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# ARTICLES

## INTERPRETING UN SANCTIONS: THE RULINGS AND ROLE OF THE YUGOSLAVIA SANCTIONS COMMITTEE

*Michael P. Scharf* \*  
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In response to the evolving crisis in Yugoslavia,<sup>1</sup> the United Nations Security Council adopted several resolutions imposing first an arms embargo on the territory of the former Yugoslavia and later sweeping economic sanctions against the Federal Republic of Yugoslavia (Serbia-Montenegro) (FRY), which was viewed as primarily responsible for the continuing hostilities.<sup>2</sup> As in the five other sanctions regimes imposed by UN

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1. For a detailed discussion of the events leading up to the imposition of sanctions against the Federal Republic of Yugoslavia (Serbia-Montenegro) (FRY), see J. Zuckerman, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

2. The sanctions were imposed under Chapter VII of the Charter of the United Nations, and thus were binding on UN Member States. See U.N. CHARTER art. 25 & 49.

Through Resolution 713 (September 25, 1991), the Security Council imposed an arms embargo on Yugoslavia. Resolution 727 (January 8, 1992) extended the embargo to all the States which were formerly part of Yugoslavia. S.C. Res. 713, U.N. SCOR, 3009th mtg., U.N. Doc. S/Res/713 (1991) [hereinafter S.C. Res. 713]. Resolution 727 (January 8, 1992) extended the embargo to all the states which were formerly part of Yugoslavia. S.C. Res. 727, U.N. SCOR, 3028th mtg. ¶6, U.N.

Security Council resolutions (against South Africa, Iraq, Somalia, Libya, and Haiti), enforcement of the Yugoslavia sanctions was left to individual states.<sup>3</sup> Thus, the legal interpretation of the meaning of the sanctions provisions—and consequently the way in which the sanctions would be implemented—was in the first instance left to individual states. Inevitably, questions about the meaning of the provisions arose, both as states themselves grappled with often arcane and ambiguous language and as disputes ensued between states interpreting the language of the sanctions resolutions differently.

Questions concerning the interpretation of the sanctions resolutions are brought before the UN Sanctions Committee, a quasi-judicial body created by the Security Council to facilitate the implementation of the sanctions.<sup>4</sup> The Sanctions Committee issues interpretations of the sanctions resolutions on a case-by-case basis in the form of UN press releases or communications from the Chairman of the Committee to the particu-

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Doc. S/Res/727 (1992) [hereinafter S.C. Res. 727]. Resolution 743 (February 21, 1992) created an exception to the arms embargo for the UN peacekeeping forces. S.C. Res. 743, U.N. SCOR, 3055th mtg., U.N. Doc. S/Res/743 (1992) [hereinafter S.C. Res. 743].

Resolution 757 (May 30, 1992) imposed a variety of economic sanctions on the FRY. S.C. Res. 757, U.N. SCOR, 3082d mtg., U.N. Doc. S/Res/757 (1992) [hereinafter S.C. Res. 757]. These sanctions were later modified, expanded, and clarified through the adoption of Security Council Resolutions 760 (June 18, 1992), 787 (November 16, 1992), and 820 (April 17, 1993). S.C. Res. 760, U.N. SCOR, 3086th mtg., U.N. Doc. S/Res/760 (1992) [hereinafter S.C. Res. 760]; S.C. Res. 787, U.N. SCOR, 3137th mtg., U.N. Doc. S/Res/787 (1992) [hereinafter S.C. Res. 787]; S.C. Res. 820, U.N. SCOR, 3200th mtg., U.N. Doc. S/Res/820 (1993) [hereinafter S.C. Res. 820].

3. The United States implemented the sanctions through the promulgation of several Executive Orders under the authority of the International Emergency Economic Powers Act, 50 U.S.C. § 1701 (1977), and the United Nations Participation Act, 22 U.S.C. § 287(c) (1988). See Exec. Order No. 12908, 57 Fed. Reg. 23299 (1992); Exec. Order No. 12810, 57 Fed. Reg. 24347 (1992); Exec. Order No. 12831, 58 Fed. Reg. 5253 (1993); and Exec. Order No. 12846, 58 Fed. Reg. 25771 (1993). The first three of these Executive Orders were incorporated into a comprehensive set of regulations issued by the Department of Treasury. See 31 C.F.R. Pt. 858 (1993).

4. There is a separate UN Sanctions Committee for each of the sanctions regimes. The focus of this article is the Yugoslavia Sanctions Committee, which has been by far the most active of any of the Sanctions Committees in issuing interpretations of the sanctions resolutions. The Yugoslavia Sanctions Committee was established pursuant to Security Council Resolution 724 (1991) and is formally titled *The Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*. S.C. Res. 724, U.N. SCOR 3023d mtg., U.N. Doc. S/Res/724 (1991).

lar states involved. These communications, much like opinions of the UN Legal Counsel, serve as the authoritative pronouncement of the United Nations on the questions involved. Although the Yugoslavia Sanctions Committee has already issued over 2,000 communications interpreting the Yugoslavia sanctions,<sup>5</sup> its operation has until now received scant public attention.<sup>6</sup>

Part I of this article provides, for the first time, a systematic analysis of over one hundred key rulings of the UN Yugoslavia Sanctions Committee, grouping them into categories for easy reference.<sup>7</sup> It is hoped that this digest of important Sanctions Committee rulings will aid the members of the Sanctions Committee in identifying and following precedent, aid governments in implementing the sanctions, and assist businesses (and their lawyers) in operating under them.<sup>8</sup> This Article does not, however, purport to be a comprehensive survey of all of the Sanctions Committee's cases, or even all of its important cases. Indeed, one of the main purposes of this piece is to demonstrate the need for such a comprehensive undertaking by the UN Secretariat. Rather, this Article focuses on those Sanctions Committee cases that establish important precedent, significantly expand or contract the reach of the sanctions, or tell us something useful about the nature and operation of the Sanctions Committee. Drawing from this material, Part II of the Article seeks to provide broader insights into the process of UN Security Council resolution implementation and suggests sev-

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5. Interview with Frederick Baron, member of the U.S. State Department Serbia Sanctions Task Force, in Washington D.C. (June 21, 1993) [hereinafter Interview with Frederick Baron].

6. Sanctions Committee communications are designated "restricted" for routing purposes, meaning that they are distributed to governments and missions, but not to UN depository libraries. The U.S. Government does not treat UN "restricted" documents as "classified material." Telephone Interview with Flora Evon, Director of U.S. Department of State International Organizations Documents Center (Oct. 1, 1993).

7. The analysis draws upon the Sanctions Committee's formal communications as well as the record of its proceedings.

8. This material should continue to remain of use even after the sanctions on the FRY are lifted, since the rulings of the Yugoslavia Sanctions Committee will guide the work of other existing UN Sanctions Committees and future committees in interpreting similarly worded provisions of Security Council sanctions resolutions. See generally *infra* part II.B.

eral possible changes to improve the way in which the Sanctions Committee operates.

## I. THE RULINGS OF THE SANCTIONS COMMITTEE

The Yugoslavia Sanctions Committee was originally established by Security Council Resolution 724 to recommend appropriate measures to the Security Council in response to violations of the arms embargo.<sup>9</sup> The Committee's mandate was later expanded by Security Council Resolutions 757 and 760, which authorized the Sanctions Committee to recommend appropriate measures to the Council in response to violations of the economic sanctions, to promulgate guidelines for sanctions implementation, and (under a no-objection procedure) to decide upon applications for the approval of humanitarian shipments.<sup>10</sup> Although the Security Council has never expressly given the Sanctions Committee a general mandate to issue interpretations of the sanctions resolutions, as will be seen below, the Committee has taken on this function in responding to communications received from states seeking clarification of the sanctions resolutions' reach.

The Sanctions Committee is composed of representatives of the fifteen states that are members of the Security Council.<sup>11</sup> While unanimous decision of the Committee is technically required only for those questions that are governed by the Committee's "no-objection" procedure (such as approval of humanitarian shipments into the FRY), in practice the Committee makes all of its decisions by consensus. Cases come before the Committee through communications by states seeking the Committee's views on, or its authorization for, proposed action.<sup>12</sup> In the United States, the State Department will

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9. S.C. Res. 724, U.N. SCOR 3023d mtg. ¶ 5(b), U.N. Doc. S/Res/724 (1991).

10. S.C. Res. 757, *supra* note 2; S.C. Res. 760, *supra* note 2.

11. The ten non-permanent members of the Security Council in 1992 were Cape Verde, India, Japan, Morocco, Zimbabwe, Hungary, Ecuador, Venezuela, Austria, and Belgium. China, France, Russia, the United Kingdom, and the United States are the permanent members. See U.N. Press Release, Department of Public Information, ORG/1155 (Jan. 4, 1993).

12. With few exceptions, the Sanctions Committee has been strict in its refusal to consider requests not emanating from governments or international organizations. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 10th mtg., at 12, U.N. Doc. S/AC.27/SR.10 [hereinafter S/AC.27/SR.10] (restricted).

transmit a request for a Sanctions Committee ruling usually in response to an application submitted to the Department of Treasury's Office of Foreign Assets Control for a license to export an otherwise prohibited item. The Sanctions Committee's Secretariat<sup>13</sup> then circulates a draft response, which the members of the Committee send to their capitols for approval or comment.<sup>14</sup> When there is objection to the proposed communication, members of the Committee may table substitute (or revised) drafts for circulation. Routine cases are handled as a paper exercise. The full Committee normally meets on a weekly basis to discuss and take action on the more complex or controversial cases on its agenda.<sup>15</sup>

Drawing from the record of these meetings as well as the Sanctions Committee's formal communications, this section of the Article analyzes the Sanctions Committee's rulings within the context of the following five broad categories: (1) the arms embargo; (2) restrictions on exports to the FRY; (3) restrictions on imports from the FRY; (4) restrictions on FRY shipping; and (5) restrictions on FRY participation in sporting events.

#### A. *The Arms Embargo*

The Security Council sanctions resolutions impose "a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia."<sup>16</sup> The initial resolution imposing the arms embargo, resolution 713, was adopted in

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13. According to a recent report of the U.S. General Accounting Office, the Sanctions Committee has a staff of only two persons, who are increasingly overwhelmed by the Committee's large and growing workload. See U.S. General Accounting Office, Report: Serbia-Montenegro: Implementation of U.N. Economic Sanctions, at 6 (April 1993) [hereinafter GAO].

14. In the United States, an inter-agency task force (whose members include the State Department, the Department of Treasury's Office of Foreign Assets Control, and the National Security Council) must approve the draft communications as well as U.S. draft substitute responses in non-routine cases. The drafting of such responses is done by the State Department's Office of International Organizations Affairs and the Office of the Assistant Legal Adviser for United Nations Affairs. Interview with Frederick Baron, *supra* note 5.

15. Interview with Frederick Baron, *supra* note 5.

16. See S.C. Res. 713, *supra* note 2. The United States implemented the arms embargo through an order prohibiting export of defense articles to the former Yugoslavia, effective July 19, 1991 (the U.S. action preceded the UN embargo). See Public Notice 1427, Suspension of Munitions Export Licenses to Yugoslavia, 56 Fed. Reg. 33,322 (1991).

September 1991—several months before Croatia, Slovenia, and Bosnia-Herzegovina were recognized by the international community as independent states separate from Yugoslavia. Through indirect action that escaped the notice of most commentators as well as many governments, the Security Council later reaffirmed that the arms embargo continued to apply to each of the states that emerged from the territory of the former Yugoslavia.<sup>17</sup>

In light of armed attacks by forces under the direction of the FRY against Bosnia-Herzegovina, the application of the arms embargo to Bosnia became a matter of controversy. On March 20, 1993, the government of Bosnia-Herzegovina submitted a request for provisional measures (the equivalent of a preliminary injunction) to the International Court of Justice,<sup>18</sup> arguing that resolution 713 and other relevant Security Council resolutions must be construed to allow states to provide Bosnia-Herzegovina with military equipment in accordance with its inherent right of individual and collective self-defense under Article 51 of the UN Charter.<sup>19</sup> While the International Court of Justice declined to rule on the issue on juris-

17. S.C. Res. 727, *supra* note 2, ¶ 6 (which "reaffirm[s] the embargo applied in paragraph 6 of resolution 713 (1991) and in paragraph 5 of resolution 724 (1991), and decides that the embargo applies in accordance with paragraph 33 of the Secretary-General's report (S/23363)."). See *Further Report of the Secretary-General Pursuant to Security Council Resolution 721 (1991)*, U.N. SCOR, at 7, ¶ 33, U.N. Doc. S/23363 (1992) [hereinafter S/23363]. Paragraph 33 of that report provided: "Indeed, Mr. Vance added that the arms embargo would continue to apply to all areas that have been part of Yugoslavia, any decisions on the question of the recognition of the independence of certain republics notwithstanding." *Id.*

18. See *Case Concerning Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugo. (Serbia and Montenegro))*, 1993 I.C.J. (Apr. 8), reprinted in 87 AM. J. INT'L L. 505 (1993) (concerning the request for the indication of provisional measures). The International Court of Justice ruled that it lacked jurisdiction to consider this claim. *Id.* at 515.

19. U.N. CHARTER art. 51. The Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international Peace and Security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

*Id.*

dictional grounds, the United States Department of State has taken the position that "[i]f the United States were to act in a manner inconsistent with the Security Council's Chapter VII arms embargo on Bosnia on the theory that Bosnia's right of self-defense supersedes the actions of the Council, the authority of the Security Council would be severely undermined."<sup>20</sup> As indicated below, notwithstanding Bosnia's arguments concerning its right of self-defense, the Sanctions Committee has continued to apply the arms embargo to all of the states of the former Yugoslavia including Bosnia.

Several of the first cases brought before the Sanctions Committee concerned "dual-use" items—that is, items that could be used either for military or civilian purposes. The first such case, considered by the Committee on March 16, 1992, concerned Germany's refusal to return several Yugoslav helicopters to the FRY, Croatia, Macedonia, and Slovenia after the completion of routine servicing. The FRY sought assistance from the Committee in its efforts to secure the return of one of the aircraft, which it described as a civilian helicopter not subject to the arms embargo.<sup>21</sup> Germany informed the Committee that, although not armed, the helicopters had nevertheless been classified as dual-purpose aircraft under the relevant German regulations.<sup>22</sup> Germany felt that, since the deployment of the helicopters in connection with armed conflicts in

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20. See Letter from Wendy R. Sherman, Assistant Secretary of State for Legislative Affairs, U.S. Department of State to Lee H. Hamilton, Chairman of the Committee on Foreign Affairs of the U.S. House of Representatives (undated) (enclosing an analysis by the State Department Legal Adviser of the Bosnia-Herzegovina Self-Defense Provision of H.R. 2333) (on file with author). The Legal Adviser's analysis states, in part:

The right to self-defense does not necessarily entail an unrestricted right to purchase or receive arms from the world at large. Even assuming that an arms embargo constrains the right to self defense, however, the second sentence of Article 51 makes clear that the Security Council may take action under Chapter VII of the Charter which may indeed affect a State's exercise of the right of self-defense . . . [W]hen the Security Council imposes an arms embargo or cease-fire, such actions will often affect a State's exercise of the right of self-defense.

*Id.*

21. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 6th mtg. at 4-6, U.N. Doc. S/AC.27/SR.6 (1992) [hereinafter S/AC.27/SR.6] (restricted).

22. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 7th mtg. at 3, U.N. Doc. S/AC.27/SR.7 (1992) [hereinafter S/AC.27/SR.7] (restricted).



the former Yugoslavia could not be ruled out, it could not approve the re-export of the helicopters in view of the arms embargo unless it was authorized to do so by the Sanctions Committee.<sup>23</sup> Although the Chairman of the Committee initially expressed doubts regarding whether the Committee had the competence to address the question of dual-use items, after discussion by the Committee he ruled that the question of dual use was germane to the Committee's work.<sup>24</sup> The Committee then decided that the position of the German authorities in this case was well-founded and decided not to authorize the re-export of the helicopter to the FRY.<sup>25</sup>

The March 16, 1992 ruling on the dual-use helicopter case can be viewed as the *Marbury v. Madison*<sup>26</sup> of Yugoslavia Sanctions Committee jurisprudence. Finding that the Security Council resolution establishing its mandate "did not have to be interpreted restrictively," the Committee in effect asserted its authority to issue interpretations of the sanctions resolutions as incidental to its mandate.<sup>27</sup>

The Committee soon had occasion to refine its position on dual-use helicopters when it approved a request from Canada to authorize the sale of a medi-vac helicopter to Bosnia-Herzegovina.<sup>28</sup> The Committee distinguished the Canadian request, involving a specifically equipped ambulance helicopter which would have to be dismantled before it could be converted to military use, from the German-held police helicopters, which

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23. *Id.*

24. See S/AC.27/SR.6, *supra* note 21, at 5-6.

25. See S/AC.27/SR.7, *supra* note 22, at 3.

26. 5 U.S. 137 (1803). In this seminal case the Supreme Court of the United States first asserted its constitutional right to exercise judicial review on the constitutionality of U.S. legislation.

27. See S/AC.27/SR.6, *supra* note 21, at 4, 6. According to the record, the Chairman of the Sanctions Committee "wondered whether the Committee had the competence to address [questions of interpretation of the sanctions] and what capacity it had to identify materials and equipment susceptible to dual use or capable of being converted to military use." S/AC.27/SR.6, *supra* note 21, at 5. The Chairman concluded from the Committee's discussion of the matter that "Resolution 724 (1991) [establishing the Committee] did not necessarily have to be interpreted restrictively. The issues raised by the case under consideration, such as the dual use of equipment were germane to the Committee's work . . . ." S/AC.27/SR.6, *supra* note 21, at 6.

28. See S/AC.27/SR.7, *supra* note 22, at 5-7.

the Committee believed were relatively easy to modify for military use.<sup>29</sup>

In a different dual-use context, the Committee declined to authorize a request by Germany to ship DM 24,100 worth of nitroglycerin to be used by the FRY in mining coal to meet the country's humanitarian electric needs, pending adequate assurances that the end use would not be military.<sup>30</sup> Similarly, the Committee refused to authorize a request from Hungary to export one hundred mine-detection devices to Croatia, despite assurances that the end-user of the devices would be the special mine-sweeping unit of the Croatian police which is not involved in any military activity, and that the devices would be used solely to secure the safe return of the civilian population to the territories evacuated by the Serbian Army.<sup>31</sup>

An important factor in such cases is that the "humanitarian exception" applicable to other aspects of the sanctions does not apply to the arms embargo. The only organization authorized to receive and use military equipment in the former Yugoslavia is UNPROFOR, the UN Peacekeeping force.<sup>32</sup> Therefore, the only relevant issue in these cases is whether there were sufficient assurances that the items would not be put to a military use.

The resolutions imposing the arms embargo do not contain any provisions concerning the disposition of items seized in violation of the embargo. When Croatia reported that it seized a cargo of military weapons unloaded from an Iranian airliner at Zagreb airport, the Committee authorized the Croatian authorities to destroy immediately all the military equipment in question under the supervision of UNPROFOR.<sup>33</sup> This is to

29. See S/AC.27/SR.7, *supra* note 22, at 5.

30. See Letter from the Chairman of the Sanctions Committee to the Permanent Representative of Germany to the UN (Nov. 9, 1992) (U.N. Doc. S/AC.27/1992/OC.1395).

31. Sanctions Comm. Case 444/Add.1 of Sept. 10, 1992. See also Interview with Frederick Baron, *supra* note 5.

32. See S.C. Res. 743, *supra* note 2. ("Decides within the same framework that the embargo imposed by paragraph 6 of Security Council resolution 713 (1991) shall not apply to weapons and military equipment destined for the sole use of UNPROFOR."). See also Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to "Whomever It May Concern" (June 5, 1992) (U.N. Doc. S/AC.27/1992/OC.12).

33. See Letter from Katsumi Sezaki, Acting Chairman of Sanctions Committee, to José Ayala Lasso, President of the Security Council (Sept. 14, 1992) (U.N. Doc.

be contrasted with the Committee's position on embargoed items seized outside the country upon which sanctions have been imposed. In such cases the Committee has authorized the seizing state to dispose of the items as it sees fit so long as "no funds or benefits related to the [seized items] should be made available to entities in or operating from the [embargoed country]." <sup>34</sup>

### *B. Exports to the FRY*

The main purpose of the Security Council imposed sanctions on the FRY was to disrupt the FRY economy, and thereby "apply pressure on Serbia-Montenegro to meet UN demands to cease outside aggression and interference in Bosnia and Herzegovina."<sup>35</sup> The key to this was a comprehensive embargo imposed on exports to the FRY. This was not to be a complete embargo, however. As discussed in the following section of this Article, the Security Council expressly created certain exceptions, which the Sanctions Committee interpreted broadly, and the Sanctions Committee itself created a host of other exceptions to the embargo.

#### 1. The Humanitarian Exception

The meaning and scope of the "humanitarian exception"—those provisions in the sanctions regime which carved exceptions to restrictions on exports to the FRY for foodstuffs, medicines, and other humanitarian items as well as financial transactions related to such humanitarian shipments—have been the source of continuous debate both within the United Nations and among states seeking to implement the sanctions regime. With the possible exception of the problems encountered in the interpretation of the provisions regarding shipping on the high seas, in territorial waters, and on the Danube River, the humanitarian provision has provided the Sanctions

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S/AC.27/1992/OC.752).

34. *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia, Proposed Amendment to Draft Letter to Colombia*, U.N. SCOR, 54th mtg., U.N. Doc. S/AC.27/1993/Comm.375/Amend.2. (1993) [hereinafter *Draft Letter*].

35. See GAO, *supra* note 13, at 4.

Committee with a greater amount of case work than any other category of the sanctions.

When first established, the Yugoslavia sanctions regime's humanitarian exception was limited to the supply of commodities or products intended strictly for medical purposes and foodstuffs, which could be shipped to the FRY after the state of origin notified the Sanctions Committee of the shipment.<sup>36</sup> During the Sanctions Committee's meeting on June 10, 1992, the Chairman of the Committee tabled a draft communication stating that the exemption to the sanctions set forth in paragraph 10 of resolution 757 (for activities related to UNPROFOR, to the Conference on Yugoslavia, and to the European Community Monitor Mission)<sup>37</sup> applied as well to the emergency relief assistance being provided by the UN High Commissioner for Refugees, the World Health Organization, the International Committee of the Red Cross, the United Nations Development Programme, and UNICEF.<sup>38</sup>

The United Kingdom's Sanctions Committee representative believed that the proposed interpretation was unfounded. Instead, he took the position that a new Security Council resolution containing language similar to paragraph 20 of resolution 687 concerning Iraq was needed.<sup>39</sup> The representatives of

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36. S.C. Res. 757, *supra* note 2, ¶ 4c. The Security Council decides that all states shall prevent:

[T]he sale or supply by their nationals or from their territories or using their flag vessels or aircraft of any commodities or products, whether or not originating in their territories, but not including supplies intended strictly for medical purposes and foodstuffs notified to the [Sanctions Committee], to any person or body for the purpose of any business carried on, in or operated from the FRY, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products.

S.C. Res. 757, *supra* note 2, ¶ 4c.

37. See S.C. Res. 757, *supra* note 2, ¶ 10, in which the Security Council decided "that the measures imposed by this resolution shall not apply to activities related to UNPROFOR, to the Conference on Yugoslavia or to the European Community Monitor Mission . . . ."

38. See S/AC.27/SR.10, *supra* note 12, at 9-10.

39. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 12th mtg. at 2-4, U.N. Doc. S/AC.27/SR.12 (1992) (restricted). Resolution 687 (1991) provided in relevant part that the Iraq sanctions "shall not apply to foodstuffs notified to the [Sanctions Committee] or with the approval of that Committee, under the simplified and accelerated 'no objection' procedure, to materials and supplies for essential civilian needs . . . ." *Id.*

the United States, Belgium, Austria, Japan, and France, on the other hand, expressed the view that the Committee could include such a provision in its guidelines without waiting for Security Council action.<sup>40</sup> Their position on this matter gave an early indication of the willingness of the Sanctions Committee to interpret Security Council sanctions resolutions liberally. Ultimately, a compromise was reached whereby the Committee decided to promulgate the proposed guideline without delay, but also simultaneously to suggest that the Security Council meet to adopt a new resolution on the matter.<sup>41</sup>

The resulting Security Council resolution, resolution 760, went beyond the need identified by the Committee for authorization for the relief activities of certain international humanitarian organizations. Instead, with Sanctions Committee approval under the "no-objection" procedure, any state or organization could now ship commodities and products "for essential humanitarian need" to the FRY.<sup>42</sup>

In contrast to resolution 687 on Iraq, which provided a list of specific articles presumed to be "materials and supplies for essential civilian needs,"<sup>43</sup> the Sanctions Committee decided

40. *Id.*

41. *Id.* at 5. See also *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 13th mtg. at 3, U.N. Doc. S/AC.27/SR.13 (1992) (restricted).

42. S.C. Res. 760, *supra* note 2. Security Council Resolution 760 also provides that the Security Council:

Decides that the prohibitions in paragraph 4(c) of Resolution 757 (1992) concerning the sale or supply to the FRY of commodities or products, other than medical supplies and foodstuffs, and the prohibitions against financial transactions related thereto, contained in Resolution 757 (1992) shall not apply, with the approval of the [Sanctions Committee] under the simplified and accelerated "no objection" procedure, to commodities and products for essential humanitarian need.

S.C. Res. 760, *supra* note 2.

43. S.C. Res. 687, U.N. SCOR, 2981st mtg. ¶ 20, U.N. Doc. S/Res/687 (1991) [hereinafter S.C. Res. 687]. The Security Council decided that the sanctions on Iraq

shall not apply to foodstuffs notified to the [Sanctions Committee] or with the approval of that Committee, under the simplified and accelerated "no objection" procedure, to materials and supplies for essential civilian needs as identified in the report of the Secretary General dated 20 March 1991, and in any further findings of humanitarian need by the Committee.

*Id.* The referenced Secretary-General's report lists a variety of items related to agriculture production, water, sanitation, and health including: fertilizers, pesticides, veterinary drugs, agricultural machinery, water purification equipment, sanitation equipment, and battery-operated incubators. See Letter from Javier Perez de

not to attempt to formulate a guiding list of exempted humanitarian items for Yugoslavia. Rather, the Committee stated that it preferred to "consider specific questions" concerning proposed humanitarian exports to the FRY "on a case by case basis, as they arise."<sup>44</sup>

As interpreted by the Committee, the scope of the humanitarian exception was held to encompass a wide variety of goods and services, most of which were of no surprise to the international community. Such commodities as medicines, foodstuffs, emergency shelters, and clothing were consistently approved by the Sanctions Committee on a routine basis. Despite an inherent risk of diversion, the Committee also routinely approved the shipment of items that were not themselves of a humanitarian nature, but were related to the transport and distribution of food and medicine.<sup>45</sup>

There were, however, several cases that the Committee rejected which seemed at first blush to serve a clear humanitarian purpose. In one such case, the Committee "could find no justification based on humanitarian need" for the shipment to Serbia of boxes of matches.<sup>46</sup> Though the record of the Committee's discussion of the case sheds little light on its motives, it is likely that the Committee's rejection was related to the time of the year (summer), the large number of matches requested (3 million boxes), and, in particular, the fact that Serbians were reported to have engaged in widespread burning of Bosnian towns and villages.<sup>47</sup> In a similar vein, the Committee denied the FRY's request for heating oil "for the operation of purely humanitarian institutions . . . during the ap-

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Cuellar, Secretary-General, to President of the Security Council (March 20, 1991) (U.N. Doc. S/22366).

44. Letter from the Sanctions Committee to the Permanent Mission of Slovenia (June 12, 1992) (U.N. Doc. S/AC.27/1992/OC.26).

45. See, e.g., Letter from José Ayala Lasso, Chairman of Sanctions Committee, to Sir David Hannay, KCMG, Ambassador Extraordinary and Plenipotentiary Permanent Representative to the United Nations, Permanent Mission of the United Kingdom (Dec. 31, 1992), (U.N. Doc. S/AC.27/1992/OC.2170) (authorizing the shipment of a Land Rover 110 station wagon for use by the charity OXFAM in distributing food in Serbia).

46. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 16th mtg. at 6, U.N. Doc. S/AC.27/SR.16 (1992) (restricted) [hereinafter S/AC.27/SR.16].

47. See, e.g., U.N. ESCOR, 1st Sess., Agenda Item 3, at 2, U.N. Doc. E/CN.4/1992/S-1/9 (1993).

proaching winter season," in the absence of "a system to monitor the final use of the oil" in light of its potential military applications.<sup>48</sup>

On the other hand, the Committee has approved many items that would seem to be dubious candidates for the humanitarian exception, including cigarettes,<sup>49</sup> chocolate bars,<sup>50</sup> potato chips,<sup>51</sup> wine, and vodka.<sup>52</sup> While it is true that enumerating legitimate items of essential humanitarian need might indeed be impractical, there seems to be no reason why the Sanctions Committee could not develop a short list of items, including cigarettes and vodka, deemed to fall outside the humanitarian exception. The denial of such items would likely have a strong psychological impact on the Serb population.<sup>53</sup> To date, however, such suggestions have not been well received within the Sanctions Committee.<sup>54</sup>

## 2. Pharmaceutical Precursors

The United States member of the Sanctions Committee initially took the position that pharmaceutical precursors (chemicals used in the production of finished pharmaceutical products) should not be permitted under the humanitarian exception of resolution 757 as "supplies intended strictly for medical purposes." Here, as distinct from dual-use military

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48. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 36th mtg. at 3-7, U.N. Doc. S/AC.27/SR.36 (1992) (restricted) [hereinafter S/AC.27/SR.36].

49. Letter from José Ayala Lasso, Chairman of Sanctions Committee, to Mr. Slavi Pashovski, Permanent Representative of Bulgaria to the United Nations (Nov. 30, 1992) (U.N. Doc. S/AC.27/1992/OC.1639); Letter from José Ayala Lasso, Chairman of Sanctions Committee, to Mr. Svetlomisr Baev, Permanent Representative of Bulgaria to the United Nations (July 20, 1992) (U.N. Doc. S/AC.27/1992/OC.234).

50. Letter from José Ayala Lasso, Chairman of Sanctions Committee, to Mr. Thomas L. Richardson, Deputy Permanent Representative of the United Kingdom to the United Nations (Nov. 13, 1992) (U.N. Doc. S/AC.27/1992/OC.1475).

51. Letter from the Sanctions Committee to the Permanent Mission of the Netherlands to the United States (July 10, 1992) (U.N. Doc. S/AC.27/1992/OC.151).

52. Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Mr. Slavi Pashovski, Permanent Representative of Bulgaria to the United Nations (Nov. 11, 1992) (U.N. Doc. S/AC.27/1992/OC.1415).

53. Cigarettes could be denied on the basis of their adverse health effects and vodka could be denied on the basis of its potential military application (*i.e.*, as a "Molotov cocktail").

54. See Interview with Frederick Baron, *supra* note 5.

items, the risk was not that the chemicals would be used for non-humanitarian purposes. Rather, in the view of the United States, the danger was that the pharmaceutical precursors would be used to keep the FRY's sizeable pharmaceutical industry in operation (and thereby prop up the FRY's economy) rather than for immediate domestic consumption.<sup>55</sup> The United Kingdom, France, Belgium, and Russia, on the other hand, argued that opposing the import of components for the FRY pharmaceutical industry would prevent the FRY from producing necessary drugs and might create additional needs for humanitarian assistance.<sup>56</sup>

Since it was isolated on the issue, the United States reluctantly withdrew its objection,<sup>57</sup> but subsequently urged the Committee to revisit its decision to allow shipments of pharmaceutical precursors when the Committee received reports that companies in the FRY were exporting finished pharmaceuticals in contravention of the ban on exports established by the sanctions regime.<sup>58</sup> The Sanctions Committee responded by restricting imports of pharmaceutical precursors to companies which had been identified as exporting finished pharmaceuticals.<sup>59</sup> Thus, upon notification by a firm of its

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55. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 18th mtg. at 7, U.N. Doc. S/AC.27/SR.18 (1992) (restricted).

56. *Id.* at 7-8.

57. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 21st mtg. at 4, U.N. Doc. S/AC.27/SR.21 (1992) (restricted) [hereinafter S/AC.27/SR.21].

58. See, e.g., Letter from James C. Ngobi, Secretary of the Sanctions Committee, to Professor Ibrahim A. Gambari, Permanent Representative of Nigeria (Nov. 30, 1992) (U.N. Doc. S/AC.27/1992/OC.1778) (requesting Nigerian authorities to undertake investigations of the origin of "pharmaceutical goods intercepted in Greece which were apparently under export from . . . the Federal Republic of Yugoslavia to . . . Nigeria").

The Sanctions Committee previously ruled that the sanctions prohibited the FRY even from exporting medical supplies urgently needed in Ethiopia, making it clear that the humanitarian exception applied to exports to the FRY, not exports from the FRY. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 14th mtg. at 6, U.N. Doc. S/AC.27/SR.14 (1992) (restricted).

59. Beginning in November 1992, the Sanctions Committee began to deny, pending investigation, exports of precursors to companies in the FRY which were suspected of violating the ban on exports by exporting finished pharmaceuticals abroad. See, e.g., Letter from José Ayala Lasso, Chairman of Sanctions Committee, to Bent Haakansen, Permanent Representative of Denmark to the United Nations (Nov. 9, 1992) (U.N. Doc. S/AC.27/1992/OC.1400) (The letter states: "The Commit-



intention to export precursors to specified FRY pharmaceutical companies, the Sanctions Committee would place a "hold" on the transaction pending an examination of the probable end use of the product.

Repeated requests by the Sanctions Committee for investigations of illegal exports of finished pharmaceuticals by several FRY firms were ignored or deflected by FRY officials with denials that such transactions had occurred.<sup>60</sup> Finally, in February of 1993, the Sanctions Committee decided to prohibit all exports to the eight FRY firms identified as having engaged in illegal exports until FRY authorities provided the Committee with the complete report on the exportation of pharmaceuticals from Serbian firms to Slovenia.<sup>61</sup> The information was never provided. Consequently, pharmaceutical precursors cannot be exported to the FRY under the exception for "supplies intended strictly for medical purposes" when there is reason to believe that the precursors will be used for export purposes rather than for domestic medical consumption.

### 3. The Exception for Humanitarian Remittances/Pensions

Paragraph five of resolution 757 proscribes the remittance of "any funds" to persons or bodies within the FRY, "except payments exclusively for strictly medical or humanitarian purposes and foodstuffs."<sup>62</sup> While the Committee routinely approved requests by international humanitarian organizations such as UNICEF, the UN High Commissioner for Refugees, and the World Food Programme to transfer funds into the FRY for their activities,<sup>63</sup> it struggled with a range of cases involv-

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tee deem[s] it necessary to undertake further inquiries so as to ascertain whether or not the end use of the indicated shipment would contravene the sanctions measures imposed . . . in resolution 757").

60. See, e.g., Letter from Ronaldo Mota Sardenberg, Chair of the Sanctions Committee, to Dragomir Djokic, Permanent Mission of the Federal Republic of Yugoslavia to the U.N. (Feb. 3, 1993) (U.N. Doc. S/AC.27/1993/OC.521).

61. *Id.*

62. S.C. Res. 757, *supra* note 2, ¶ 5.

63. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to James P. Grant, Executive Director of the United Nations Children's Fund, (Oct. 30, 1992) (U.N. Doc. S/AC.27/1992/OC.1293) (authorizing UNICEF to transfer funds on a monthly basis to its Belgrade office in order to finance local operational and office expenses); Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Santiago Romero, Acting Director of the Office of the United Nations High Commissioner for Refugees (Nov. 12, 1992) (U.N. Doc.

ing direct "humanitarian" payments to persons in the FRY.

On one end of the spectrum were the cases of obvious humanitarian need, such as the Committee's approval of a request for a Netherlands-based organization to make monthly remittances amounting to \$3,840 to several hundred Yugoslav children orphaned in the hostilities.<sup>64</sup> Falling in the middle of this range of cases was a request by Greece for authorization to make remittances to Greek students studying in the FRY. Rather than give a blanket authorization for all students studying in the FRY, the Committee confined its authorization to exceptional cases and to students who were about to complete their studies.<sup>65</sup>

At the other end of the spectrum was the tricky issue of pension payments to individuals in the FRY. The Sanctions Committee initially took a restrictive view of the authority of states to transfer pension payments to individuals in the FRY under the remittance clause of resolution 757. While the members of the Committee recognized the general humanitarian nature of pensions,<sup>66</sup> some members were concerned by the amount of hard currency which these payments could make available to FRY authorities.<sup>67</sup> According to one estimate, payment of such benefits would make available to the FRY some \$1.5 billion per year in foreign exchange.<sup>68</sup>

The Sanctions Committee first considered the question of allowing pension payments to be made when the government

S/AC.27/992/OC.1447) (authorizing UNHCR and the World Food Programme to undertake purchases and related transactions in Serbia for the implementation of certain humanitarian assistance projects in the FRY).

64. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 27th mtg. at 8, U.N. Doc. S/AC.27/SR.27 (1992) [hereinafter S/AC.27/SR.27] (restricted).

65. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 11th mtg. at 2, U.N. Doc. S/AC.27/SR.11 (1992) (restricted).

66. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 9th mtg. at 3-5, U.N. Doc. S/AC.27/SR.9 (1992) (restricted).

67. See S/AC.27/SR.10, *supra* note 12, at 3 (The U.S. representative "said it was his Government's position that it was important for the sanctions to cover remittances of funds to Serbia and Montenegro, as the Yugoslav Government would attempt to manipulate such transfers for its own advantage, and it had therefore prohibited all such remittances involving transfers from United States banks.").

68. See S/AC.27/SR.21, *supra* note 57, at 5.

of Australia requested the Committee's view "on the possibility of continuing to pay out pension funds to eligible Australian recipients in Serbia and Montenegro."<sup>69</sup> The Committee rejected the request for a blanket authorization for pension payments as over-broad, but stated that this decision would not prejudice the Committee's position in considering more specific requests in the future.<sup>70</sup> During the next several months, in response to similar requests for blanket authorization for pension payments, the Committee consistently reconfirmed that it would only approve individual requests on a case-by-case demonstration of humanitarian need.<sup>71</sup>

This position, however, gradually changed as it became apparent that some states continued to transfer pensions without consulting with the Sanctions Committee, since paragraph 5 of resolution 757 did not require notification to or authorization by the Sanctions Committee before making humanitarian payments. Since it lacked a mechanism by which to control such payments, the Committee, by the fall of 1992, decided to turn the matter completely over to the individual states, determining that in appropriate circumstances such remittances would not violate resolution 757, and that it was for individual states to determine whether such payments were warranted in each case.<sup>72</sup>

#### 4. The Diplomatic Exception

Although the sanctions resolutions do not contain an express exception for the operation of diplomatic missions, the Sanctions Committee has interpreted the sanctions resolutions

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69. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Richard Butler, Permanent Representative of Australia to the United Nations (June 11, 1992) (U.N. Doc. S/AC.27/1991/OC.19).

70. *Id.* See S/AC.27/SR.10, *supra* note 12, at 4. An alternative approach that the Committee apparently did not consider was to authorize pension payments limited to a specific amount (e.g., \$200.00).

71. See *Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, U.N. SCOR, 14th mtg. at 7, U.N. Doc. S/AC.27/SR.14 (1992); see also S/AC.27/SR.21, *supra* note 57, at 4; Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Dragomir Djokic, Permanent Representative of the FRY to the United Nations (July 15, 1992) (U.N. Doc. S/AC.27/1992/OC.222).

72. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Dragomir Djokic, Permanent Representative of the FRY to the United Nations (Nov. 20, 1992) (U.N. Doc. S/AC.27/1992/OC.1555).

as containing such an exception "to maintain the normal functioning of diplomatic missions in accordance with the norms of international law."<sup>73</sup> Citing the precedent of allowing diplomatic missions to continue functioning despite the imposition of the Iraqi sanctions regime, the Committee determined that "the embargo did not apply to imports and exports for the sole needs of embassies and consular missions or the import and export of personal household effects of diplomats and non-diplomats."<sup>74</sup>

The Committee later clarified that its reference to the "norms of international law" was to the Vienna Convention on Diplomatic Relations of 1961.<sup>75</sup> The Vienna Convention provides for entry into the receiving state of "articles for the official use of the Mission" and "articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment."<sup>76</sup> The Convention also provides that "the receiving State shall accord full facilities for the performance of the functions of the mission," that "the diplomatic bag shall not be opened or detained," and that the diplomatic agent's papers, correspondence, and property "shall enjoy inviolability."<sup>77</sup> The Vienna Convention does not, however, address the continuing shipment of goods to diplomatic missions during a UN imposed economic embargo.

As the Sanctions Committee has pointed out in another context, "under the Charter of the United Nations and the relevant resolutions of the Security Council [states have the]

73. See S/AC.27/SR.10, *supra* note 12, at 6. The Committee's ruling on this matter was in response to a communication by Greece "requesting an interpretation as to whether the embargo applied to imports and exports for the sole needs of embassies, diplomatic, and consular missions." See S/AC.27/SR.10 *supra* note 12, at 6.

74. See Security Council Committee Established Pursuant to Resolution 724 (1991) *Concerning Yugoslavia*, U.N. SCOR, 10th mtg. at 12, U.N. Doc. S/AC.27/SR.10 (restricted). The Committee's view that the sanctions do not cover the personal household affects of "non-diplomats" is justified under the "repatriation" exception discussed briefly in the text accompanying note 105, *infra*, rather than the diplomatic exception.

75. See UN Press Release, Department of Public Information (May 11, 1993) (U.N. Doc. SC/5615).

76. See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 36, 23 U.S.T. 3227, 500 U.N.T.S. 95.

77. *Id.* arts. 25, 27.

obligation to implement the sanctions regime notwithstanding the existence of any rights or obligations under any other international agreement.”<sup>78</sup> In the absence of an express provision creating a diplomatic exception, or any references in the record to the Security Council’s intention that such a residual exception should be read into the sanctions resolutions, the Sanctions Committee could have ruled that the sanctions override the above provisions of the Vienna Convention. Indeed, this would seem to have been the intention of the Security Council as evinced by paragraph 8 of resolution 757, which requires states to reduce the number of staff at FRY diplomatic missions within their territory. Instead, based on its Iraqi precedent and perhaps a desire to facilitate diplomatic pressure on the FRY through continuing diplomatic contact in Belgrade, the Sanctions Committee took the position that the sanctions were not intended to prohibit shipments to or from diplomatic missions and their personnel in the FRY in accordance with the Vienna Convention. While “diplomatic shipments,” therefore, do not require specific Sanctions Committee approval, states frequently notify the Sanctions Committee of such shipments in advance to obtain from the Committee a document confirming that the sanctions are not applicable to the shipment.<sup>79</sup>

Consistent with the international law principle of reciprocity, the Sanctions Committee has also opined that the sanctions “should not impede the normal functioning” of FRY diplomatic and consular missions abroad. Consequently, the Committee has ruled that bank accounts for the sole purpose of FRY diplomatic and consular missions are exempt from the sanctions.<sup>80</sup> However, the Committee has narrowly construed

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78. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to M. Gheorghe Chirila, Permanent Mission of Romania to the United Nations (Aug. 26, 1992) (U.N. Doc. S/AC.27/1992/OC.592) [hereinafter *Romanian Letter*].

79. See, e.g., Letter from José Ayala Lasso, Chairman of the Sanctions Committee to Slavi Pashovski, Permanent Mission of Bulgaria to the United Nations (Nov. 30, 1992) (U.N. Doc. S/AC.27/1992/OC.1683) (notification of a shipment of three tons of gasoline for the Bulgarian Embassy in Belgrade); Letter from José Ayala, Chairman of the Sanctions Committee to Peter Osvald, Permanent Mission of Sweden to the United Nations (Nov. 25, 1992) (U.N. Doc. S/AC.27/1992/OC.1635) (notification of shipment of a 1992 Volvo 740 GL automobile).

80. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Dragomir Djokic, Permanent Mission of the FRY to the United Nations (July 13, 1992) (U.N. Doc. S/AC.27/1992/OC.172).

this exception. For example, when the FRY requested the Committee's authorization for the release of its embassy's funds on deposit with Jugobanka, New York, which the United States government had frozen, the Committee responded "that several banks in the United States are licensed to carry accounts of the FRY, and that the Government is free to deposit fresh funds into those accounts for the use of its embassies and consulates abroad."<sup>81</sup>

### 5. Informational Materials Exception

Yet another exception to the sanctions created by the Sanctions Committee pertains to informational materials such as mail, newsprint for nongovernmental newspaper operations, and broadcasting equipment for the independent media in the FRY. The Committee has justified this exception on the ground that the particular informational material was not a commodity or product, or that it fell within the essential humanitarian need exception.

On August 12, 1992, the Sanctions Committee had occasion to rule on the application of the sanctions to parcel post delivery in response to a request by Belgium for advice on the transport operations of the company DHL International, based in Belgrade, which is a subsidiary of DHL Worldwide Express, Brussels.<sup>82</sup> On the ground that there were no specific provisions within Security Council Resolution 757 limiting or prohibiting the delivery of mail to or from the FRY, the Committee stated that it had no objection to the continued transport operations by the subsidiary of the Belgium company.<sup>83</sup> This ruling created a gaping loophole in the embargo. Under this ruling, many otherwise prohibited items can be shipped into the FRY via the mails and DHL without limitation on size, weight, or value.

In the fall of 1992, the United States requested the Sanctions Committee's approval to grant licenses to several non-

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81. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Drasomir Djokic, Permanent Mission of the FRY to the United Nations (July 16, 1992) (U.N. Doc. S/AC.27/1992/OC.224).

82. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Paul Noterdaeme, Permanent Representative of Belgium to the United Nations (Aug. 12, 1990) (U.N. Doc. S/AC.27/1992/OC.415).

83. *Id.*

profit, philanthropic organizations to supply independent, democratic media organizations in Serbia-Montenegro with essential technical equipment which would enable them to continue their independent and democratic reporting of events in Yugoslavia.<sup>84</sup> The United States argued that the supplies should be allowed under the humanitarian exception to the sanctions because the continued operation of independent, democratic media in Serbia-Montenegro was essential for the fulfillment of the Yugoslav people's fundamental right to freedom of information as recognized in Article 19 of the 1948 Universal Declaration of Human Rights, Article 19 of the International Covenant on Political and Civil Rights, and Article 10 of the European Convention on Human Rights.<sup>85</sup> On November 19, the Sanctions Committee approved the request, along with a similar request by the United Kingdom, on condition that the proper use of the equipment would be monitored by the International Media Fund, a United States nongovernmental organization, and that any suspected misuse or diversion of the equipment would be reported promptly to the Committee.<sup>86</sup>

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84. See Unclassified State Department Cable 247697 to the U.S. Mission to the United Nations, captioned "support for democratic initiatives" (Aug. 1, 1992) (on file with author). See also Letter from the Deputy Permanent Representative of the United States to the Chairman of the United Nations Sanctions Committee (Nov. 24, 1992) (U.N. Doc. S/AC.27/1992/Comm.1647). The organizations were the International Media Fund, the Open Society Fund, and the National Endowment for Democracy. The items to be supplied consisted of computer hardware and software, television broadcasting equipment and office equipment. The media organizations that would receive these supplies were Studio B (TV), Naplo magazine, Monitor magazine, Pancevac newspaper, and Radio Pancevac. *Id.*

85. *Universal Declaration of Human Rights, 1948*, reprinted in EDMUND OSMANCIK, *ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS* (2d ed. 1990). Article 19 of the Universal Declaration states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and the right to seek, receive and impart information and ideas through any media and regardless of frontiers." *Id.* Nearly identical language is contained in the International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. The underlying argument would be as follows: (1) the continued operation of Serbia-Montenegro's independent media depends on their receiving the equipment at issue; and, (2) because the continued operation of independent media is related to the human rights of the Serbian people, there is a "humanitarian need" for the equipment.

86. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Thomas L. Richardson, Deputy Permanent Representative of the United King-

Once it had been established that television and radio equipment could be supplied to independent media under the "humanitarian exception" to the sanctions, France quickly submitted a request to supply newsprint, magazine paper, and other supplies to four independent press organizations in Serbia.<sup>87</sup> The Committee approved the request without any special conditions. While an exception to support the continued operation of the independent (anti-government) media promotes the goals of the sanctions, the rationale for the exception (*i.e.*, freedom of information) leaves the Sanctions Committee with no principled basis to deny similar exports for government controlled media.

## 6. The Transshipment Exception

Perhaps the single largest flaw in the sanctions regime was the initial decision by the Security Council to permit the transshipment of goods across the territory of the FRY as a general exception to the sanctions.<sup>88</sup> While the Sanctions Committee worked for several months following the adoption of resolution 757 to standardize approval procedures, ultimately

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dom to the United Nations (Nov. 19, 1992) (U.N. Doc. S/AC.27/1992/OC.1546); Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Alexander F. Watson, Deputy Permanent Representative of the United States to the United Nations (Dec. 7, 1992) (U.N. Doc. S/AC.27/1992/OC.1770).

Ironically, on December 31, 1992, the United Kingdom reported to the Sanctions Committee that the equipment had been hijacked upon crossing the Hungarian-Serbian border. See Letter from T.L. Richardson, *Charge d'affaires* of the Permanent Mission of the United Kingdom, to the Chairman of the U.N. Sanctions Committee (Jan. 7, 1993) (U.N. Doc. S/AC.27/1993/Comm.9). The Chairman of the Sanctions Committee then wrote the Permanent Mission of the FRY demanding that it take all necessary steps to locate the diverted equipment and ensure its delivery. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Dragomir Djokic, Permanent Mission of the FRY to the United Nations (Dec. 30, 1992) (U.N. Doc. S/AC.27/1992/OC.2128).

87. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Harvé Ladsous, Deputy Permanent Representative of France to the United Nations (Nov. 25, 1992) (U.N. Doc. S/AC.27/1992/OC.1649).

88. S.C. Res. 757, *supra* note 2, ¶ 6. Pursuant to U.N. Security Council Resolution 757, paragraph 6, the Security Council:

Decides that the prohibitions in paragraphs 4 and 5 [preventing the exportation to and importation from the FRY of all commodities] shall not apply to the transshipment through the FRY of commodities and products originating outside the FRY and temporarily present in the territory of the FRY only for the purpose of such transshipment . . . .

S.C. Res. 757, *supra* note 2, ¶ 6.



conveyances carrying "transshipped" goods provided the single largest source of illegal commodities imported into the FRY.<sup>89</sup>

The regime as established by resolution 757, under whose terms commodities were allowed to cross FRY borders without the approval of the Sanctions Committee,<sup>90</sup> was fraught with problems. First, use of the term "transshipment" initially caused confusion among those charged with implementing the sanctions on the borders of the FRY. "Transshipment" is generally understood as describing the process whereby goods being shipped are transferred from one form of conveyance to another—such as from a ship to a truck—en route to a final destination. As used in resolution 757, however, the term embraced a different meaning: namely, the routing, either in one form of conveyance or by any number of conveyances, of goods from one country to another country through the territory of the FRY. As the Sanctions Committee made clear, the purpose of the resolution was to limit the transfer of goods into the FRY, not across its territory to other countries. Thus, the Sanctions Committee issued an interpretation stating clearly that the term "transshipment" as used in the sanctions resolutions "is to be construed as including 'transit' as well."<sup>91</sup>

A second problem concerning the interpretation of the transshipment clause was raised when the FRY demanded that tolls be paid for the use of roads, creating a tension between paragraph 5's prohibition on making available to the FRY "funds and economic resources" and operative paragraph 6's statement that such prohibitions "shall not apply" to transshipment. The Sanctions Committee approved a Greek payment of tolls to authorities of the FRY "since it is a basic requirement of such transshipment, which is permitted under the terms of resolution 757."<sup>92</sup> The FRY took advantage of this ruling to require the payment of exorbitant transit charges

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89. See generally GAO, *supra* note 13.

90. See *Guidelines of the Security Council Committee Established Pursuant to Resolution 724 (1991) concerning Yugoslavia*, U.N. SCOR, 13th mtg. ¶ 10, U.N. Doc. S/AC.27/1992/CRP.7/Rev.3 (1992) [hereinafter *Guidelines*].

91. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Victor H. Batiouk, Permanent Mission of Ukraine to the United Nations (Jan. 21, 1993) (U.N. Doc. S/AC.27/1993/OC.107).

92. See Letter from Sanctions Committee, to Ambassador Antonias Exarchos, Permanent Representative of Greece to the United Nations (June 12, 1992) (U.N. Doc. S/AC.28/1992/OC.24).

from vessels passing through the FRY portion of the Danube River, which became a major source of foreign currency.<sup>93</sup>

The Security Council attempted to address these difficulties in resolution 787 and the revised guidelines which accompanied the new sanctions. This resolution strictly limited the types of commodities which could be transshipped and required transshipment to be approved by the Sanctions Committee under its no-objection procedure.<sup>94</sup> The resolution further tightened the regime by requiring countries of destination to report to the Sanctions Committee upon completion of the transshipment.<sup>95</sup>

While the language of resolution 787 did address many of the legal problems created by the imprecision of resolution 757, the transshipment regime continued to prove unworkable in practice. Most importantly, the Sanctions Committee, through the Sanctions Assistance Missions (SAMs) and authorities in the front-line states, was unable adequately to monitor and enforce the regime. Documents continued to be forged—approval letters themselves were often forged, but more frequently lists attached to approval letters (which themselves bore no official stamp or other markings) were changed to reflect items which were left behind or added to shipments.<sup>96</sup>

Acknowledgment that the transshipment regime was unworkable, combined with escalated aggression by Bosnian Serbs against Bosnian Moslems in the spring of 1993, led to a growing consensus among states that transshipments should be totally banned. Accordingly, resolution 820—adopted on April 17, 1993, nearly one year after the establishment of the

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93. See Letter from the Permanent Representative of Hungary to the United Nations to the President of the Security Council (May 12, 1993) (U.N. Doc. S/25808) [hereinafter Hungarian Letter].

94. S.C. Res. 787, *supra* note 2, ¶ 9. Resolution 787(9) attempted to ensure that transshipped goods would not be diverted to the FRY by prohibiting the transshipment of crude oil, petroleum products, coal, energy-related equipment, iron, steel, other metals, chemicals, rubber, tires, vehicles, aircraft, and motors of all types unless specifically authorized on a case-by-case basis by the Sanctions Committee under its no-objection procedure. S.C. Res. 787, *supra* note 2, ¶ 9.

95. See *Guidelines*, *supra* note 90, ¶ 10(c). Paragraph 10(c) of the Guidelines required a confirmation from receiving states that authorized transshipments were received in good order and in conformity with the particulars as restated in the letter of authorization. *Guidelines*, *supra* note 90.

96. GAO, *supra* note 13, at 22.

ban on imports and exports in resolution 757—established a complete ban on all land transfers of commodities into the territory of the FRY,<sup>97</sup> and severely restricted transshipment on the Danube.<sup>98</sup>

The failure of the transshipment regime can be attributed both to poorly constructed provisions and to practical problems. By failing adequately to establish limits on the types of commodities and products which could be transshipped, resolution 757 allowed considerable amounts of fuel, machinery, and other economic resources to enter the territory of the FRY, where they were frequently off-loaded (either by plan or against the wishes of the shippers) and used by the authorities of the FRY. Also, the earlier resolution did not provide any notification requirement upon completion of the transfer of commodities. Accordingly, there was no mechanism by which to verify that transshipment had been completed.

Most importantly, however, the regime as established was largely unworkable as a matter of practice. The international community was unable, or unwilling, to commit sufficient resources to monitor the implementation of the regime. First, with limited resources it proved impossible to verify the contents of shipments. Second, it was difficult for SAM teams to verify the authenticity of documents. Finally, the SAM teams were unable to monitor effectively the departure of conveyances in order to verify that goods which entered the FRY also departed the FRY.

### *C. Imports from the FRY*

At first blush, the sanctions provision prohibiting the importation of goods from the FRY appears to be among the most succinct and clear of those contained in the sanction resolutions. Specifically, resolution 757(4)(a) obligates states to prevent "the import into their territories of all commodities and

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97. S.C. Res. 820, U.N. SCOR, 3200th mtg. at 3, U.N. Doc. S/Res/820 (1993) [hereinafter S.C. Res. 820]. Resolution 820(13) obligates states to prevent diversion to the territory of the FRY of commodities and products said to be destined for other places. *Id.*

98. *Id.* at 4, ¶ 15. Resolution 820(15) permits transshipment of commodities and products through the FRY on the Danube "only if specifically authorized by the [Sanctions Committee] and only if each vessel so authorized is subject to effective monitoring while passing along the Danube." *Id.*

products originating in the Federal Republic of Yugoslavia (Serbia and Montenegro) exported therefrom after the date of the present resolution.”<sup>99</sup> However, much in the same way that the Sanctions Committee identified and implemented “implied” exceptions to the sanctions regime’s ban on exports to the FRY in the cases of the diplomatic exception<sup>100</sup> and the informational materials exception,<sup>101</sup> the Sanctions Committee also carved exceptions to the complete ban on imports for cases involving “religious objects” and for cases of “repatriation” from the FRY of goods belonging to other states.

The religious objects exception was established in October 1992, when the Sanctions Committee approved the importation from the FRY of a religious sculpture commissioned by a Serbian Orthodox Church in the United States. The Committee approved the shipment despite its recognition that “Resolution 757 did not specifically authorize such transactions”<sup>102</sup> since the humanitarian exception only applied to exports to, not imports from, the FRY.<sup>103</sup> In doing so, the Committee employed the peculiar rationale that the sculpture was a “religious object, not a commodity” and therefore not subject to the sanctions provisions.<sup>104</sup> This rationale would exempt from the sanctions a host of other religious objects including paintings, figurines, bibles, and even religious text books.

In one of its first repatriation cases, the Sanctions Committee decided in July 1992 to authorize the return of a Turkish-registered aircraft which had been sent to the FRY for servicing prior to the adoption of resolution 757.<sup>105</sup> Also in July, the Sanctions Committee authorized the return from the FRY of fabrics belonging to Liz Claiborne, Inc., which had not yet been processed into finished textile products.<sup>106</sup>

The Sanctions Committee strictly confined its repatriation exception to cases in which the items (1) were only temporarily

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99. S.C. Res. 757, *supra* note 2.

100. See *supra* notes 70-78 and accompanying text.

101. See *supra* notes 78-84 and accompanying text.

102. See S/AC.27/SR.36, *supra* note 48, at 11.

103. See *supra* note 58.

104. See S/AC.27/SR.36, *supra* note 48, at 11.

105. See S/AC.27/SR.21, *supra* note 57, at 7.

106. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Edward J. Perkins, Ambassador of the United States to the United Nations (July 24, 1992) (U.N. Doc. S/AC.27/1992/OC.300).

present in the FRY, and (2) were not in any way altered or processed while in the FRY. For example, the Committee refused Egypt's request for repatriation of equipment in the absence of more detailed information indicating "the exact nature and value" of the repairs rendered in the FRY.<sup>107</sup> Nor was the Committee willing to authorize repatriation where goods had been bought and paid for prior to the imposition of sanctions under the repatriation exception. Thus, the Committee refused a request by Mongolia for repatriation of hotel furniture it had purchased from a FRY company before the Security Council's adoption of resolution 757 but which had not yet been shipped when the sanctions were imposed.<sup>108</sup> Although several members of the Committee were sympathetic to the argument that this was merely a routine repatriation case since title had passed to Mongolia before the imposition of sanctions, authorization was denied because "without a mechanism to monitor and investigate such kinds of transactions, it would be impossible to verify claims that the goods to be exported from the FRY had been paid for before 30 May 1992."<sup>109</sup>

A repatriation exception to the prohibition on imports from the sanctioned states makes good sense. The denial of repatriation claims only injures the property owners outside of the sanctioned state. Indeed, the sanctioned state could arguably refuse to release such property, in effect making a *de facto* expropriation, by shielding itself under the language of the sanctions. As such, future sanctions regimes would do well to include an explicit provision allowing the repatriation of property stranded in sanctioned states. This exception should also include cases in which title to property has passed prior to imposition of sanctions such as in the Mongolia furniture case, provided that the requesting state provides the Committee with specific information verifying that the merchandise in question was fully paid for prior to the imposition of sanctions.

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107. See S/AC.27/SR.36, *supra* note 48, at 9.

108. See S/AC.27/SR.36, *supra* note 48, at 6; see also S/AC.27/SR.27, *supra* note 64, at 4.

109. See S/AC.27/SR.27, *supra* note 64, at 2.

*D. The Maritime Sanctions*

## 1. FRY Vessels

After the imposition of the sanctions, the FRY continued to trade through its sizeable merchant fleet in circumvention of the Security Council resolutions. The application of the sanctions to FRY vessels thus became an increasingly important issue for the Sanctions Committee. While the language of resolution 757 does not explicitly cover such vessels, two of its provisions were potentially applicable: paragraph 4(c) provides that all states are required to prevent any activities in their territories which promote or are calculated to promote trade benefitting the FRY,<sup>110</sup> and paragraph 5 provides that all states are required not to make available to the FRY "any funds or any other financial or economic resources."<sup>111</sup>

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110. See S.C. Res. 757, *supra* note 2, ¶ 4(c). Paragraph 4(c) of Resolution 757 reads:

Decides that all States shall prevent: . . . The sale or supply by their nationals or from their territories or using their flag vessels or aircraft of any commodities or products, whether or not originating in their territories, but not including supplies intended strictly for medical purposes and foodstuffs notified to the Committee established pursuant to resolution 724 (1001), or to any person or body for the purpose of any business carried on in, or operated from the Federal Republic of Yugoslavia (Serbia and Montenegro), and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products.

See S.C. Res. 757, *supra* note 4, ¶ 4c. This provision would apply if providing port services to FRY vessels was deemed an activity which promotes trade with the FRY.

111. See S.C. Res. 757, *supra* note 2, ¶ 5 (Emphasis added). Paragraph 5 of Resolution 757 provides:

Decides that all States shall not make available to the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) or to any commercial, industrial or public utility undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro), any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to those authorities or to any such undertaking of any such funds or resources and from remitting any other funds to persons or bodies within the Federal Republic of Yugoslavia (Serbia and Montenegro), except payments exclusively for strictly medical or humanitarian purposes and foodstuffs.

S.C. Res. 757, *supra* note 2, ¶ 5.

This provision can be read either to authorize the detention of FRY vessels or to prohibit the provision of services to such vessels. For this provision to authorize detention of FRY vessels, vessels must be deemed to be an "economic re-

In domestic litigation challenging the United States government's seizure of four FRY-owned, Maltese-flagged vessels which called at United States ports, the United States took the position that these provisions of resolution 757 authorized states to take appropriate action to prevent the continued operation of FRY vessels.<sup>112</sup> In response to the United States' request for the Sanctions Committee's position on the matter—which the United States hoped to use to bolster its position in court—the Committee issued a ruling on August 28, 1992, stating: "in view of the fact that the vessels are apparently owned by majority interests in Montenegro, their continued operation and any payments related thereto would be in violation of the sanctions established under resolution 757 (1992)."<sup>113</sup>

As is almost always the case with Sanctions Committee communications, the Committee did not explain the basis for its August 28, 1992 ruling. The ruling could be interpreted either (1) as requiring states to prohibit the provision of services to FRY vessels (which in most cases would effectively preclude their entry into or departure from port) as the European Community (EC) countries had done;<sup>114</sup> or (2) as requiring states actively to seize and impound FRY vessels that enter their territorial waters—following the United States model. Although the question was largely rendered moot a year later when the Security Council adopted resolution 820, which explicitly provides that states "shall impound" all FRY-interest vessels as well as other vessels in their territories found to

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source," and permitting FRY vessels to depart from a state's territorial jurisdiction must be deemed making an economic resource available to the FRY. For this provision to be read as prohibiting the provision of port services, the service itself must be deemed an "economic resource," and FRY owned vessels must be deemed an arm of the authorities or an undertaking operating in the FRY.

112. See Memorandum in Opposition To Plaintiff's Motion for A Preliminary Injunction at 6, *Milena Ship Management Co. v. Newcomb*, 804 F. Supp. 859 (E.D. La. 1992).

Ultimately, the U.S. Court of Appeals for the Fifth Circuit upheld the government's detention of the vessels, finding the government's interpretation of the sanctions and implementing executive orders to be reasonable. See *Milena Ship Management Co. v. Newcomb*, No. 92-3905, 1993 U.S. App. LEXIS 18355 (5th Cir. July 21, 1993).

113. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Alexander F. Watson, Deputy Permanent Representative of the United States (Aug. 28, 1992) (U.N. Doc. S/AC.27/1992/OC.624).

114. See Council Regulation 1432/92, 1992 O.J. (L151) 4.

have been in violation of the sanctions, the ambiguity of paragraphs 4(c) and 5 of resolution 757 resulted in much disparity in the treatment of FRY vessels by states and consequently an uneven application of the sanctions in the interim.<sup>115</sup> Moreover, while resolution 820 codifies the United States model, the rulings of the Sanctions Committee suggest that it had in mind the EC rule. For example, in one such case, the Committee emphasized that "the provision of supplies, services or payments to vessels of the Federal Republic of Yugoslavia is prohibited."<sup>116</sup>

The Committee has developed a rather broad definition of "vessels of the Federal Republic of Yugoslavia" (applicable

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115. See S.C. Res. 820, *supra* note 97, at 6, ¶ 24. Paragraph 24 of Security Council Resolution 820 provides:

[A]ll States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) and that these vessels, freight vehicles, rolling stock and aircraft may be forfeit to the seizing State upon a determination that they have been in violation of resolutions 713 (1991), 757 (1992), 787 (1992) or the present resolution.

Res. 820, *supra* note 97, at 6, ¶ 24. Paragraph 25 of the same Resolution provides:

[A]ll States shall detain pending investigation all vessels, freight vehicles, rolling stock, aircraft and cargoes found in their territories and suspected of having violated or being in violation of resolutions 713 (1991), 757 (1992), 787 (1992) or the present resolution, and that, upon a determination that they have been in violation, such vessels, freight vehicles, rolling stock and aircraft shall be impounded and, where appropriate, they and their cargoes may be forfeit to the detaining State.

Res. 820, *supra* note 97, ¶ 25. See S.C. Res. 713, *supra* note 2; S.C. Res. 757, *supra* note 2; S.C. Res. 787, *supra* note 2.

Resolution 661 (which imposed sanctions on Iraq) used the same "economic resources" language as Resolution 757, S.C. Res. 661, SCOR 2933d mtg., U.N. Doc. S/INF/46 (1990), and engendered similar confusion, some of which was alleviated when the Security Council adopted Resolution 670, which called upon "all States to detain any ships of Iraqi registry which enter their ports . . . or to deny such ships entrance to their ports except in circumstances recognized under international law as necessary to safeguard human life." See S.C. Res. 670, SCOR 2943d mtg., U.N. Doc. S/INF/46 (1990) [hereinafter S.C. Res. 670].

116. See Romanian Letter, *supra* note 78. In 1990, the U.N. Legal Counsel issued an opinion interpreting the "economic resource" provision of Security Council Resolution 661 (1990) S.C. Res. 661, *supra* note 115, at 19-20, concerning Iraq as prohibiting the provision of port services "such as the provision of water, supplies and fuel" to Iraqi and Kuwaiti vessels and vessels coming from or heading to Kuwait or Iraq. See Letter from Carl-August Fleischhauer, the Under-Secretary-General for Legal Affairs to the Chairman of the Iraqi Sanctions Committee (Oct. 3, 1990) (U.N. Doc. S/AC.25/1990/Note/18).



under both interpretations). It has, for example, defined such vessels to include FRY-flagged vessels, as well as "vessel[s] owned wholly or partially by persons residing in or by companies registered in the Federal Republic of Yugoslavia (Serbia and Montenegro)."<sup>117</sup> The Committee has explained that "the decisive question in determining whether sanctions should apply to a given vessel is who exercises effective control over the vessel, not simply what flag the vessel is flying."<sup>118</sup> In another ruling, the Committee indicated that foreign owned and registered vessels under contract with entities in the FRY might be deemed to be FRY vessels for purposes of the sanctions.<sup>119</sup>

The Committee has also carved out several exceptions to its prohibitions concerning FRY vessels. On December 17, 1992, for example, the Committee granted an exception "on the basis of humanitarian considerations" for the provision of "food, water and other humanitarian services to the crew" of FRY vessels.<sup>120</sup> The Committee attempted to confine its exception by stating "the Committee does not authorize the unloading of the cargo, nor any maintenance or services to be

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117. See Letter from the Chairman of the Sanctions Committee to the Netherlands Permanent Mission to the United Nations (Dec. 8, 1992) (U.N. Doc. S/AC.27/1992/OC.1763) [hereinafter Netherlands Letter].

118. See Letter from the Sanctions Committee to the Permanent Mission of the Netherlands (Sept. 29, 1992) (U.N. Doc. S/AC.27/1992/OC.865). Subsequently, the Security Council codified this interpretation in paragraph 10 of Resolution 787 (Nov. 16, 1992), which provides:

The Security Council further decides, acting under Chapter VII of the Charter of the United Nations, that any vessel in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be considered, for the purpose of implementation of the relevant resolutions of the Security Council, a vessel of the Federal Republic of Yugoslavia (Serbia and Montenegro) regardless of the flag under which the vessel sails.

S.C. Res. 787, *supra* note 2, ¶ 10.

119. See Letter from Ronaldo Mota Sardenberg, Chairman of the Sanctions Committee, to Victor H. Batiouk, Permanent Mission of Ukraine to the United Nations (Mar. 2, 1993) (U.N. Doc. S/AC.27/1993/OC.1350) (The letter requested the Ukrainian Government to investigate allegations that a Ukrainian flagged vessel, "[l]eased to a commercial enterprise in the Russian Federation, continues to be in use under a contract with the firm Gori of Montenegro, which would be a violation of paragraph 5 of Security Council Resolution 757 (1992).").

120. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Bent Haakonsen, Permanent Mission of Denmark (Dec. 17, 1992) (U.N. Doc. S/AC.27/1992/OC.1954).

provided to the vessel itself.”<sup>121</sup> In a later case, the Committee explained further that “in case of extreme, life-threatening emergencies of a humanitarian nature States may request the approval of the Sanctions Committee to permit on an exceptional basis such [FRY] vessels to enter their port waters or receive necessary services.”<sup>122</sup>

Soon thereafter, the Committee created an exception to its caveat prohibiting the unloading of cargo when it authorized the Netherlands to unload from the *Crna Gora*, a FRY-owned vessel, a cargo of 63,000 tons of hot coal, which was in danger of spontaneous ignition.<sup>123</sup> The Committee’s communication in that case explained that “the Committee’s decision in this instance is founded solely upon an appreciation of the assessment by the Netherlands authorities that the continued confinement of the cargo in question represents a serious safety hazard” and the Committee’s approval was made “on the condition that the cargo in question remains under impoundment by the Netherlands authorities for the duration of the sanctions.”<sup>124</sup> Later, the Committee reversed itself on the last of its conditions, ruling that the *Crna Gora*’s cargo may be released provided “no funds or benefits related to the cargo should be made available to entities in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro).”<sup>125</sup>

## 2. The Situation on the Danube

The Danube River flows 1,776 miles from Germany to the Black Sea through the countries of Austria, Slovakia, Hungary, Romania, Bulgaria and the FRY. Shipping on the river is regulated by the 1948 Danube Convention, which guarantees freedom of navigation on the Danube.<sup>126</sup> The Danube constitutes

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121. *Id.*

122. Letter from the Chairman of the Sanctions Committee to Chew Tai Soo, Permanent Representative of Singapore to the United Nations (Jan. 8, 1993) (U.N. Doc. S/AC.27/1993/OC.58). While the Communication indicated that the Committee expected states to apply to the Committee for authorization in such cases, it noted that simple notification to the Committee would be appropriate in emergency situations in which the Committee’s approval could not be sought in advance. *Id.*

123. See Netherlands Letter, *supra* note 117.

124. See Netherlands Letter, *supra* note 117.

125. See Draft Letter, *supra* note 34.

126. Convention Regarding the Regime of Navigation on the Danube, Aug. 18, 1948, 33 U.N.T.S. 201 [hereinafter Danube Convention].

a critical transportation link between Eastern Europe and Western Europe, and therefore became a central focus of the international community's efforts to disrupt trade with the FRY.

In response to the position of the Danubian states that their obligations under the Danube Convention prevented them from taking any action against FRY or other vessels violating the sanctions on the Danube, the Sanctions Committee informed the Danubian states that:

The special regime of the Danube under international conventions cannot affect the application of the sanctions regime since, under the Charter of the United Nations and the relevant resolutions of the Security Council, states must fulfill their Charter obligations to implement the sanctions regime notwithstanding the existence of any rights or obligations under any other international agreement.<sup>127</sup>

In the face of continuing protestations by the Danubian states concerning the extent of their authority to act on the Danube, the Security Council adopted Security Council Resolution 787, which:

Reaffirms the responsibility of riparian states to take necessary measures to ensure that shipping on the Danube is in accordance with resolutions 713 (1991) and 757 (1992), including such measures commensurate with the specific circumstances as may be necessary to halt such shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions of resolutions 713 (1991) and 757 (1992).<sup>128</sup>

Later, in light of continuing intransigence on the part of the Danubian states to use force to enforce the Sanctions on the Danube, the Security Council issued a Presidential State-

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127. See Romanian Letter, *supra* note 78. Under Articles 28 and 48 of the U.N. Charter, members of the United Nations are obligated to accept and carry out the decisions of the Security Council for the maintenance of international peace and security. U.N. CHARTER arts. 28, 48. The interference with international navigation on the Danube would be conducted pursuant to the obligations of the riparian states under such decisions. To the extent that the obligations of those States under the Danube Convention, *supra* note 126, conflict with the obligations under the U.N. Charter, Article 103 of the Charter provides that the Charter obligations prevail. U.N. CHARTER art. 103.

128. See S.C. Res. 787, *supra* note 2, ¶ 13.

ment calling on the Danubian states to enforce the Security Council resolutions "vigorously" with respect to vessels on the Danube and reminding them that "under Article 103 of the Charter, the obligations of the Members of the United Nations under the Charter shall prevail over their obligations under any other international agreement."<sup>129</sup> In response, the members of the Danube Commission adopted a resolution which stated:

The states members of the Danube Commission deem it essential to confirm officially that, in implementing the Security Council resolutions, they are guided by the following notions: (a) All obligations relating to the regime of navigation on the Danube which are not affected by the sanctions must continue to be fulfilled strictly; (b) Measures adopted in implementation of the Security Council resolutions which establish some limits on the regime of free navigation on the Danube should be regarded as being solely of a temporary nature. Such measures related only to the actions taken with a view to the implementation of the relevant Security Council resolutions, and cannot influence the future regime of free navigation on the Danube.<sup>130</sup>

After initial reluctance, the Danube states demonstrated through this resolution their intent to actively enforce the sanctions on the Danube.

When, consistent with the Sanctions Committee's August 1992 ruling, Ukraine, Romania, and Bulgaria began to detain FRY vessels and other vessels on the Danube suspected of violating the sanctions, a host of new issues arose. For example, in December 1992, Romania requested the Sanctions Committee's authorization to release empty FRY vessels from the port area of Galatzi on the Danube, where they were creating a dangerous situation due to the freezing of the river. The Committee apprised Romania that it could find no grounds upon which to approve that country's request.<sup>131</sup> Two days

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129. UNITED NATIONS, SECURITY COUNCIL, NOTE BY THE PRESIDENT OF THE SECURITY COUNCIL, U.N. Doc. S/25270 (1993). [hereinafter PRESIDENT'S NOTE]

130. See Hungarian Letter, *supra* note 93.

131. See Letter from Jose Ayala Lasso, Chairman of the Sanctions Committee, to Valeriu Florean, Permanent Mission of Romania to the United Nations (Dec. 22, 1992) (U.N. Doc. S/AC.27/1992/OC.2067).

later, the Committee reversed itself by approving the release of the empty vessels on the following conditions:

That the Sanctions Assistance Mission (SAM) in the area will be requested to verify that the vessels released for return to Serbia and Montenegro are indeed empty, further, that in approving the request to repatriate the vessels in question the Committee is doing so on humanitarian and health grounds in the present circumstances, and finally, that the present exception does not set a precedent for any future course of action in similar circumstances.<sup>132</sup>

While explicitly denying the creation of precedent, the Sanctions Committee nevertheless in effect created a "safety exception" to the detention of FRY vessels as it had done earlier with respect to the prohibition on providing services to FRY vessels in the *Crna Gora* case.<sup>133</sup> Three weeks later, the Sanctions Committee employed this same rationale in approving Romania's request to provide FRY authorities with fuel to ensure the functioning of FRY ice-breaking vessels on the Danube River.<sup>134</sup>

The next month, the FRY retaliated against Romania for detaining its vessels by seizing Romanian vessels on the Danube and threatening to seize more Romanian vessels unless Romania allowed the passage of FRY vessels on the Danube.<sup>135</sup> Soon thereafter, the FRY increased the pressure by using its vessels to blockade the Romanian "Iron Gates II" lock, halting all upstream and downstream traffic on the Danube.<sup>136</sup> The FRY also reportedly threatened to blow up the levee at Prahovo with the purpose of changing the Danube's course and diverting traffic passing through the Romanian

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132. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee, to Valeriu Florean, Permanent Mission of Romania to the United Nations (Dec. 24, 1992) (U.N. Doc. S/AC.27/1992/OC.2106).

133. See *supra* note 123 and accompanying text discussing the Committee's authorization for the Netherlands to off-load a cargo of hot coal from a FRY vessel.

134. Letter from Ronaldo Mota Sardenberg, Chairman of the Sanctions Committee, to Valeriu Florean, Permanent Mission of Romania to the United Nations (Jan. 18, 1993) (U.N. Doc. S/AC.27/1993/OC.117).

135. See PRESIDENT'S NOTE, *supra* note 129.

136. See Letter from the Permanent Representative of Bulgaria Addressed to the President of the Security Council (Mar. 4, 1993) (U.N. Doc. S/25373).

canal locks.<sup>137</sup> In response, the Security Council issued a Presidential Statement demanding that the FRY immediately desist from such unlawful retaliatory measures taken in response to actions by states in fulfillment of their obligations under the Charter of the United Nations.<sup>138</sup>

The members of the Sanctions Committee further urged Romania to deny FRY vessels use of the Iron Gates II Lock, which was on the Romanian side of the Danube.<sup>139</sup> Romania argued, however, that "since the Romanian side does not impose any taxation on the Yugoslav vessels for the use of the locks, this activity cannot be assimilated as 'providing services' under paragraph 4 of Security Council Resolution 757 (1992)."<sup>140</sup> The matter was settled a month later when the Security Council included in resolution 820 a provision confirming that:

[N]o vessels (a) registered in the FRY or (b) in which a majority or controlling interest is held by a person or undertaking in or operating from the FRY or (c) suspected of having violated or being in violation of resolutions 713 (1991), 757 (1992), 787 (1992) or the present resolution shall be permitted to pass through installations, including river locks or canals within the territory of member states.<sup>141</sup>

### 3. Enforcement

In response to a request for the Committee's position on what actions could and should be undertaken with respect to vessels and their cargo in situations when violations of the sanctions have been established, the Committee stated:

In view of the fact that full responsibility for the implementation of the mandatory sanctions imposed by the Security Council rests with states and, where specifically indicated, international organizations, the Committee has noted that it is up to each State to institute the measures to meet its obli-

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137. *Id.*

138. See PRESIDENT'S NOTE, *supra* note 129.

139. See Letter from Ioan Voleu, the *Charge d'affaires* of the Permanent Mission of Romania, to Chairman of the Sanctions Committee (Mar. 19, 1993) (U.N. Doc. S/AC.27/1993/Comm.213/Add.B).

140. *Id.*

141. See S.C. Res. 820, *supra* note 97, at 4, ¶ 16.

gations set out in the relevant Security Council resolutions, including adoption of relevant national laws and/or procedures and their strict and effective implementation. The Committee felt that such action should, *inter alia*, envisage severe penal provisions, in accordance with appropriate norms of international law, so as to prevent the ship to deliver prohibited cargo and to ensure that prohibited cargo does not reach its final destination.<sup>142</sup>

While a description of the measures taken by each country to enforce the sanctions against FRY vessels and other sanction-violating vessels is beyond the scope of this article, it is appropriate here to describe briefly those measures taken by the United States, which have served as a model for other countries.

On March 11, 1993, the United States Department of Treasury's Office of Foreign Assets Control named twenty-five maritime firms and fifty-five ships controlled, managed, or operated by these firms as "Specially Designated Nationals" of Yugoslavia.<sup>143</sup> These vessels are presumed to be owned or controlled by the government of the FRY and, pursuant to Executive Order, are subject to "blocking" if they come within United States jurisdiction.<sup>144</sup> Moreover, the regulatory prohibitions governing transactions by United States persons with the government of the FRY are automatically extended to these vessels. The United States Executive Orders also prohibit the import of any FRY-origin cargo into the United States and the export to the FRY of cargo from the United States, and vessels and their cargo found in violation of the Executive Orders are subject to seizure and forfeiture to the United States.<sup>145</sup>

Though the United States enforcement actions appear quite sweeping, several gaps still exist. For example, the Unit-

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142. See Letter from Ronaldo Mota Sardenberg, Chairman of the Sanctions Committee, to Slavi Pashovksi, Permanent Representative of Bulgaria to the United Nations (Jan. 21, 1993) (U.N. Doc. S/AC.27/1993/OC.102).

143. See President's Message to the Congress Reporting on the National Emergency with Respect to the Federal Republic of Yugoslavia (Serbia and Montenegro), 29 WKLY COMP. PRES. DOC. 952 (May 31, 1993).

144. See Exec. Order 124,846-Additional Measures with Respect to the Federal Republic of Yugoslavia (Serbia and Montenegro), 29 WKLY COMP. PRES. DOC. 685 (May 3, 1993).

145. See 19 U.S.C. § 1595a(C) (1988) and 18 U.S.C. § 545 (1988).

ed States has no authority to take action against vessels that are not FRY vessels and have not engaged in illegal importation into or exportation from the United States, but have in the past engaged in third country trade with the FRY in violation of the Security Council sanctions. An effective way to ground such sanction-busting vessels is for the state of the vessel's registry to "de-flag" it and for other states to refrain from re-flagging the vessel since, under international law, ships without nationality are subject to arrest and detention by any state.<sup>146</sup> Without new legislative authority, however, the United States is powerless to "de-flag" United States registered vessels that have violated the sanctions<sup>147</sup> or to refrain from re-flagging vessels that other countries have de-flagged for this reason.<sup>148</sup>

In light of the difficulties faced by individual states attempting to enforce the sanctions against non-FRY vessels engaged in illegal trade with the FRY, the North Atlantic Treaty Organization and the Western European Union placed a joint naval task force in the Adriatic Sea to deter violations of the sanctions.<sup>149</sup> Under the terms of resolution 787, this multinational interdiction force was authorized to "use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions of resolutions 713 (1991) and 757 (1992)."<sup>150</sup> Because this measure proved to be subject to easy circumvention by vessels falsely declaring that the FRY was not their destination, the Security Council included in resolution 820 (1993) a provision "prohibit[ing] all commercial maritime traffic from entering the territorial sea of

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146. See generally Part VII of the Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/Conf.62/122, 21 I.L.M. 1261 (not yet entered into force). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 501, comment c (1987) ("A ship that is not registered in any state . . . is considered 'a ship without nationality'; it may be boarded by a war ship or other clearly marked law enforcement ship of any state . . .").

147. See 46 U.S.C. §§ 12110, 12122, and 12123 (Supp. 1993).

148. See 46 U.S.C. § 121, (1992) (United States law only requires that a vessel "not [be] registered under the laws of a foreign country" at the time of application.).

149. See GAO, *supra* note 13.

150. See S.C. Res. 787, *supra* note 2, ¶ 12.



the [FRY] except when authorized on a case-by-case basis by the [Sanctions Committee]."<sup>151</sup> This measure effectively imposed a naval blockade against the FRY.

### *E. Sporting Events*

Paragraph 8(b) of resolution 757 obligates states to "prevent the participation in sporting events on their territory of persons or groups representing the FRY." Immediately following the adoption of 757, the "Yugoslav" soccer team in Sweden for the European Cup Finals was informed by the Swedish government that it would not be allowed to participate.<sup>152</sup> The United States government established guidelines for consular posts making eligibility determinations for athletes applying to come to the United States to participate in sporting events.<sup>153</sup> FRY athletes already in the United States who did not meet the eligibility criteria were prohibited from competing.<sup>154</sup>

Adopted on May 30, 1992, this sanction provision led to immediate questions concerning the extent to which athletes from the FRY would be able to participate in the Olympic Games scheduled to be held in Barcelona that summer. Initially, the International Olympic Committee (IOC) attempted to develop a plan which would allow athletes from the FRY to

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151. See S.C. Res. 820, *supra* note 97, at 6, ¶ 28. The Resolution also clarifies that force may be used "[i]n the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro)" to enforce the sanctions. See S.C. Res. 820, *supra* note 97, at 6, ¶ 29.

152. See *Sweden Welcomes UN Sanctions Against Serbia and Montenegro*, Unclassified State Department Cable 002745 from the U.S. Mission in Stockholm, June 1, 1992.

153. See *UN Sanctions Against Yugoslav Athletes*, Unclassified State Department Cable to All Consular Posts, June 9, 1992. In determining eligibility, consular officers were instructed to ask: (a) whether the individual or group was sponsored by the Government of the FRY, the National Olympic Committee of the FRY, or by a sporting federation located in the FRY; (b) whether the individual or group purported to represent the FRY; and (c) whether recognition of the individual or group was given in the name of the FRY. An affirmative answer to any one of these questions raised a presumption of ineligibility. *Id.*

154. See Letter from John R. Bolton, Assistant Secretary of State for International Organization Affairs to Kae Browning, Executive Director of the U.S. Table Tennis Association (requesting that two FRY athletes scheduled to compete in the U.S. Open Table Tennis Championships be prohibited from entering the competition) (on file with authors).

compete in the Olympics under the Olympic flag on a team fully funded by the IOC.

After considering the question of FRY participation at four meetings between July 16 and July 21, 1992, the Sanctions Committee arrived at its final decision on the participation of FRY athletes in the Summer Games. Noting that the Committee could be guided by no precedent or example, the Committee decided that participation of athletes as private individuals would not violate the provision, so long as: (1) it was clearly evident that the athletes competed solely in their personal and individual capacities; (2) the IOC assumed responsibility for the selection of participating athletes; (3) the athletes were accompanied only by trainers and not by any other personnel or officials; and (4) the athletes refrained from making any political statements or gestures.<sup>155</sup>

The Sanctions Committee went on to state that athletes should be limited to participation in individual sports, because "participation . . . in team events would inevitably evoke representation of their country, and therefore would be in violation of the relevant sanctions."<sup>156</sup> The criteria established for participation in the Barcelona games have remained intact.

The reasoning underlying the Sanctions Committee's decision to limit participation to individual sports—that participation of more than one athlete "evoke[s] representation of" the FRY—is curious. Paragraph 8(b) of resolution 757 expressly determines that all states shall prevent participation in sporting events by persons or groups *representing* the FRY. The provision implicates an affirmative intention, either on the part of the athlete or the organization sponsoring the event, that the individual or group represents the FRY. Absent such a subjective intention, individuals—whether competing alone or as part of a group—should be allowed to participate. Allowing a figure skater to participate as an individual, while denying the participation of the two individuals forming the figure skating pair, seems to contradict the purpose of the provision.

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155. See Letter from José Ayala Lasso, Chairman of the Sanctions Committee to Don Juan Antonia Yañez-Barnuevo (July 21, 1992) (U.N. Doc. S/AC.27/1992/OC.283).

156. *Id.*

## II. OBSERVATIONS AND RECOMMENDATIONS

### A. *Security Council Drafting and the Role of the Sanctions Committee*

The Security Council's sanctions resolutions contain a myriad of open-ended and undefined terms. The above discussion is replete with examples of such vaguely drafted terms, including resolution 713's reference to "military equipment," resolution 757's use of the phrase "economic resource," and resolution 760's exception for "products for essential humanitarian need."<sup>157</sup> In some cases, such as with respect to the continued operation of FRY vessels, the Security Council has had to clarify the provisions of sanctions resolutions in subsequent resolutions or presidential statements. Sometimes this has followed the Sanctions Committee's inability to reach consensus on an appropriate interpretation, and other times the Council has merely ratified an earlier ruling by the Sanctions Committee to lend it increased visibility and support. Frequently, however, the subsequent resolutions of the Security Council have created confusion over whether the Council has promulgated a new obligation on states or has merely clarified an existing obligation. This, in turn, creates uncertainty over whether relevant rulings of the Sanctions Committee continue as good authority.<sup>158</sup>

One of the principal reasons that the sponsors of the sanctions resolutions have tabled or agreed to such vague wording is to enable them to garner the maximum support of other members of the Council at the time of adoption of the sanctions resolutions. Frequently, disputes over technical terms are deferred by last minute substitution of less precise language—often language used in an earlier resolution concerning a different sanctions regime.<sup>159</sup> Even though such horse-trad-

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157. Similar examples of vague drafting can be found in the U.S. Constitution, U.S. CONST. amends. V, XIV (e.g., "due process" reference in the Fifth and Fourteenth Amendments) and in important statutes (such as section 5 of the Federal Trade Commission Act of 1914 which empowers the FTC to prevent "unfair methods of competition." 15 U.S.C. § 45(b) (1988)).

158. For example, it is unclear how the Committee's rulings on the provision of port services to FRY vessels are effected by the adoption of Security Council Resolution 820, which requires states to impound FRY vessels.

159. See *infra* notes 161-87 and accompanying text (the Security Council Resolutions establishing the several sanctions regimes contain many similar or identical provisions).

ing over technical terms is not usually essential for passage of the resolution, unanimous (or near unanimous) adoption by the Council is seen as important in cases of binding Chapter VII sanctions in order to signal wide-spread international support for sanctions.

Another reason for such vagueness is that Security Council resolutions are drafted in a time-sensitive, rather than deliberative, atmosphere.<sup>160</sup> In the context of hurried negotiations, the Council is simply unable to consider fully the range of implications of its choice of language. Rather, the Security Council usually has at best a general idea of what it wants to accomplish through the adoption of a particular sanctions resolution, but it is not always certain about what specific conduct to prohibit.

The Council, therefore, is content to adopt (or recycle) vague terms in its sanctions resolutions and to defer to the Sanctions Committee for evolving application and clarification of the sanctions on a case-by-case basis.<sup>161</sup> Moreover, the Council is usually not troubled by the potential for adverse Sanctions Committee interpretations because each member of the Council has an effective veto over any such interpretation. By allowing the Sanctions Committee to assume the function of interpreting the sanctions, the Council avoids the necessity of facing the difficult task of minute specification of what is and what is not to be permitted under the sanctions.

Surprisingly, with regard to some of the Sanctions Committee's most important rulings, such as on the existence of the "diplomatic," "safety," and "information materials" exceptions to the sanctions, the Security Council has taken no action to codify through subsequent resolution the Sanctions Committee's interpretations. On other questions, such as the application of the sanctions to FRY vessels and the obligation to freeze FRY assets, the Security Council has adopted the Sanctions Committee interpretations in subsequent "clarifying"

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160. Ironically, such time sensitivity is usually imposed by political factors rather than any crisis situation on the ground.

161. In making case-by-case interpretations of the sanctions resolutions, the Sanctions Committee has not generally applied a "retroactivity doctrine," which, under U.S. administrative law, provides that agency changes to standards of conduct cannot apply retroactively to persons who have acted in accordance with the prevailing standards. *See* SEC v. Chenery, 332 U.S. 194, 203 (1947).

resolutions. However, the Security Council has demonstrated a troubling tendency to overlook its previous clarifications when instituting a new sanctions regime based on the provisions of previous sanctions resolutions. For example, after the Security Council clarified in resolution 670 that states were required by resolution 661 to detain Iraqi ships and freeze Iraqi assets, the Council repeated the unclear language of resolution 661 in resolution 757 imposing sanctions on the FRY. The Council subsequently adopted resolution 820, which made the same clarifications that were made in resolution 670. To avoid unnecessary confusion, the Security Council should, to the extent possible, codify the important rulings of the Sanctions Committee in subsequent resolutions, and new sanctions regimes should take these clarifications fully into account.

The Sanctions Committee's March 16, 1992 ruling on the dual-use helicopter case<sup>162</sup> defined the Committee as a body with a judicial function that was not explicitly delegated to it by the Security Council but with regard to which the Council has never objected. In this way, the Sanctions Committee fills a gap existing in the methodology of interpreting Security Council sanctions. Because the UN's traditional judicial body—the International Court of Justice (ICJ)—is far too formal and cumbersome to provide speedy interpretation of the sanctions resolutions in cases that number in the hundreds per year, the Sanctions Committee acts as the only efficient forum to resolve ambiguity uniformly in sanctions resolutions.<sup>163</sup> While the Security Council has acquiesced in the expanding judicial function of the Sanctions Committee, it has not taken advantage of subsequent sanctions resolutions to explicitly include this function in the Yugoslavia Sanctions Committee's mandate, nor has it included this function in the mandate of the subsequently established Haiti Sanctions Committee,<sup>164</sup>

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162. See *supra* notes 21-27 and accompanying text.

163. Jurisdiction of the International Court of Justice (ICJ) requires the consent of the parties and the Court's justice is generally slow and expensive. Since its inception in 1945, the World Court has presided over less than 100 cases and its docket has never surpassed a dozen cases in a year. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 272 (1991).

164. See, e.g., *France, the United States of America and Venezuela: draft resolution*, U.N. SCOR, at 3-4, U.N. Doc. S/25957 (1993). Resolution 841 gives the Haiti Sanctions Committee the following functions:

(a) to examine the reports submitted pursuant to paragraph 13 below; (b) to seek from all States further information regarding the action taken by

suggesting that the status of the Sanctions Committee's judicial function is somewhat precarious. It would be unfortunate if the Council were to reign-in the Committee's judicial function, given the vital role that the Sanctions Committee plays in facilitating uniform interpretation of the sanctions. Consequently, the authors recommend that the mandate of future Sanctions Committees explicitly grant those Committees the authority "[t]o issue interpretations of the sanctions on a case-by-case basis in response to requests for fact-specific interpretations from governments."

### *B. Consistency Among Sanctions Regimes*

As revealed by comparing the texts reproduced in the notes below, the various UN sanctions regimes contain similar or identical provisions concerning: an embargo on arms to the sanctioned state (South Africa,<sup>165</sup> Libya,<sup>166</sup> the former

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them concerning the effective implementation of this resolution; (c) to consider any information brought to its attention by States concerning violations of the measures imposed by this resolution and to recommend appropriate measures in response thereto; (d) to consider and decide expeditiously requests for the approval of imports of petroleum and petroleum products for essential humanitarian needs in accordance with paragraph 7 above; (e) to make periodic reports to the Security Council on information submitted to it regarding alleged violations of the present resolution, identifying where possible persons or entities, including vessels, reported to be engaged in such violations; (f) to promulgate guidelines to facilitate implementation of this resolution.

165. See S.C. Res. 418, U.N. SCOR, 2046th mtg. at 2, ¶ 5, U.N. Doc. S/RES/418 (1977). The Security Council:

*Decides* that all States shall cease forthwith any provision to South Africa of arms and related material of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment, and spare parts for the aforementioned, and shall cease as well the provision of all types of equipment and supplies and grants of licensing arrangements for the manufacture or maintenance of the aforementioned.

166. See S.C. Res. 748, U.N. SCOR, 3063rd mtg. at 2, ¶ 5, U.N. Doc. S/RES/748 (1992) [hereinafter S.C. Res. 748]. The Security Council:

*Decides . . .* that all States shall (a) prohibit any provision to Libya by their nationals or from their territory of arms and related material of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment and spare parts for the aforementioned, as well as the provision of any types of equipment, supplies and grants of licensing arrangements, for the manufacture or maintenance of the aforementioned; (b) prohibit any provision to Libya by their nationals or from their territory of technical advice, assistance or training related to the provision, manufacture, maintenance or use of the

Yugoslavia,<sup>167</sup> Somalia,<sup>168</sup> and Haiti<sup>169</sup>); a prohibition of air flights of the sanctioned state (Iraq,<sup>170</sup> Libya,<sup>171</sup> and the FRY<sup>172</sup>); the seizure of vessels and vehicles of the sanctioned

items in (a) above; (c) withdraw any of their officials or agents present in Libya to advise the Libyan authorities on military matters.

167. See S.C. Res. 713, *supra* note 2, ¶ 6 ( "States shall . . . immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia." ).

168. See S.C. Res. 733, U.N. SCOR, 3039th mtg. at 2, ¶ 5, U.N. Doc. S/RES/733 (1992) ( "States shall . . . immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia." ).

169. See S.C. Res. 841, U.N. SCOR, 3238th mtg. at 3, ¶ 5, U.N. Doc. S/RES/841 (1993) [hereinafter S.C. Res. 841]. The Security Council:

*Decides* that all States shall prevent the sale or supply, by their nationals or from their territories or using their flag vessels or aircraft, of petroleum or petroleum products or arms and related material of all types, including weapons and ammunition, military vehicles and equipment, police equipment and spare parts for the aforementioned, whether or not originating in their territories, to any person or body in Haiti or to any person or body for the purpose of any business carried on in or operated from Haiti, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply.

170. See S.C. Res. 670, *supra* note 115, at 25, ¶¶ 3, 4. The Security Council:

*Decides* that all States . . . shall deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq . . . other than food in humanitarian circumstances, subject to authorization by the Council or the [Sanctions Committee] and in accordance with resolution 666 (1990), or supplies intended strictly for medical purposes or solely for UNIIMOG.

S.C. Res. 670, *supra* note 115, at 25, ¶¶ 3, 4. (Paragraph 4: "Decides further that all States shall deny permission to any aircraft destined to land in Iraq or Kuwait, whatever its State of registration, to overfly its territory unless [it falls into one of three exceptions].").

171. See S.C. Res. 748, *supra* note 166, at 2-3, ¶¶ 4, 6(b). The Security Council:

*Decides* that all States shall: (a) deny permission to any aircraft to take off from, land in or overfly from the territory of Libya, unless the particular flight has been approved on grounds of significant humanitarian need; (b) prohibit, by their nationals or from their territory, the supply of any aircraft or aircraft components to Libya, the provision of engineering and maintenance servicing of Libyan aircraft or aircraft components, the certification of airworthiness for such aircraft, and the payment of new claims against existing insurance contracts and the provision of new direct insurance for such aircraft.

(The Resolution also states that the Security Council "Decides that all States shall . . . prevent the operation of all Libyan Arab Airlines offices." ).

172. See S.C. Res. 757, *supra* note 2, ¶ 7. The Security Council:

*Decides* that all States shall: (a) deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of the FRY (Serbia and Montenegro),

state (Iraq<sup>173</sup> and the FRY<sup>174</sup>); an embargo on imports from the sanctioned state (Iraq<sup>175</sup> and the FRY<sup>176</sup>); an

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unless the particular flight has been approved for humanitarian or other purposes consistent with the relevant resolutions of the Council by the Sanctions Committee; (b) prohibit, by their nationals or from their territory, the provision of engineering and maintenance servicing of aircraft registered in the FRY (Serbia and Montenegro) or operated by or on behalf of entities in the FRY (Serbia and Montenegro) or components for such aircraft, the certification of airworthiness for such aircraft, and the payment of new claims against existing insurance contracts and the provision of new direct insurance for such aircraft.

173. See S.C. Res. 757, *supra* note 2, ¶ 7 (The Security Council “[c]alls upon States to detain any ships of Iraqi registry which enter their ports and which are being or have been used in violation of resolution 661 (1990), or to deny such ships entrance to their ports except in circumstances recognized under international law as necessary to safeguard life.”).

174. See S.C. Res. 820, *supra* note 97, at 6, ¶ 24. The Security Council:

*Decides* that all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the FRY and that these vessels, freight vehicles, rolling stock and aircraft may be forfeit to the seizing State upon a determination that they have been in violation of resolutions 713 (1991), 757 (1992), 787 (1992) or the present resolution.

S.C. Res. 820, *supra* note 97, at 6, ¶ 24.

Paragraph 25: The Security Council:

*Decides* that all States shall detain pending investigation all vessels, freight vehicles, rolling stock, aircraft and cargoes found in their territories and suspected of having violated or being in violation of resolutions 713 (1991), 757 (1992), 787 (1992), or the present resolution, and that, upon a determination that they have been in violation, such vessels, freight vehicles, rolling stock and aircraft shall be impounded and, where appropriate, they and their cargoes may be forfeit to the detaining State.

S.C. Res. 820, *supra* note 97, at 6, ¶ 25. Paragraph 26: The Security Council “Confirms that States may charge the expense of impounding vessels, freight vehicles, rolling stock and aircraft to their owners.”

175. See S.C. Res. 661, *supra*, note 115, ¶ 3. The Security Council:

*Decides* that all States shall prevent: (a) The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution; (b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export or trans-shipment of any commodities or products from Iraq and exported therefrom after the date of the present resolution, including in particular any transfer of funds to Iraq for the purposes of such activities or dealings.

176. See S.C. Res. 757, *supra* note 2, ¶ 4. The Security Council:

*Decides* that all States shall prevent: (a) The import into their territories of all commodities and products originating in the FRY exported therefrom after the date of the present resolution; (b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export or trans-shipment of any commodities or products



embargo on exports to the sanctioned State (Iraq,<sup>177</sup> the FRY,<sup>178</sup> and Haiti<sup>179</sup>); a prohibition on making available

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originating in the FRY and . . . exported therefrom after the date of the present resolution, including in particular any transfer of funds to the FRY for the purposes of such activities or dealings.

177. See S.C. Res. 757 *supra* note 2, ¶ 4. See S.C. Res. 661 *supra* note 115; S.C. Res. 670, *supra* note 115. Resolution 661, ¶ 3 (c): The Security Council:

*Decides* that all States shall prevent the sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products.

S.C. Res. 670, *supra* note 115, ¶ 2. Resolution 670, Paragraph 2: The Security Council "[c]onfirms that resolution 661 (1990) applies to all means of transport, including aircraft." S.C. Res. 687, *supra* note 43, ¶ 20. The Security Council:

*Decides*, effectively immediately, that the prohibitions against the sale or supply to Iraq of commodities or products, other than medicine and health supplies, and prohibitions against financial transactions related thereto contained in resolution 660 (1990) shall not apply to foodstuffs notified to the [Sanctions Committee] or with the approval of that Committee, under the simplified and accelerated "no-objection" procedure, to materials and supplies for essential civilian needs as identified in the report of the Secretary General dated 20 March 1991, and in any further findings of humanitarian need by the Committee.

178. See S.C. Res. 757, *supra* note 2, at 3, 4, ¶ 4(c). The Security Council: *Decides* that all States shall prevent the sale or supply by their nationals or from their territories or using their flag vessels or aircraft of any commodities or products, whether or not originating in their territories, but not including supplies intended strictly for medical purposes and foodstuffs notified to the [Sanctions Committee], to any person or body for the purpose of any business carried on in or operated from the FRY, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products.

See S.C. Res. 760, *supra* note 2. The Security Council:

*Decides* that the prohibitions in paragraph 4(c) of resolution 757 (1992) concerning the sale or supply to the FRY of commodities or products, other than medical supplies and foodstuffs, and the prohibitions against financial transactions related thereto, contained in Resolution 757 (1992) shall not apply, with the approval of the [Sanctions Committee] under the simplified and accelerated "no objection" procedure, to commodities and products for essential humanitarian need.

179. See S.C. Res. 841, *supra* note 169, at 3, ¶ 5. The Security Council:

*Decides* that all States shall prevent the sale or supply, by their nationals or from their territories or using their flag vessels or aircraft, of petroleum or petroleum products or arms and related material of all types, including weapons and ammunition, military vehicles and equip-

funds or other resources to the sanctioned state (Iraq<sup>180</sup> and the FRY<sup>181</sup>); the freezing of assets of the sanctioned state (Iraq,<sup>182</sup> the FRY,<sup>183</sup> and Haiti<sup>184</sup>); and the reduction of

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ment, police equipment and spare parts for the aforementioned, whether or not originating in their territories, to any person or body in Haiti or to any person or body for the purpose of any business carried on in or operated from Haiti, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply.

180. See S.C. Res. 661, *supra* note 115, at 20, ¶ 4. The Security Council: *Decides* that all States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs.

181. See S.C. Res. 757, *supra* note 2, at 4, ¶ 5. The Security Council: *Decides* that all States shall not make available to the authorities in the FRY or to any commercial, industrial or public utility undertaking in the FRY, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to those authorities or to any such undertaking of any such funds or resources and from remitting any other funds to persons or bodies within the FRY, except payments exclusively for strictly medical or humanitarian purposes and foodstuffs.

182. See S.C. Res. 670, *supra* note 115, at 25, ¶ 9. (The Security Council "[r]eminds all States of their obligations under resolution 661 (1990) with regard to the freezing of Iraqi assets, and the protection of the assets of the legitimate Government of Kuwait and its agencies, located within their territory and to report to the [Sanctions Committee] regarding those assets.").

183. See S.C. Res. 820, *supra* note 97, at 5, ¶ 21. The Security Council: *Decides* that States in which there are funds, including any funds derived from property, (a) of the authorities in the FRY, or (b) of commercial, industrial or public utility undertakings in the FRY, or (c) controlled directly or indirectly by such authorities or undertakings or by entities, wherever located or organized, owned or controlled by such authorities or undertakings, shall require all persons and entities within their own territories holding such funds to freeze them to ensure that they are not made available directly or indirectly to or for the benefit of the authorities in the FRY or to any commercial, industrial or public utility undertaking in the FRY, and calls on all States to report to the [Sanctions Committee] on actions taken pursuant to this paragraph.

184. See S.C. Res. 841, *supra* note 169, at 3, ¶ 8. The Security Council: *Decides* that States in which there are funds, including any funds derived from property, (a) of the Government of Haiti or of the de facto authorities in Haiti, or (b) controlled directly or indirectly by such Government authorities or by entities, wherever located or organized, owned or con-

diplomatic ties with the sanctioned state (Libya<sup>185</sup> and the FRY<sup>186</sup>).

For reasons of fairness and predictability, identical provisions in different regimes should be construed as identical in scope.<sup>187</sup> It logically follows that questions arising under one sanctions regime should not be addressed solely in terms of the precedent of that regime. Rather, recourse should be made to the precedent of the other regimes and each case should be viewed as a potential precedent for such other regimes including as yet unforeseen regimes that may be instituted in the future, using the provisions of the current Security Council resolutions as models. There is no mechanism, however, to ensure this consistency under the existing system.

Rather than create a single UN Sanctions Committee, separate Sanctions Committees have been established for each of the sanctions regimes. Although the several Sanctions Committees are composed of the same states (i.e., the members of the Security Council), frequently these states assign different personnel at their UN missions and at their capitals to participate in the proceedings of the different Committees and to make decisions regarding the different regimes. There is an obvious need for a coordinating mechanism between regimes. At a minimum, the UN Secretariat should publish a bi-annual "Sanctions Committee Digest," similar to Part I of this article, which would index and summarize the rulings of the several Sanctions Committees for easy reference.

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trolled by such Government or authorities, shall require all persons and entities within their own territories holding such funds to freeze them to ensure that they are not made available directly or indirectly to or for the benefit of the de facto authorities in Haiti.

185. See S.C. Res. 748, *supra* note 166, at 3, ¶ 6. The Security Council: *Decides* that all States shall . . . significantly reduce the number and the level of the staff at Libyan diplomatic missions and consular posts and restrict or control the movement within their territory of all such staff who remain; in the case of Libyan missions to international organizations, the host state may, as it deems necessary, consult the organization concerned on the measures required to implement this subparagraph.

186. See S.C. Res. 757, *supra* note 2, at 4, ¶ 8. (The Security Council "Decides that all States shall reduce the level of the staff at diplomatic missions and consular posts of the FRY.")

187. While the practice of interpreting the several sanctions regimes differently has the advantage of allowing the UN to be tougher on one sanctioned country than another depending on the prevailing circumstances, such disparate treatment would be better accomplished by varying the language of the sanctions resolutions.

*C. The Nature of the Sanctions Committee*

Although it serves a judicial function, in many ways the Sanctions Committee differs from traditional judicial bodies or administrative agencies.<sup>188</sup> These differences are discussed below, under the following categories: (1) composition and operation of the Bench; (2) form of decision; and, (3) decision-making process.

*1. Composition and Operation of the Bench*

Although the Sanctions Committee performs a judicial role, its composition and operation are unlike any other judicial entity. The Sanctions Committee, for example, is composed of diplomats rather than experienced lawyers or jurists. Because of their background, the Committee's members are accustomed to a problem-solving technique that stresses negotiation rather than legal reasoning. Moreover, unlike a traditional judicial body or administrative agency, the Sanctions Committee does not consist of a known bench. The composition of the Committee is in constant flux, changing as diplomats move on to other assignments and as "substitutes" sit in for their colleagues on a frequent basis, thereby disrupting the continuity of the bench.<sup>189</sup> Finally, unlike a tribunal in which decisions are made by majority vote, in a consensus-based system, such as that employed by the Sanctions Committee, one Committee member (and hence state) can dominate the whole group. This also encourages horse-trading rather than principled decision-making. These factors greatly reduce the jural quality of the Committee's decisions. To remedy this defect the Sanctions Committee should make its decisions by vote, rather than consensus, and the members of the Committee should be persons of recognized competence in international law appointed

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188. While the authors' recommendations seek to enhance the jural quality of the Sanctions Committee decision-making, other commentators have argued generally that questions of interpretation and dispute resolution in the context of international organizations are better resolved by political rather than judicial processes. See H.G. SCHERMERS, *INTERNATIONAL INSTITUTIONAL LAW* § 1193, 1203-06 (1980).

189. According to one of the U.S. officials who attend Sanctions Committee meetings, "you end up with different decisions depending on [who] is in the chair for the United States, and similarly for most others states." Interview with Frederick Baron, *supra* note 5.

by the members of the Security Council to serve fixed-year terms.<sup>190</sup>

Perhaps the most significant distinction between the Sanctions Committee and most international tribunals and domestic courts in the common law tradition is that the Sanctions Committee does not employ adversary argument by Counsel to narrow and sharpen the decision process. Argument of Counsel can increase predictability by locating and pointing to significant issues, by gathering and focusing crucial authorities, by making facts clear and vivid, and by illuminating the probable consequences of potential decisions.<sup>191</sup> Nor does the Sanctions Committee follow the informal rule-making procedure employed by United States administrative agencies, which provides for notice of a proposed rule and submission of views or arguments by interested parties.<sup>192</sup> The efficacy of the Committee would be improved greatly if in important (as opposed to clearly routine) cases it were to entertain limited oral presentation by the state requesting an interpretation and brief written submissions by other states with a direct interest in the case.

## 2. Form of Decision

The form of the Sanctions Committee's decision also distinguishes it from other judicial entities. For example, the Sanctions Committee neither issues signed opinions nor records the vote of its members as do most judicial bodies. Anonymous decisions behind closed doors give rise to complaints that the Committee is acting like a "Star Chamber," whose members are insulated from even the barest measure of accountability for their rulings.<sup>193</sup> Moreover, the Sanctions Committee does

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190. Cf. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, arts. 2-18, *reprinted in* FRANCIS O. WILCOX & CARL M. MARCY, PROPOSALS FOR CHANGES IN THE UNITED NATIONS 500 (1955) [hereinafter ARTICLES]. (Judges of the ICJ are elected for nine-year terms and are required to have the qualifications required in their respective countries for appointment to the highest judicial office or be jurisconsults of recognized competence in international law.)

191. See KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960), *reprinted in* GEORGE C. CHRISTIE, JURISPRUDENCE 989 (1973).

192. See R. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 321 (1985).

193. Cf. *Joint Antifacist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) ("a democratic government must therefore practice fairness, and fairness can rarely be obtained by secret one-sided determina-

not issue a detailed opinion in the way a traditional court or administrative agency would—setting forth its findings of fact and application of law to those particular facts. Instead, the Committee issues brief conclusory communications, with the barest references to context.

In the common law tradition, in order to ascertain from a case the guiding (or binding) legal principle, one must identify the case's "ratio decidendi," which has been defined as "the material facts of the case plus the decision thereon."<sup>194</sup> The Sanctions Committee frequently does not specify these material facts. One must read the Committee's rulings together with the incoming communications and the record of proceedings to even begin to ascertain what facts may have been considered material. Often it is simply impossible to determine from this record which of the various facts the Committee determined to be material or immaterial. Moreover, the Sanctions Committee rarely enunciates its legal reasoning in its communications. There is, therefore, no guide for determining which facts played a significant role in the Committee's decision.

Technically, the principle of *stare decisis* does not apply to the International Court of Justice and other international tribunals.<sup>195</sup> Nevertheless, such international judicial bodies "are respectful of precedent"<sup>196</sup> and frequently cite their previous decisions for authority and distinguish decisions when they are not being followed in similar cases.<sup>197</sup> Although the record of the Sanctions Committee's deliberations are full of

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tions of facts decisive of rights").

194. A.W.B. Simpson, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 413 (1958).

195. See ARTICLES, *supra* note 190, at 507. (Article 59 of the Statute of the International Court of Justice states that "[t]he decision of the court has no binding force except between the parties and in respect of that particular case.").

196. See LOUIS HENKIN ET AL., INTERNATIONAL LAW 88 (1980).

197. See SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 612 (1965). See also HENKIN, ET AL., *supra* note 196, at 89. According to Professors Henkin et al., "the reluctance [of international courts] to depart openly from a previous judgment or opinion given by the same court, or by another international judicial authority of high standing, is hardly less pronounced than in municipal jurisdictions." HENKIN ET AL., *supra* note 196, at 89. But see T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 49-50 (1988) (noting that the Court of Justice of the European Communities rarely refers to its previous decisions and has on occasion failed to follow its precedent without attempt to distinguish it).

references to previous cases which the Committee Members considered to constitute precedent, Sanctions Committee formal communications rarely cite to the Committee's past precedent. Several of the Committee's communications, moreover, explicitly assert that they are not to be taken as precedent for future cases<sup>198</sup> and the Committee has on occasion simply reversed itself without attempting to distinguish the previous decision or explain its change of course.<sup>199</sup>

The absence of the doctrine of precedent leads inevitably to incoherent and unpredictable rulings. "Consistency is a prime value in a legal system" and justice requires that like cases be treated alike.<sup>200</sup> Foreseeability as to what conduct is permissible or impermissible is especially critical in the area of sanctions implementation because of the many business relationships that are affected.<sup>201</sup> In addition, if it is to function as a judicial body, the Committee has a duty to introduce into its work some degree of reason and some sense of fairness. By announcing that a particular decision shall not constitute precedent, the Committee undermines the international community's respect for and confidence in its decisions. Moreover, by adopting a politically expedient decision that does not fit into its precedent, the Committee impairs the rule of law. In contrast, one past president of the International Court of Justice lauded the ICJ's "remarkable unity of precedent [as] an important factor in the development of international law."<sup>202</sup> At least with respect to important (as opposed to routine) cas-

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198. See, e.g., Letter from the Chairman of the Sanctions Committee to the Permanent Mission of Romania (Dec. 24, 1992) (U.N. Doc. S/AC.27/199/OC.2106) With respect to its ruling authorizing the return of FRY vessels being detained by Romania, the Committee stated: "the present exception does not set a precedent for any future course of action in similar circumstances." *Id.* With respect to its ruling authorizing the unloading of cargo from a detained FRY vessel, the Committee stated: "It should be clearly understood that the Committee's decision . . . in no way constitutes a precedent for any comparable situation which may arise in [the] future." *Id.*

199. See *supra* notes 124-25 and 130-31 and accompanying text.

200. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 307 (1993).

201. The authors recognize, on the other hand, that heightened foreseeability may render it more difficult for the members of the Security Council to agree on the terms to be included in sanctions resolutions since it eliminates the possibility of creative ambiguity.

202. See *The Court and the Registry*, 1961-1962 Y.B. INT'L CT. JUST. 1, 2.

es, the Committee should issue brief written opinions that identify the material facts and application of law to those facts.

### 3. Decision Making Process

The Sanctions Committee does not have much recourse to one of the fundamental tools of legal interpretation: a detailed negotiating record.<sup>203</sup> One would expect the function of the Sanctions Committee, as a quasi-judicial body, to be to interpret the provisions of the sanctions resolutions in the light of the purposes which the Security Council had in mind in adopting them. However, the members of the Security Council rarely use their "Explanations of Vote" (or, in UN parlance, EOVs) to give interpretive statements on specific provisions of resolutions. Instead, for the most part, EOVs are largely political statements, intended to send diplomatic signals rather than to clarify legal meaning. The debate on resolution 821, creating the Yugoslavia War Crimes Tribunal, was a notable exception.<sup>204</sup> Many of the members of the Council explicitly provided detailed interpretive statements on the provisions of the Statute for the War Crimes Tribunal. It would be of great utility to the operation of the Sanctions Committee if the members of the Security Council continued to provide such interpretive statements, particularly with respect to the meaning of the provisions of sanctions resolutions.

### III. CONCLUSION

Although not originally intended for that purpose, the United Nations Sanctions Committees have come to play a vital role in issuing authoritative interpretations of UN sanctions resolutions. The analysis of the Yugoslavia Sanctions Committee's key decisions provided in this Article indicates that the Committee has issued a number of novel and surprising interpretations that at times greatly expand, and at others contract, the meaning of sanctions resolutions. Until now, the Committee has operated in obscurity, with its rulings and

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203. Cf. Article 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 (entered into force 1980) (recourse should be had to the negotiating record to determine the meaning of an instrument when its terms leave the meaning ambiguous or obscure).

204. See U.N. SCOR, 3270th mtg. U.N. Doc. S/PV. 3217 (1993).



record familiar only to a handful of government officials, despite the fact that the interpretations of the Committee have a direct impact on the conduct of thousands of businesses around the world on a daily basis.

One principal purpose of this Article has been to demonstrate the need for the UN to publish a bi-annual digest of the rulings of its Sanctions Committees, which, like Part I of this Article, would analyze the Committees' cases in their context and group the decisions by topic for ease of reference. Such a digest would prove instrumental to governments and businesses, as well as to the Sanctions Committee itself. Throughout the Article, the authors have made several other recommendations to improve the operation of the Sanctions Committee and the interpretation of Security Council resolutions, which are summarized below:

(1) The Security Council should in future resolutions provide expressly that the Sanctions Committee's mandate include issuing interpretations of the sanctions resolutions, so that there can be no question of the Committee's continuing competence to undertake this function;

(2) The Security Council should take several steps to enhance the jural quality of the Sanctions Committee, including: (a) creating a single comprehensive Sanctions Committee to handle all of the UN sanctions regimes; (b) requiring that the members of the Sanctions Committee be experts with legal experience appointed by the members of the Security Council to serve fixed-year terms; (c) requiring that the Sanctions Committee make its decisions by vote, rather than consensus, and in important cases, that the Committee issue signed, written, opinions that identify the material facts and application of law to those facts; and (d) authorizing the Committee in important cases to allow limited oral presentation by the state requesting an interpretation and brief written submissions of interest by other states;

(3) In their Explanation of Votes, the Members of the Security Council should provide interpretive statements with respect to the meaning of the provisions of sanctions resolutions to aid the Sanctions Committee in interpreting the

resolutions in the light of the purposes which the Security Council had in mind in adopting them; and

(4) The Security Council should, to the extent possible, codify the important rulings of the Sanctions Committee in subsequent resolutions, and should fully reflect these clarifications in new sanctions regimes.

In making these recommendations, the authors are sensitive to the view expressed by the United States Supreme Court in a similar context that "conserving scarce fiscal and administrative resources" should be taken into account in determining how judicial a decision-making process should be.<sup>205</sup> The authors also recognize that some of these suggestions are likely to encounter initial political resistance. However, as the Security Council continues to intensify its reliance on comprehensive economic sanctions to respond to threats to international peace and security around the globe, the several UN Sanctions Committees will play an increasingly important role in interpreting those sanctions. Consequently, their work will come under heightened public scrutiny and there is likely to be increasing pressure to clarify the Sanctions Committees' authority to issue interpretations of the Sanctions resolutions, to legitimate the process by which such interpretations are rendered, and to make these interpretations readily available to the public.

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205. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976).

