degree of autonomy in the criminal field.

Equally, the EC has, under the First Pillar, adopted a number of treaties providing for criminal liability regarding matters that relate to the internal workings of Community institutions. Thus, conventions have been applied to

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[7] In fact, the Community accedes to international treaties, such as the 2000 UN Convention Against Transnational Organised Crime, Council Decision 2004/579/EC of 29 April 2004, OJ 2004 L 261/69.

[8] Article 103 of the UN Charter obliges states that wherever there exists a conflict between an obligation assumed under the Charter and under any other convention, obligations under the Charter take precedence. However, since the Charter is composed of, and is addressed to States, this obligation does not extend to inter-governmental organisations and as a result the EU is not formally bound to adhere to Security Council resolutions in the same manner as its member states are bound.

stem the tide of fraud affecting the EC budget,[9] or corruption of EC officials.[10] As these matters could not have been dealt with First Pillar legal instruments, it was imperative that they be regulated through traditional public international law hardware, i.e. treaties. These, however, remain a substantial part of EC criminal *acquis* and a stepping-stone to Third Pillar developments.

This new instrument in the context of the Third Pillar was called Framework Decision. Its legal nature is very much akin to First Pillar Directives, as they set out the objective to be achieved, but they lack a very important ingredient of Directives, in that they are devoid of direct effect. The ECJ in the *Pupino* case held that Framework Decisions were capable of indirect effect in that 'national courts are required to interpret national law as far as possible in a way that conforms to the wording and purpose of the Framework Decision'. Nonetheless, the ECJ expressly pointed out that such an obligation on national courts was limited by the principles of legal certainty and non-retroactivity and thus, for example, Framework Decisions cannot create a new crime in the absence of similar national legislation.[11] What can Framework Directives do? For one thing, the Commission has employed Framework Decisions to criminalise at the EU level a number of activities, such as the Council Framework Decision of 29 May 2000 on Increasing Protection by Criminal Penalties and Other Sanctions against Counterfeiting in connection with the Introduction of the Euro;[12] Council Framework Decision of 28 May 2001 on Combating Fraud and Counterfeiting of Non-Cash Means of Payment;[13] Council Framework Decision of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime;[14] Council Framework Decision of 22 July 2003 on Combating Corruption in the Private Sector.[15] Equally, besides action in the field of substantive criminal law, Framework Decisions have achieved significant coherence in procedural criminal law, particularly as regards confiscation and seizure regimes and exchange of information. Moreover, Framework Decisions have sought to bring a measure of consistency to particular forms of criminal liability, particularly the criminal liability of legal persons. Not all member states provide for the criminal liability of legal persons, and even when they do so, significant divergences exist. The Framework Decisions that have dealt with the liability of legal persons have not pushed member states to necessarily provide for their criminal liability, deeming that the benefits of such action

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9 1995 Convention on the Protection of the European Communities' Financial Interests, OJ 1995 C 316. as supplemented by First Council Protocol of 27 September 1996 to the Convention on the protection of the European Communities' financial interests, OJ 1996 C 313; Second Council Protocol of 19 June 1997 to the Convention on the protection of the European Communities' financial interests, OJ 1997 C 221.

10 Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of 26 May 1997, OJ 1997 C 195.

11 Judgment of 16 June 2005, in *Case 105/03, Re Criminal Proceedings Against Pupino*, paras. 43-44, [2005] 3 WLR 1102.

12 OJ 2000 L 140, 14/06/00.

13 OJ 2001 L 149, 02/06/01.

14 OJ 2001 L 182, 05/07/01.

15 OJ 2003 L 192, 31/07/03.

would not necessarily contribute the same amount of advantages that belie the criminalisation of substantive offences. Therefore, the objective for legal persons is to provide dissuasive penalties irrespective of how these are characterised at the domestic level; whether criminal, civil or administrative. It should be noted, however, that Third Pillar authority to initiate proposals for – and subsequently adopt – Framework Decisions, is restricted only to those matters that fall within the competent fields allocated under the Third Pillar. The ECJ was adamant in this regard, ruling that the adoption of a Framework Decision on environmental crime was *ultra vires*, deeming that all matters relating to the environment fall within the absolute competence of First Pillar institutions and could only be dealt with legal instruments of the First Pillar. The same is, of course, true with regard to other matters, particularly competition law and this is a matter outside the purview of Third Pillar institutions to criminalise, as are banking violations, etc.

The various instruments adopted in the EC/EU to give effect to criminal justice policies, whether within Europe or beyond, are nothing more than treaties in refined form. All these instruments conform to the definition of a treaty contained in Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties; i.e. 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Where a Community instrument is adopted by the EC Commission under circumstances which involve delegation of authority by the Council or the member states and the Commission has the authority to act on its own, the adopted instrument will not satisfy the requirements of a treaty. This is so because it does not involve a direct agreement between States. Nonetheless, because it will be premised on delegation or transfer of powers by a primary treaty to the EC Commission, the instrument adopted will have the same legal effects as that of a treaty, but its scope will be limited to its particular subject matter. All other EU/EC legislative instruments are treaties because they fall squarely within the relevant definition of the Vienna Convention but are endowed with special characteristics which usual treaties generally lack. For one thing, where applicable, Community legislation can be directly applicable and/or directly effective. In the case of Framework Decisions, domestic legislation has to be interpreted in light of these.

Besides the obvious benefits of coherency in the criminal justice fields stemming from Third Pillar efforts, in the long run such coherency would lead to a system of EU criminal cooperation where because crimes will be the same in all member states, the procedures would as a result be easier and speedier. In practice, this would help remove traditional hurdles, such as the double criminality and *ne bis in idem* requirements. The latter involves the prohibition under human rights standards, for individuals to be tried twice for the same set of facts. Let us now examine the relationship of the EU/EC with Third States and other international actors.

II. Inter-State Relationships between EU States and Between them and Third States

It is sometimes forgotten that the complex web of legal relationships between the various States forming the EU and EC is of an essentially international legal nature. Indeed, the premise for the centralised law-making capacity of the Community's institutions is the Rome Treaty and its various amendments ever since. In the sphere of criminal law we have to distinguish between two types of relationships: (a) those exclusively between EU member states and (b) those involving also non-EU member states.

As regards the former, given that the legal cultures among member states share many common elements on account of the Community *acquis*, the adoption of particular instruments, such as Directives, Regulations and Framework Decisions, which do resemble treaties, are far less arduous to agree upon than regular treaties. To help illustrate this point, one should consider the advances in the field of inter-State cooperation generally and that undertaken in the EU with regard to crime. While general treaty law has been able to define and criminalise most international crimes, it has proven unable to exact from States analogous pledges of cooperation. Extradition, for example, is only achieved through bilateral treaties and the principle *aut dedere aut judicare* is inapplicable in the absence of such bilateral treaties. With the exception of particular UN Security Council resolutions, few international treaties provide for binding and otherwise intrusive cooperation. The reason behind this is the lack of trust. This explains the gigantic advances within the EU legal sphere, particularly with the adoption of the Arrest Warrant (EAW) on the basis of the mutual recognition principle. Mutual recognition essentially allows criminal judgments issued in one EU member State to be recognised and enforced in another without consideration of the double criminality principle or other procedural hurdles. Mutual recognition has also been applied to the European Evidence Warrant, the Decision on Execution of Orders Freezing Property or Evidence[16] and the Decision on the Application of the Principle of Mutual Recognition to Financial Penalties.[17]

The relationships between EU member states and third States are of a different level and complexity. On the one hand, EU member states are individually parties to international treaties together with non-EU States, while at the same time they are also bound by Community legislation on the same subject matter. This is not *per se* problematic, because usually the general treaty will in all likelihood be narrower in scope than the Community legislation and it is unlikely that a conflict between the two will arise.[18] There are two reasons for the general lack of conflict between Community law and treaty obligations with third States. The first has to do with the fact that Community institutions interpret Community instruments in

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[16] Council Framework Decision of 22 July 2003 (2003/577/JHA) on Execution of Orders Freezing Property or Evidence, OJ 2003 L 196.

[17] Council Framework Decision of 24 Feb. 2005, OJ 2005 L 76/16, 22/03/05.

[18] Moreover, as we have already demonstrated, the Community will accede to a significant number of multilateral treaties.

accordance with international law and as a matter of fact tend to give priority to it.[19] Moreover, on a very practical level, EU member states avoid binding themselves in their legal relations with third States in such a way as to infringe normative undertakings or common policies adopted at Community level. For example, no EU-member State succumbed to negotiate bilateral impunity agreements with the USA with regard to the jurisdiction of the International Criminal Court (ICC).

Given that EU legislation is more comprehensive than available general treaty law, one may wonder why EU member states wish to become signatories to such treaties. EU member states may wish to develop their relationships on a particular criminal matter with Third States, even if at a rudimentary level. This is particularly welcome where criminal cooperation would otherwise have been impossible with regard to transnational crime involving Third States. It is certainly not prudent to exclude Third States from the normative frameworks underlying the various international and transnational crimes because not only will their cooperation one day be needed, but by disenfranchising them one pushes them towards granting impunity to possible perpetrators. In fact, the pursuit of the Community is to induce Third States towards particular legal action, even if that means that EU States themselves ratify instruments that are weaker than those adopted at Community level. One notable example is money laundering, where there does not yet exist a discrete international treaty, in contrast to three generations of Money Laundering Directives adopted at Community level.[20] Since the adoption of such a general treaty seems at this point distant, EU member states have pushed towards other directions, particularly through non-binding Recommendations through the Financial Action Task Force (FATF), formed by the G-7 and centred within the Organisation for Economic Cooperation and Development (OECD).[21] Such broadening of participation has brought results in other fields of international criminal law too. The OECD's efforts on corruption, followed subsequently by measures taken at Community level and by the Council of Europe culminated in 2003 in the adoption of the UN Convention against Corruption and also the 2000 UN Convention against Transnational Organised Crime. The level of cooperation in both instruments is significant, and it is worth noting that the UN Corruption Convention establishes a mechanism of asset sharing, entailing direct and indirect repatriation of corrupt proceeds.

So far we have established that Community criminal law, relating both to transnational and international crimes, is both more comprehensive and entails great and effective cooperation between members, in contrast to general

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[19] *Case No. C-289/90, Anklagemyndigheden/Poulsen and Diva Navigation Corporation*, [1992] ECR I-6019, para. 9; *Case No. C-162/96, Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] ECR I-3655, para. 45.

[20] Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the purpose of Money Laundering (OJ 1991 L 166, 28/06/1991); Parliament and Council Directive 2001/97/EC of 4 December 2001, amending Directive 91/308/EEC (OJ 2001 L 344, 28/12/2001); Parliament and Council Directive 2005/60/EC of 26 October 2005 on the Prevention of the Use of the Financial System for the purpose of Money Laundering and Terrorist Financing (OJ 2005 L 309, 25/11/2005).

[21] *See* V. Mitsilegas, Money Laundering Countermeasures in the European Union. A New Paradigm of Security Governance versus Fundamental Legal Principles (2003).

international criminal law conventions. We have also noted that a weaker normative framework exists in the relationship of EU member states with Third States. Thus, we are faced with two distinct legal regimes which will not conflict with one another, but one will necessarily will be broader in scope and encompass persons or property which the other will not.[22] Given, however, that criminal law is predominantly territorial and that the UN Security Council has imposed particular binding obligations upon UN member states, all of which have been transposed into EU criminal law also, two possibilities arise: (a) the principle of territoriality will apply where the offence took place on the territory of an EU member State and thus domestic and EU criminal law will be utilised; and (b) where the offence in question, or a particular mode of cooperation are prescribed by resolutions of the UN Security Council, the EU member State will be obliged to follow suit, regardless of its other contractual commitments with that third State. This latter aspect will be analysed in more detail in the following section.

III. The EU and International Criminal Law Imposed by the UN Security Council

The fundamental question examined in this section is whether the UN Security Council can legislate in the field of international criminal law and whether by doing so its resolutions are binding and directly effective not only upon EU member states, but also upon the EC and the EU themselves as distinct legal entities. If this were indeed so, then by implication the criminal law produced by the EU, or parts thereof, could be lawfully invalidated by a single act of the Security Council. Equally, it could well expect the Security Council to adopt normative rules that would be automatically implemented in the Union, forcing thus the relevant organs of the Union to follow from then on a course of legislative thinking in line with the dictates of the Security Council.

Given that the UN Security Council has been very active since the events of 9/11 in adopting legal measures and preventive mechanisms concerned with terrorism, resolutions of the Security Council and of its subsidiary bodies have flourished as a result. A test case was presented to the Court of First Instance, in which it was asked by named individuals and representatives of Al Barakaat International Foundation to annul a number of Regulations relating to the freezing of the applicants' funds.[23] The complicating factor was that the freezing order[24]

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[22] The ECJ has consistently interpreted Art. 307 EC, relating to relations with third States, in a way which the application of the EC Treaty does not affect the duty of EC member states to respect the rights of third States under a prior agreement and to perform their obligations thereunder in conformity with international law. *See Case No. C-324/93, Evans Medical and Macfarlan Smith*, [1995] ECR I-563, para. 27; *Case No. 10/61, Commission v Italy*, [1962] ECR 1; *Case No. C-124/95,Centro-Com*, [1997] ECR I-81, para. 56.

[23] Judgment of 21 September 2005 in *Cases T-306/01* and *T-315/01*, *Ahmed Ali Yusuf and Al Barakaat International Foundation and Yassin Abdullah Kadi v Council and Commission,* [*Al Barakaat* case]. *See also*, I. Cameron, *Terrorist Financing in International Law*, *in* I. Bantekas (Ed.), International and European Financial Criminal Law 65 (2006).

[24] Council Regulation 467/2001, OJ 2001 L 067 (6 March 2001), on Prohibiting the Export of

was not premised on initiatives of the Council or the Commission, but was rather predicated on a number of Security Council resolutions demanding the freezing of assets of persons suspected of having committed or financed terrorist activities in connection with the terrorist network of Usama bin Laden. Moreover, the names of persons and organisations subject to such freezing orders were appended to a list that was designated as such by a Security Council-appointed Sanctions Committee.[25]

Two issues are important in relation to the legality of the measures adopted (regulation in the present case) by the EC Council: (a) their legal basis in EC law; and (b) the legal basis of Security Council resolutions vis-à-vis the EC legal order. Let us first briefly consider the first of these. Regulation 467/2001 was adopted on the basis of Articles 60 and 301 EC, which authorise the Council to take necessary and urgent measures with regard to the movement of capital and payments in order to interrupt or reduce, in whole or in part, economic relations with one or more third countries. The complicating factor in this case, however, is that the named individuals and the organisation were Swedish nationals and/or registered under the laws of Sweden. Thus, the effects of the Regulation, although targeted at those associated with the Taliban regime and Al-Qaeda, befell necessarily within EC territory and upon EC nationals. Was this result compatible with Articles 60 and 301? The Court made it clear that:

> Nothing in the wording of those provisions makes it possible to exclude the adoption of restrictive measures directly affecting individuals or organisations, whether or not established in the Community, in so far as such measures actually seek to reduce, in part or completely, economic relations with one or more third countries … In fact, just as economic or financial sanctions may legitimately be directed specifically at the rulers of a third country, rather than at the country as such, they may be directed at the persons or entities associated with those rulers or directly or indirectly controlled by them, wherever they may be … Articles 60 and 301 EC would not provide an efficient means of applying pressure to the rulers with influence over the policy of a third country if the Community could not, on the basis of those provisions, adopt measures against individuals who, although not resident in the third country in question, are sufficiently connected to the regime

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Certain Goods and Services to Afghanistan, Strengthening the Flight Band and Extending the Freeze of Funds and Other Financial Resources in respect of the Taliban of Afghanistan; Council Regulation 881/2002 (27 May 2002), on Imposing Certain Specific Restrictive Measures directed against Certain Persons and Entities associated with Usama bin Laden, the Al-Qaeda Network and the Taliban.

[25] SC Res 1267 (1999). Paragraph 6 of this Resolution established the Sanctions Committee. SC Res. 1333 (2000) ordered States to freeze terrorist-related assets, as designated by the Sanctions Committee. The Resolution also instructed the Sanctions Committee to maintain an updated list on the basis of information provided by individual States and regional organisations. It was against an Addendum to this list of 8 March 2001, in which the applicants names were entered and on which EC Council Regulation 467/2001 was premised, that the applicants challenged to annul. With the adoption of Resolution 1390 (16 Jan. 2002), the Security Council elaborated the measures provided in the previous resolutions and ordered that they be maintained, since the previous resolutions envisaged that the Council would review the imposition of the measures every twelve months. A subsequent Council resolution was adopted on 17 January 2003 (1455), by which time the names of two applicants had been removed from the sanctions list.

> against which the sanctions are directed. Furthermore … the fact that some of those individuals so targeted happen to be nationals of a member State is irrelevant, for if they are to be effective in the context of the free movement of capital, financial sanctions cannot be confined solely to nationals of the third country concerned.[26]

Subsequently, Regulation 881/2002 repealed Regulation 467/2001, but the principle remains the same, with the additional factor that Regulation 881 has its legal bases not only Articles 60 and 301 EC, but also Article 308 EC.

The next question posed is of a far more crucial nature to our discussion. Is the EC bound by UN Security Council resolutions, and if so, are these capable of producing direct effect within the EC's normative framework? The Court of First Instance correctly affirmed that as a result of Article 103 of the UN Charter, all member states are bound in their international relations to adhere to the provisions of the Charter, over and above other obligations assumed through multilateral or bilateral treaties or indeed customary international law. Equally, UN member states are obliged to strictly adhere to Security Council resolutions (whether adopted under Chapter VII of the Charter or not) in accordance with Article 25 of the UN Charter. The Court of First Instance then noted that international organisations are not generally bound by the provisions of the Charter because it is only State entities that are signatories to the Charter and not international organisations. The Court, however, failed to infuse some theoretical substance to the discussion by omitting to investigate the consequences flowing from the international legal personality of international organisations, such as the European Communities. We shall address this point shortly. So, what the Court settled initially were the two extremes; i.e. that States are bound by the UN Charter and Security Council resolutions and that international organisations are not bound by these instruments.

Two questions are, however, left unanswered. The first concerns whether the EC can voluntarily submit to Security Council resolutions and if so under what legal basis. The second relates to the whether the obligations arising out of the UN Charter are necessarily conferred by the individual member states to other legal entities they establish in their international relations. The first of these questions was not specifically raised by the Court of First Instance; however, it did note that the adoption of common positions by the Community institutions following the adoption of Security Council resolutions is within their authority and exercise of powers.[27] There is no reason why an international organisation cannot do so, as long as it does not act *ultra vires* in relation to its founding constitutional instrument. Certainly, this is possible through a plethora of measures for the EC and the EU institutions.

The Court of First Instance noted that although the EC is not a member of the United Nations it is required to act in its spheres of competence in such a way as to fulfil the obligations imposed on its member states as a result of their UN membership.[28] Whether following serious, or little thinking, the Court premised this argument on another legal argument under which EC member states must be

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[26] *Al Barakaat* case, *supra* note 23, paras. 112, 115.
[27] *Id*., para. 179.
[28] *Id*., para. 210.

viewed to have either transferred to the Communities powers (and obligations, I would add) attained as a result of their UN membership or because they consider doing so politically opportune (the latter is hardly a legal argument).[29] This 'transfer of powers' argument was justified by the Court on the basis of Article 48(2) of the UN Charter, which provides that Security Council resolutions pertaining to the maintenance of international peace and security shall be carried out by members of the United Nations directly and through their action in the appropriate international agencies of which they are members. This seems to be a fair argument, save for the fact that Article 48(2) refers only to Chapter VII Security Council resolutions and not to each and every obligation contained in the UN Charter. Therefore, the transferability of powers and obligations argument can at best apply only with regard to Chapter VII resolutions, something which the Court of First Instance omitted to mention. Moreover, Security Council and State practice suggests that the duty of UN member states to undertake action through regional and other organisations has been hardly obligatory. For one thing, in all cases where the Security Council has authorised the use of force against recalcitrant States, it has never ordered any military alliance or regional organisation to implement the relevant resolution. Obviously, the individual States, and particularly the United States, that instigated these resolutions had already secured agreement to set up and head coalition forces and thus for all practical purposes the Council never called upon any inter-governmental organisation to undertake such a task. In every case, whether it was individual States, coalitions of States or international organisations, they all volunteered to implement Security Council resolutions.[30] Secondly, it is certainly clear that where the Statute (or founding instrument) of an international organisation excludes the authority of the Security Council from its ambit, the transfer of powers and obligations argument finds no application. An example of such a Statute is that of the International Criminal Court (ICC). With the exception of the powers granted to the Council under Articles 13(b) and 16 of the ICC Statute to refer a situation to the Court and to defer investigations under particular circumstances, the Security Council cannot intervene in ICC proceedings. By inserting these two provisions the ICC member states delimited the Security Council's authority vis-à-vis the ICC. By implication, therefore, the transferability of powers and obligations argument is equally inapplicable. Thus, it is not totally clear that such a duty is imposed on the EC on the basis of Article 48 of the UN Charter.

Following from its previous argument, therefore, the Court of First Instance could only find it logical to conclude that:

> With regard to the relations between the obligations of the member States of the Community by virtue of the Charter of the United Nations and their obligations under Community law, it may be added that, in accordance with the first paragraph of Article 307 EC, 'the rights and obligations arising from agreements concluded before 1 January 1958, or for acceding States, before the date of their accession, between one or more member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this treaty'… The purpose of

[29] *Id*., para. 211.
[30] For example, SC Res 678 (29 Nov. 1990).

> [Article 307] is to make it clear, in accordance with the principles of international law, that application of the EC Treaty does not affect the duty of the member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder.[31]

Having found that the obligations of EC member states arising from the UN Charter had been transferred to the EC, it was only a minor step for the Court to state 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'.[32] The Court's argument that Article 301 EC reflects this will of the member states to allow the Security Council to adopt binding resolutions upon the Community legal order seems at best unconvincing, as only a very far-fetched interpretation of this provision could bring about this result. Following from its argumentation the Court of First Instance concluded that 'Community law must be interpreted, and its scope limited, in the light of the relevant rules of international law … and 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'.[33]

Let us briefly examine the relevance of the international legal personality of international organisations in respect to the argument advanced by the Court of First Instance. It is a well-known principle that inter-governmental organisations endowed with international legal personality have an existence distinct from that of their member states. If that were not so, legal personality would be meaningless and we would instead be talking about an association of States. Certainly, founding States can choose to limit the powers conferred on international organisations, but what power ultimately remains will still entail some sort of legal personality. The fact that international organisation X has distinct legal personality from members A, B and C and so can sue and be sued only under its own name and assets (and contract under its own name and assets, etc) necessarily means that it is not subject to the obligations and privileges enjoyed by its member states. Imagine a scenario where members A, B and C enjoyed conflicting obligations and rights under their individual treaty relationships. Can it seriously be said that these would be transferred to the legal person of organisation X? It is one thing to argue that an international organisation must comply with general international law, a fact which is incumbent upon all international legal persons anyway, and it is a different thing to claim that international organisations must comply with international law solely because their member states are bound to do so. Equally, a distinction should be made between the failure of an EU member State to implement a Security Council resolution and the failure of the EU as an international person to do so. The former would incur State responsibility, while the latter would not. One could naturally posit the argument that a State could hide behind a fiction, i.e. an international organisation, and thus avoid fulfilling its obligations under the UN Charter. This argument has no factual basis, at least

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31 *Al Barakaat* case, *supra* note 23, paras. 235-36.
32 *Id*., para. 243.
33 *Id*., paras. 249, 253.

as far as the EU is concerned. This is because no single EU member State can impose its views on Community policy. Not only twenty-five member states are struggling both for power and consensus, but this is also the case with a number of powerful institutions, such as the Commission, the Parliament and others that have a significant voice of their own. It is therefore, difficult, if not impossible, for EU member states to hide behind the veil of the Community to avoid consequences under the Charter. The most sensible conclusion is, therefore, that while the Community is bound to adhere to general international law, it is voluntarily implementing that portion of international law to which it is not legally bound, this being the case with Security Council resolutions. When it decides to do so, it does not contravene its own internal law because it has provisions in place which provide it with such authority.

Finally, the Court of First Instance sought to determine whether Security Council resolutions were amenable to a review of legality by Community judicial institutions. The Court noted that because of their binding character they, in principle, fall outside the ambit of judicial review and that 'the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law'.[34] However, the Court discovered one exception to this exclusion of judicial review. This concerns an 'indirect' judicial authority as to:

> [t]he 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. … International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the member States of the United Nations nor, in consequence, the Community.[35]

This is a logical conclusion and one which is unlikely to have any practical effect in the Community legal order, as a finding of *jus cogens* incompatibility would have the effect of nullifying a Security Council resolution, an event which would invalidate the Court's primary argument, particularly where the Council itself believes the resolution to be lawful.

C. Epilogue

The EU's criminal justice policy and competence is premised on two distinct strands. On the one hand lies its internal dimension. It is there that actual criminal legislation is adopted in the Third Pillar and indirect criminal legislation in the First. Although the instruments used therein are clad in the guise of Framework Decisions, Regulations or Directives, they in fact resemble treaties in that they are contractual agreements to the extent that their adoption necessitates an agreement of all member states, whether at Head-of-State, Ministerial or other level. Thus,

[34] *Id*., para. 276.
[35] *Id*., paras. 277, 281.

even the EU/EC internal criminal justice order is predicated on an international law dimension. Equally, one should evaluate the relationship between the EU/EC as an international organisation and the United Nations, particularly the power of the Security Council to issue binding resolutions. The puzzle is exhausted by the need to examine the nature of criminal law obligations of EU member states in their individual capacity vis-à-vis their parallel obligations towards third States that are parties to bilateral and particularly multilateral international criminal law conventions.

As regards the relationship of the EU/EC with the UN Security Council, the Council's resolutions are certainly binding on individual member states. The same is not true with regard to the Community or its institutions. For one thing, the Community is not a party to the UN Charter and the fact that its members are is of little significance to the Community as an entity because of its distinct legal personality from that of its members. It goes without saying that where individual member states infringe their obligations under the UN Charter through action undertaken by the Community on their behalf, they would incur State responsibility, but this matter does not affect the Community as such. It is obvious, however, that neither the EU, nor the EC are likely to adopt legislation that is contrary to Security Council resolutions and in fact the drafting of any such legislation is always sought to be in conformity with general international law. The same principle is more or less applicable in the case of EU/EC criminal law and obligations arising out of multilateral treaties with third States. For one thing, the EU has acceded to a host of international criminal law treaties and the general policy is harmonious and consensual in this field between EU member states. As a result, no individual action is undertaken with third parties that is inconsistent with EU criminal justice policy. In the unlikely event of a conflict of contractual obligations, general international law would help resolve differences with third parties (particularly the *prior in tempore potior in jure* rule).

Overall, while the pace of criminal cooperation, and legislative measures adopted thereof, in the EU is at a very high level, the opposite is true with regard to general international criminal law, with the exception of recent Security Council action, particularly in the field of terrorism. The bridging of this discrepancy is an unachievable objective, but what is worth pursuing is an external relations strategy whereby the criminal justice policies of the EU are incorporated as far as possible in other international *fora*.