National Security and European Law*

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I. Introduction

Most or all legal systems, whether national or international, provide for suspension of obligations in the event of emergencies or threats to national security. The Community legal system, and the systems established by the second and third pillars of the European Union, are no exception. 'National security' derogations inevitably form part of or overlap with *public* security or foreign policy exceptions. But whatever form the derogations take, there is always a risk that individuals' rights will be damaged when they are invoked.

Disputes over national security in the European Union can take three forms. First, and most frequently, a dispute can arise when a Member State has derogated from an EU or EC rule for national security reasons. Secondly, a dispute could arise when the European Community or European Union takes action to defend the security of the Community or the Union. Thirdly, national security issues arise when a Member State is delegated power to administer an act of the Community or Union, notably the enforcement of economic sanctions and denial of entry to or expulsion of a person under a third pillar measure or the Schengen Convention.[1] The ongoing process of European integration thus has a twofold impact on the protection of national security: increasingly there is a joint concept of national security that the Member States have developed in common, but there remain many reasons why the national security of one Member State might be invoked as a derogation from the integration process.

Readers familiar with the Court of Justice's jurisprudence will recognize the above three scenarios: they precisely parallel the circumstances in which human rights issues arise in EC law. The Court has established that a Member State's derogations from EC law must be assessed in light of human rights principles; it has assessed Community acts for conformity with human rights principles, and interpreted them in light of those principles; it has reviewed national implementation of Community acts in light of them; and it has declined to review human-rights issues when a matter falls entirely outside the scope of EC law. It is submitted that the Court's approach to human-rights

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[1] (1991) ILM 73.

issues should be followed, *mutatis mutandis*, in interpreting third-pillar instruments, where respect for human rights is especially important and is expressly incorporated in Article K of the Treaty on European Union and in many third-pillar acts.[2] In the second pillar, there is already one example of the Court applying the 'agency' approach to the human-rights issues arising from the Member States' application of an EC regulation with foreign policy aims.[3]

The parallel between human-rights jurisprudence and national-security derogations is germane not just because of the frequent overlap between the two issues, but because the proportionality principle inherent in both EC law and the European Convention on Human Rights requires that the more an act taken on national security grounds impinges upon protection of human rights, the more stringently national courts and the European Courts should review such acts.[4]

However, acts taken to protect national security pose a unique legal challenge. On the one hand, they involve the exercise of political judgment in an emergency or concern a matter relating to the existence of the State, and so it is frequently argued that judicial control of such acts is impossible or unsuitable. On the other hand, the suspension of the rule of law removes an essential constitutional check on government action, which may never be more necessary than when a government is combatting an emergency and tempted to abuse its powers. Such abuse can occur not only against the rights protected by the European Convention on Human Rights but against the rights granted by Community law.

Legal control over government decisions is one of the central principles of Community law. It is also a central principle in the case-law of the European Court of Human Rights, which is embedded in the Community or Union legal order. These general principles of legal control should be applied to national security derogations in a systematic manner, in order to strike a balance between the need of the State to combat threats to its very existence and the need of companies and individuals to restrain threats to their rights from the State.

[2] Three of five third pillar Conventions agreed by early 1997 gave the Court a role. Certain national courts outside the UK will be able to refer to the ECJ questions relating to the Europol Convention (OJ 1995 C 316/1; Protocol, OJ 1996 C 299); the Customs Information System (CIS) Convention (OJ 1995 C 316/33; Protocol, not yet published); and the Convention on protection of the Community's financial interests (PIF Convention) with Protocol on associated corruption (OJ 1995 C 316/48; OJ 1996 C 313/1; Court Protocol, not yet published). Dispute settlement before the Court is provided for in all three Conventions (with a UK opt-out for Europol). The two Extradition Conventions (OJ 1995 C 78; OJ 1996 C 313/11) allow no role for the Court. The Treaty revision proposals of 5 Dec 1996 (Dublin draft revisions: CONF 2500/96) would extend the Court's role in the third pillar somewhat.

[3] Case C–84/95 *Bosphorus* [1996] ECR I-3953.

[4] G. de Búrca, 'The Principle of Proportionality and its Application in EC Law', 13 *YEL* 105 (1993).

II. Constitutional framework

The division of the European Union into three separate 'pillars' makes it necessary to examine separately the national-security issues that arise under each pillar.

A THE EUROPEAN COMMUNITY

The Court of Justice has ruled expressly that there is no general 'public safety' provision in the EC Treaty:

> [T]he only articles in which the Treaty provides for derogations applicable in situations which may involve public safety are Articles 36, 48, 56, 223 and 224 which deal with exceptional and clearly defined cases. Because of their limited character those Articles do not lend themselves to a wide interpretation and it is is [*sic*] not possible to infer from them that there is inherent in the Treaty a general proviso covering all measures taken for reasons of public safety. If every provision of Community law were held to be subject to a general proviso, regardless of the specific requirements laid down by the provisions of the Treaty, this might impair the binding nature of Community law and its uniform application.[5]

The first three of the Articles mentioned by the Court allow for specified derogations from free movement, and include also Article 66 EC (extending Article 56 to services) and now Article 73d(1) (b) on capital and payments, in force since the start of 1994. These derogations have been implemented in more detail by secondary legislation. The Community's commercial policy, trade agreements with third States, freedom of information policies, and certain miscellaneous legislation allow for similar exceptions. Finally, Articles 223 and 224 EC are general derogations from the entire Treaty and will therefore be considered at the end.

i) Derogations from free movement

Articles 36, 48(3), 56, 66, and 73d(1) (b) EC allow derogations on 'public security' grounds from the free movement of goods, workers, self-employed persons, services, and capital respectively. The Court of Justice has four times considered the 'public security' exception in relation to the free movement of goods,[6] and its first ruling on the exception for free movement of people was expected in early 1997.[7] There have not yet been any rulings on 'public security' and the free movement of capital, or on firms' freedom of establishment or freedom to provide services. It must be presumed that the free movement of

[5] Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 para 26.

[6] Case 231/83 *Cullet* v *Centre Leclerc* [1985] ECR 305; Case 72/83 *Campus Oil* v*Minister for Industry and Energy* [1984] ECR 2727; Case C–347/88 *Commission* v *Greece* [1990] ECR I–4707; Case C–367/89 *Aimé Richardt* v *Commission* [1991] ECR I-4621.

[7] Joined Cases C–65/95 and C–111/95 *Shingara* and *Radiom* pending; see Advocate General Ruiz-Jarabo Colomer's Opinion of 26 Nov 1996.

students in vocational training, guaranteed by Articles 6 and 127 EC, is also subject to identical derogations under the Treaty.[8] Article 8a EC, which grants general free movement and residence rights to EU citizens, arguably grants additional rights further to those granted in Articles 48, 52, 59, and 6/127 EC, but it is expressly subject to the limitations laid down in the Treaty and secondary legislation.[9] Article 221 of the Treaty, guaranteeing equal treatment in investment, is not subject to any express derogation, and the Court of Justice has yet to consider whether one exists. The use of national security exceptions under Article 7a EC, a general clause requiring free movement, is closely connected with the EU's home-affairs policies and so is considered below.[10]

Derogations from the free movement of individuals guaranteed by Articles 48, 52, 59, and 6/127 EC have been spelled out in Directive 64/221.[11] This Directive also covers pensioners and persons of independent means, who have rights to move based on secondary legislation (and arguably on the basis of Article 8a also). It is submitted that protection equivalent to that extended by the Directive also extends to all persons moving or residing within the Community on the basis of Article 8a EC, not just those persons within categories explicitly subject to the Directive.[12]

The Directive sets out both the substantive grounds upon which EC nationals can be expelled or refused entry and the procedural protections to which they are entitled. It is undoubted that persons representing a (current) threat to national security in a Member State fall within the category of persons who can be expelled or refused entry on 'public security' grounds, although that term should be interpreted restrictively in light of the European Court's restrictive interpretation of the requirements of 'public policy'.[13] If Member States wish to expel or refuse entry to persons who represent a security threat, they must also be taking comparable steps to combat equivalent threats posed by their own nationals.[14]

The Directive also purports to authorize Member States to limit the procedural rights of such persons. According to Article 6 of the Directive, the reasons

[8] In Case C–357/89 *Raulin* v *Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027 para 39, the Court accepted that the right could be subject to 'conditions deriving from the legitimate interests of the Member States'; the examples of legitimate interests then discussed by the Court were non-exhaustive.

[9] The issue of defining Art 8a arose in Case C–229/94 *Adams*, withdrawn (see reference at [1995] All ER (EC) 177; withdrawal at [1995] 3 CMLR 476). Art 8a is a residual clause, applying only when a matter cannot be addressed under another Treaty article (Case C–193/94 *Skanavi* [1995] ECR I-929). See Opinion in *Shingara* and *Radiom*, n 7 above, on the extended effect of Art 8a (para 34) and confirming the right of Member States to expel EU citizens pursuant to the Art (para 116).

[10] See below s II c, 388–9.

[11] OJ Sp Ed 1963–4, 117.

[12] The Court of Justice has established that directives implementing free movement rights are merely a detailed expression of rights which flow directly from the Treaty: see Case 48/75 *Procureur du Roi* v *Royer* [1976] ECR 497; Case C–363/89 *Roux*, [1991] ECR I-273. This issue is also relevant to the territorial scope of free movement rights: it was argued in *Adams* see above n 9 that Art 8a gives nationals the right to move within their own Member State.

[13] Case 67/74 *Bonsignore* v *Oberstadt-direktor Cologne* [1975] ECR 297; Case 30/77 *The Queen* v *Bouchereau* [1977] ECR 1999.

[14] By analogy with Joined Cases 115 and 116/81 *Adoui and Cornaille* v *Belgium* [1982] ECR 1665.

for expulsion may be withheld or limited from a person if disclosure would threaten the security of the Member State. It is notable that this clause is not worded identically to Article 223(1) (a) EC: the Directive does not refer to information which the Member State 'considers necessary' to restrict, and so it is submitted that it does not establish a subjective test. Courts should be able to review the merits of national authorities' refusal to disclose information, although the [English] Court of Appeal in *Gallagher* presumed otherwise.[15] Furthermore, if an EU citizen is refused entry and is subject to the limited 'minimum' remedies a Member State is ostensibly permitted to resort to by Article 9 of the Directive, he or she may be refused the opportunity to appear in person before the advisory 'competent authority' referred to in that Article, for reasons of national security.[16]

In addition to the specific derogations provided for in the Directive, it is evident that in practice Member States will take advantage of the 'minimum remedies' option of Article 9 when they perceive a national security threat.[17] However, in his *Shingara* and *Radiom* Opinion, Advocate General Ruiz-Jarabo Colomer has argued that Article 9 violates the general principles of Community law requiring the existence of effective judicial remedies for breaches of rights. This principle is derived from general constitutional principles of the Member States and the European Convention on Human Rights (Articles 6 and 13), but has a broader material scope than the European Convention, extending not just to 'civil rights' but to 'all rights deriving from the provisions of EC law'.[18] Therefore he argues that part of Article 9 is invalid because it allows Member States to abolish the right of appeal altogether. Another part of the Article is invalid because it allows Member States to restrict national courts to reviewing only the formal validity of a government decision, rather than its merits—although the Advocate General admits that Member States' authorities may none the less be accorded wide discretion in deciding on the merits of a case, depending upon the standard of judicial supervision prevailing in that State.[19] The Advocate General does not address the option of banning an EC national from making representations in person, but it is submitted that this exclusion must also be subject to review on the merits. The exclusion will usually be disproportionate given that an allegedly dangerous person could always be accompanied by police.

Nevertheless, if the Advocate General's Opinion is followed on all the points he raises, the result will be a substantial restriction on Member States' ability

[15] *The Queen* v *Secretary of State for Home Affairs, ex parte Gallagher* [1994] 3 CMLR 295.

[16] The latter restriction is not allowed when the person is already resident: compare Arts 9(1) and 9(2) and see Case C–175/94 *The Queen* v *Secretary of State for the Home Department, ex parte John Gallagher* [1995] ECR I-4253.

[17] This is certainly true of the UK: see legislation discussed in *Shingara* and *Radiom* Opinion, paras 27–30, n 7 above.

[18] Para 75 of Opinion. The Advocate General relies on *Johnston*, n 5 above, and Cases 222/86 *UNECTEF* v *Heylens* [1987] ECR 4097; C–213/89 *Factortame II* [1990] ECR I-2433; and C–97/91 *Oleificio Borelli Spt* v *Commission* [1992] ECR I-6313. See also Enterria, 'The Extension of the Jurisdiction of National Administrative Courts by Community Law', 13 *YEL* 19 (1993).

[19] Para 87 and note 32 of Opinion.

to restrict remedies available to EC nationals on national security grounds.[20] The 'minimum remedies' option of Article 9 would be all but abolished. More broadly, the Opinion extends the 'effective remedies' principle of Community law to an area frequently subject to national security derogations.

As for access to employment and discrimination within employment, it can be presumed that all jobs or posts affecting national security would fall within the 'public employment' or 'official authority' exceptions of Articles 48(4), 55, and 66 EC, even given the narrow interpretation of these provisions by the Court.[21] If the national security issue is not the nature of the position, but the acts or views held by the applicant or employee, it is submitted that Community law must give persons the right to challenge their exclusion or termination from a position and to obtain judicial review of the merits of such a decision.[22] Substantively, nationals of other Member States should only be barred for acts or views which would bar a national of that State from the relevant position.[23] National courts' treatment of the challenge should take into account the proportionality requirement underlying EC law and the requirement of the Member States to observe the principles of the European Convention on Human Rights when derogating from Community law.[24] Although the Convention safeguards only apply to persons who have a job already, not persons seeking one, the Court of Justice has consistently applied minimum standards in all areas where persons have rights affected by Community law.

It should also be emphasized that Member States' legislation affecting employment or benefits is caught by Treaty Articles and secondary legislation even if it bears some relationship to defence obligations undertaken by nationals. Although the *content* of the measures at issue may be such as to take them outside the scope of EC law, this is not the exercise of a security derogation.[25]

To date, the Court's treatment of the security exception under Article 36 of the Treaty has been relatively stringent. A mere statement by a Member State that national security justified a derogation has never been sufficient. The Court ruled in *Cullet* that a Member State had to show definitive evidence of a threat to public security before it could invoke the exception.[26] *Aimé Richardt*[27] established that Member States could invoke the exception to

[20] The Court might not address the issues he raises, given that the national court's questions did not appear to refer to these issues.

[21] See case-law beginning with Case 149/79 *Commission* v *Belgium* [1980] ECR 3881 (Art 48(4)); Case 2/74 *Reyners* v *Belgian state* [1974] ECR 631 (Arts 55 and 66).

[22] See the case-law on remedies for blocked access to employment or a profession, notably *Heylens*, n 17 above, and Case C–340/89 *Vlassopolou* v *Ministerum für Justiz, Baden-Württemburg* [1991] ECR I-2357.

[23] By analogy with *Adoui and Cornaille*, n 13 above.

[24] See below s III B, 393–8.

[25] See Advocate General Gand's Opinion in Case 15/69 *Wurttembergische Milchverwertung-Sudmild* v *Ugliola* [1969] ECR 363; and see Case 207/78 *Even* [1979] ECR 2019, and Case C–315/94 *de vos Peter* v *Stadt Bielefeld* [1996] ECR I-1417.

[26] See above n 6. But see Advocate General Verloren van Themaat's view that it should be impossible to invoke the exception in such circumstances (para 5(3) of the Opinion).

[27] See above n 6.

restrict the transit of strategic goods, before secondary legislation governed the issue, and subject to a proportionality test. In *Campus Oil*,[28] the Court did allow Ireland to invoke the exception to protect the existence of an oil refinery on Irish territory, because the capacity to guarantee oil supplies in a crisis might be of central importance to the continued existence of the Member State. The use of the derogation is explicitly subject to the requirements of necessity and proportionality, to be applied by the Irish courts. Furthermore, when the European Court of Justice had an opportunity to give final judgment on the Article 36 exemptions that Greece claimed for its oil-refining industry, the Court assessed the merits of the derogation and declared that special measures were not justified on the facts.

As for free movement of investments under Article 221 EC, it would be logical to infer a derogation from this Article identical to those provided for under more specific Articles, particularly since the right granted by Article 221 overlaps with Articles 52 and 73b rights. It is unlikely that restrictions upon the free movement of capital and payments within the EC or between the EC and third States under Article 73d(1) (b) will raise national security questions distinct from those arising under the other free-movement provisions, particularly Article 221. By analogy with *Campus Oil*, it is submitted that restrictions upon investment or the movement of capital or payments could be justified if a particular industry is genuinely connected with the very existence of the State and the tests of necessity and proportionality are met.[29] In practice, the latter two tests will usually *not* be met, since Member States are able to regulate and oversee companies crucial to national existence to ensure by less restrictive means that the State's requirements are observed. Thee issues may lie dormant until the scope of Article 223(1) (b) EC is further determined.[30]

The derogations from free movement allowed in the Treaty itself are not the end of this examination. Member States' powers to derogate from EC rules can be limited or even extinguished by secondary legislation.[31] To date, however, except for the transit of strategic goods, the secondary legislation on free movement of goods or services has not substantially limited Member States' discretion on security matters. The TV Directive bans Member States from blocking retransmission of programmes and compels them to allow freedom of reception, within the fields co-ordinated by the Directive. However, sensitive issues of national security are clearly not co-ordinated by the Directive, and so Member States remain free to block any broadcast which reveals details of their spy satellites or which contains the 'dangerous' voices of persons associated with a banned group.[32]

[28] Ibid.

[29] On capital and payments restrictions, see Joined Cases C–163/94, 165/94, and C–250/94 *Sanz de Lera* [1995] ECR I-4821; Joined Cases C–358 and C–416/93 *Bordessa* [1995] ECR I-361.

[30] See below s IIA (vi) 380–2.

[31] See case law beginning with Case 46/76 *Bauhuis* v *Netherlands State* [1977] ECR 5.

[32] Directive 89/552, OJ 1989 L 298/23, Art 2. This is equally true of the proposed amendments: see Common Position 49/96, OJ 1996 C 264/52.

Nor would the Commission's proposal for an Internet regulation directive have any effect on national security measures. The directive, which would introduce a notification requirement for new national regulations affecting the 'information society', would only cover measures of general regulation, and contains an express exemption for measures to protect 'public order', which would presumably incorporate security threats.[33]

In other fields, the directive to be proposed on encryption technology in 1997 will only affect encryption of commercial broadcast services, not encryption technology used by law enforcement or intelligence agencies of the Member States, so there is not yet an EC law issue comparable to the American 'clipper chip' dispute.[34] However, the Commission is reportedly planning to propose a strategic encryption system for the European Union based on the latest American proposals.[35] The Commission is also planning to propose a 'home country' control system for on-line commercial communications in 1997, but it is not known whether this measure will contain specific exceptions for allegedly dangerous material.[36]

None the less, even though some restrictions on TV broadcasting or the Internet might be justified on national-security grounds, a restriction on broadcasting or Internet access by a Member State might still be disproportionate to the national-security threat. A continuing block on transmission or reception of broadcasts, or upon access to an Internet server if only certain items published were objectionable, would likely be a breach of Article 59 EC. So would compelling an Internet-access provider to block access to certain newsgroups for all its subscribers in only one Member State). There is a clear recent example: material on a Dutch server, allegedly promoting 'terrorist violence' and widely copied elsewhere, resulted in the German authorities compelling German access providers to cut off all access to the document, which blocked access to all material (whether illegal under German law or not) published on the Dutch server.[37] Responses to such issues are to be addressed by an international conference to be held in Germany and by an Action Plan to be proposed by the Commission by mid-1997.[38]

Any Community or national measures which restrict access to services will not be valid unless they respect the principles of Article 59 EC, notably mutual recognition. In any case, imposition of a prior restraint system (whether upon

[33] Art 1(4), proposed directive, COM (96) 392, 30 Aug 1996.

[34] See Green Paper, COM (96) 76, 6 Mar 1996; Rolling Action Plan on the Information Society, COM (96) 607, 27 Nov 1996, point 113 (hereinafter 'Action Plan'). On the American system, see British consultation paper of Mar 1997 on licensing encryption providers (http://dtiinfo1.dti.gov.uk.pubs).

[35] Consultation paper, ibid, sIII. This paper proposes a *national* encryption system with licensing of all non-British encryption service providers—a clear breach of Art 59 EC (unless justified).

[36] See Action Plan, see above n 34, point 104.

[37] Commission Communication on Illegal and Harmful Content on the Internet, COM (96) 487, 16 Oct 1996, point 4(b) (iv).

[38] Communication on Internet Content, ibid; Action Plan, see above n 29, point 124; Council Resolution on new policy-priorities regarding the information society, OJ 1996 C 376/1, points 15 and 33. It is clear that this process will also raise third pillar issues.

broadcasting, on-line services or the Internet generally) is likely to be unjustifiable under any circumstances.[39]

Finally, the defence industry might also be the subject of legislation with specific derogation provisions if the discussion process launched by the Commission in early 1996 bears fruit.[40] There is already a specific 'public security' exemption in the Merger Regulation, which has been used once to date.[41] The Commission would also like to see specific legislation on defence procurement; while it feels existing legislation would allow most concerns about security of supply to be addressed, it can accept the need for a security safeguard for 'flexibility in extreme cases', provided that reasons are given. On the other hand, the Commission believes that the existing system of competition and State-aid law can be applied to the defence industry *mutatis mutandis*, with special regard only to the particular features of the industry. To date, the Commission has adopted a 'careful approach' to its competence in these fields; it has always approved national concentrations and has already approved defence-related State aid for one Spanish manufacturer.[42] Member States have also declined to notify some mergers to the Commission on the grounds that the general derogation in Article 223 EC applies.[43] The Commission's determination to press for integration of the defence industry, in conjunction with parallel developments in the Western European Union, increases the likelihood that specific sectoral derogations for the Member States in this field will be fashioned and eventually litigated.

(ii) Commercial policy

It has long been established that the Common Commercial Policy falls within the exclusive power of the Community, and so national derogations for security reasons (or any other reasons) must be authorized by the Community institutions.[44] This Policy extends to movement of all goods and to any cross-border services not involving the movement of legal or natural persons.[45] The basic legislation on imports and exports from the European Community usually provides for derogations for the public security of the Member States,[46] although normally it is exports which Member States wish to control on security grounds. The Court of Justice confirmed in *Bulk Oil* that the general derogation in the Export Regulation authorized Member States to

[39] Such a system might in any case be very hard to justify under the ECHR.

[40] Commission Communication on 'The Challenges Facing the European Defence-Related Industry: a Contribution for Action at European Level', COM (96) 10, 24 Jan 1996, 17–24.

[41] Art 21(3) Reg 4064/89, OJ 1989 L 395/1; see 23rd Report on Competition Policy, point 321.

[42] See Defence Communication, 36 and Annex; Commission Decision on aid to Endesa, OJ 1989 L 367/2, point VIII.

[43] See below s II A(vi) 380–2.

[44] Case-law beginning with Opinion 1/75 [1975] ECR 1355 and Case 41/76 *Donkerwolcke* v *Procureur de la République* [1976] ECR 1921. National security derogations from the EC's trade agreements are considered separately in the following section.

[45] Opinion 1/94 [1994] ECR I-5273.

[46] See Opinion of Advocate General Jacobs in Case C–120/94 *Commission* v *Greece* (FYROM sanctions) [1996] ECR I-1513.

restrict exports without needing a specific authorization from the Community to restrict each individual good or class or good.[47]

Of course, Member States will not usually wish to restrict exports of goods unless they are for military purposes, could possibly be used for military purposes, or are destined for countries which are subject to sanctions. In each of these cases, the restriction a Member State wishes to impose is an exercise of its (and/or the European Union's) foreign policy, but it is now clear that in at least two of the three cases, the export restriction is covered by Community law, not the European Union's second pillar. Commercial policy decisions taken for foreign-policy reasons in these areas therefore still fall within the exclusive competence of the European Community.

First, it is established that dual-use goods fall within the Common Commercial Policy. The Community has granted Member States authorization to restrict exports of such goods by the Export Regulation and the authority is now comprehensively regulated by the Dual-use Goods Regulation, which provides for mutual recognition of export certificates granted by Member States with a transitional derogation for certain items.[48]

As for sanctions, the Court of Justice tersely decided in its *Commission* v *Greece* (FYROM sanctions) interim measures judgment that they fell within the commercial policy of the Community, at least when they involved trade in goods.[49] The Court has now confirmed that finding at length in *Centro-com*, and has extended it to payments which are 'essential elements' of a transaction relating to the free movement of goods.[50] The Court of Justice has also described transport restrictions as ancillary to goods-export restrictions, although it is not clear if Community competence on such ancillary transport measures is exclusive.[51] Similarly, it is not clear if the Community's power to impose financial sanctions is exclusive: in practice, such sanctions have been imposed by Member States even after the entry into force of Article 73g EC, but institutional practice cannot prevent the Court from reaching a different conclusion on competence if asked in future.[52] At the very least, exclusive competence means that sanctions on export of goods and integrally-connected payments must be implemented in EC legislation to be valid. For some time now, EC legislation has indeed been adopted each time sanctions have been applied, with the result that the Court of Justice can interpret the legislation and might rule that Member States' implementation of the sanctions is incompatible with the legislation's terms or even that the legislation is invalid.[53]

[47] Case 174/84 [1986] ECR 559; Reg 2603/69, OJ 1969, L 324/25.

[48] Case C–70/94 *Werner* [1995] ECR I-3189; Case C–83/94 *Leifer* [1995] ECR I-3231; Reg 3381/94, OJ 1994 L 367, as amended and integrated with second pillar Joint Actions (see S. Peers, 'The Common Foreign and Security Policy 1995–1996', in this volume of *YEL*). See also SEC (92) 1363, 14 July 1992, proposed Council Decision authorizing Member States to sign the Chemical Weapons Convention.

[49] Case C–120/94 R [1994] ECR I-3037.

[50] Case C–124/95 judgment of 14 Jan 1997, not yet reported, paras 23–30 and 41.

[51] Opinion 1/94, see above n 45.

[52] Ibid.

[53] See *Bosphorus*, see above n 3; *Centro-com* see above n 50; Case C–177/95 *Ebony Maritime*, judgment of 27 Feb 1997, not yet reported; and Case C–162/96 *Racke* pending (OJ 1996 C 197/13).

Furthermore, the Court ruled in *Centro-com* that sanctions legislation must be interpreted in light of internal market principles. Since the legislation harmonizes national rules designed to protect security interests, Member States are obliged to accept recognition of export certificates issued by other Member States unless they raise their concerns in a Community forum.

Goods exported for purely military purposes arguably also fall within the Common Commercial Policy, in light of the conditions required to exercise the exemptions in Article 223 EC.[54] If that is the case, current restrictions on arms exports to third States are probably justified by the derogation in the Export Regulation. It would require Community legislation, optionally in conjunction with a second pillar measure in which the Council authorized the Member States to act collectively, to establish a formal system governing the exports of such products. In the Commission's view, the dual-use goods Regulation could provide a model for such a system.[55] The Commission has also mooted negotiations with third States to grant reciprocal access to procurement and other market access issues. Any resulting agreement would obviously contain security clauses.[56] Finally, the Commission believes that tariffs on imports of military products are within exclusive EC competence, a position that seems strongly arguable in light of *Werner, Leifer* and *Centro-com*.[57]

Even when sanctions, or strategic, or military goods are not at issue, the Community's commercial and development policies will inevitably influence the foreign policy of Member States. Member States surely decided whether to grant preferences to and accept certificates from the self-proclaimed Turkish Republic of Northern Cyprus based on their view of the most appropriate *foreign policy* in light of the island's division, rather than on a *legal* interpretation of the Protocol to the EC-Cyprus trade agreement, or their view of the position in public international law.[58] Similarly, Portugal only challenged the validity of the EC-India development agreement because it wished to block the possibility of a revised agreement between the European Community, and the Association of South-East Asia Nations (more particularly, Indonesia).[59] The Euratom Treaty also provided a mechanism for a challenge to nuclear testing on health and safety grounds.[60]

Finally, acts taken by the Community and/or the Member States (possibly in the second pillar) may be the subject of dispute proceedings in the World

[54] See below s IIA(vi) 380–2.

It is not clear if the applicant in *Racke* is raising issues related to the CCP, the suspension of the EC–Yugoslav trade agreement, or both. See discussion in Peers, 'CFSP 1995–6', see above n 48; and P.J. Kuyper, 'Trade Sanctions, Security and Human Rights and Commercial Policy', in M. Maresceau, *The European Community's Commercial Policy After 1992: the Legal Dimension* (Martinus Nijhoff, 1993) 387.

[55] Defence Communication, see above n 40, 25–6.

[56] Ibid, 28.

[57] Ibid, 27–8; proposed Regulation on military goods tariffs, COM (88) 502, 12 Oct 1988; OJ 1988 C 265/19.

[58] Case C–432/92 *Anastasiou* [1994] ECR I-3087.

[59] Case C–268/94 *Portugal* v *Council* [1996] ECR I-6177.

[60] Case T-219/95 R *Danielson* v *Commission* [1995] ECR II-3051. Although the plaintiff did not have standing, a Member State would have.

Trade Organisation. This depends on an interpretation of GATT Article XXI and its younger sisters, Article XIV*bis* GATS and Article 73 of the TRIPs.[61] GATT Article XXI provides that:

Nothing in this Agreement shall be construed:

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods or materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in of war or other emergency in international relations; or
(c) to prevent any contracting party from taking any action in pursuance of the United Nations Charter for the maintenance of international peace and security.

The GATS and TRIPs provisions are identical, except that the GATS includes an exemption for 'fusionable' material and a separate 'public order' exemption which is to be given an interpretation taken straight from the Court of Justice's case-law.[62] The GATT clause has been invoked a number of times, including by the European Community itself against Yugoslavia and Argentina. No dispute settlement panel to date has had the opportunity to interpret the clauses, since the dispute brought by Yugoslavia against the Community in 1991 was terminated by Yugoslavia's suspension from the GATT. However, in 1996 the Community demanded that a panel interpret the GATT and GATS exceptions in response to US legislation concerning Cuba, Iran, and Libya. The dispute was settled in early 1997. It remains to be seen whether the WTO bodies take a stringent or relaxed approach to the exemption clauses in future disputes.

(iii) Rights under EC trade agreements

Clauses in the EC's trade agreements can confer direct effect, if sufficiently precise and unconditional, and have led to an increasing amount of litigation. However, clauses in a trade agreement identical to those in the EC Treaty do not necessarily have to be interpreted the same way (the *Polydor* principle).[63]

When will national security issues arise under such agreements? The most common disputes could arise over derogations from the free movement of goods. All of the Community's preferential agreements (reciprocal or non-reciprocal) require the Community to abolish quantitative restrictions or measures or equivalent effect, with a derogation similar or identical to that of Article 36 EC. Such clauses are not included in most of the Community's non-

[61] See M. Hahn, 'Vital Interests and the Law of GATT', 12 *Michigan Journal of International Law* 558 (1991).

[62] Article XIV(a), GATS, which applies when there is a 'sufficiently serious threat' to 'one of the fundamental interests of society': see above n 13.

[63] Case 270/80 *Polydor* v *Harlequin* [1982] ECR 329. For full description and analysis, see S. Peers, *The Trade Agreements of the European Union* (Oxford University Press, forthcoming 1998).

preferential agreements, with the exception of the Partnership and Cooperation Agreements concluded with ten former Soviet republics. In all new preferential agreements and many older agreements, there are also equivalents to Article 34 EC, barring restrictions on exports or measures of equivalent effect. Although the *Polydor* principle restricts a wide interpretation of these clauses, they must at least ban the most obvious trade restrictions.[64]

Certain trade agreements also liberalize establishment and services, usually accompanied by a repeat of the provisos of Articles 56 and 66 EC. Of course, it should be noted that if non-Community companies from *any* third State establish a subsidiary in the Community, that subsidiary is a Community company under Article 58 EC and has the full right to freedom of establishment and freedom to provide services that all Community companies enjoy.

Free movement of capital is only marginally covered by most of the Community's trade agreements, but this *lacuna* has little relevance in light of the European Court's judgment in *Sanz de Lera*, which found that the right to free movement of capital between the Community and third countries in the EC Treaty had direct effect.[65] Restrictions on capital or payment movements on national security grounds must therefore be assessed in light of the EC Treaty Articles, unless a future trade agreement provides for further liberalization than the Treaty allows.[66]

The most sensitive issue under the EC's trade agreements is the possible security derogations from the free movement of individuals.[67] Entry or residence rights are only granted under certain Community trade agreements. The European Economic Area Agreement copies the EC Treaty and secondary legislation concerning free movement of people, while EC-Turkey Association Council Decision 1/80, as interpreted by the Court of Justice, grants *residence* rights to certain Turkish workers or their family members. The European Community and Switzerland were also negotiating an agreement on the topic at time of writing.[68] The Partnership and Cooperation Agreements provide only for the entry of 'key personnel' in a firm, while the Europe Agreements with Central European States also provide for eventual free movement of service providers, and phased establishment of individual professionals or managers. The derogations from these rights are essentially identical to those in the EC Treaty, although only the European Economic Area Agreement also incorporates secondary legislation.[69]

[64] See Case C–207/91 *Euri-Pharm* [1993] ECR I-3723; Case C–228/91 *Commission* v *Italy* [1993] ECR I-2701.

[65] See above n 29.

[66] This would be relevant if a trade agreement removed or restricted some of the 'grandfathered' restrictions on movement of capital to and from third states provided for in Art 73c(1) EC.

[67] See generally S. Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' 33 *CML Rev* 7 (1996).

[68] See COM (93) 486, 1 Oct 1993.

[69] See Art 14(1), Decision 1/80; EC–Poland EA, Art 53 (OJ 1993 L 347); EC–Estonia EA, COM (95) 207, 2 June 1995, Art 54; EC–Russia PCA, COM (94) 257, 15 Jun 1994, Art 46.

All of the Community's preferential trade agreements since the early 1970s have included a slight variation upon the general derogations of Articles 223 and 224 EC and the World Trade Organisation Agreements. However, there is no proviso for a list to be drawn up by the parties, comparable to that in Article 223(2) and (3) EC, or for consultations comparable to those required under Article 224 EC.[70]

Which body is competent to assess measures taken in derogation of trade agreements? Most trade agreements provide for arbitrators to determine the correct 'interpretation or application' of an agreement in the event of any dispute, but the Community has always refrained from recourse to these arbitrators. A dispute could be referred to WTO bodies, whenever the party derogating from a Community trade agreement has also derogated from an obligation under a WTO agreement; however, in practice the Community and its preferential partners have never settled a bilateral dispute in that forum, Yugoslavia's complaint having been quashed when it was suspended from GATT. It seems that the Court of Justice will be the most common forum for disputes over derogations.

In light of the *Polydor* principle, must the various derogations receive the same interpretation as the EC Treaty Articles? This issue is before the Court of Justice in the *Kol* case, relating to expulsions for public policy under EC-Turkey Decision 1/80,[71] but has not yet been litigated in any other context before the EC courts or the EFTA Court created by the European Economic Area. It is submitted that despite the *Polydor* principle, there is no logical reason to give these clauses a different interpretation to that under the EC Treaty.[72] First, a difference in interpretation would in many cases distort trade between the EC and third States, given that exports to such States will also be covered by the Community's Export Regulation. Similarly, since movement of capital and payments to third States is covered by the EC Treaty, and EC subsidiaries with non-Community parent companies will be covered by EC law, it is important that interpretation remain consistent. Otherwise an undertaking under non-Community control could be subject to different types of derogation depending on whether it is a branch or subsidiary of a non-EC company.

As for workers, the *Kol* judgment may provide the first indication of the Court's view. One German administrative court has already decided the point in favour of a Turkish worker, and the Court of Justice has endorsed the transposition of its case-law in interpreting EC-Turkey Decision 1/80 'as far as pos-

[70] For an example, see Art 112, EC–Poland EA. There are slight variations on the text in various agreements: 1970s agreements neglected to provide for exceptions to fulfil international commitments, and the EC's agreements with ex-Soviet States include exemptions for fissionable material and systems to control dual-use goods.

[71] Case C–285/95, pending.

[72] By derogation from *Polydor*, provisions of the EEA and EC–Turkey Decision 1/95 are expressly to be interpreted in the same way as identical provisions of the EC Treaty. However, in light of Opinion 1/91 [1991] ECR I-6079, it is not clear if *all* provisions of the EEA must be interpreted identically. See judgment in Case T-115/94 *Opel* 22 Jan 1997, not yet reported; M. Cremona, 'The Dynamic and Homogeneous EEA: Byzantine Structures and Variable Geometry', 19 *EL Rev* 905 (1994); S. Peers, 'Living in Sin: Legal Integration in the EC–Turkey Customs Union' (1996) *EJIL* 411.

sible'.[73] It is submitted that the procedural and substantive protections provided for in EC law should apply wherever a free movement or residence right is granted by a trade agreement. The general principles of EC law should not be set aside or weakened simply because the beneficiaries are not Community nationals.

(iv) Freedom of information

The Community has adopted a directive requiring Member States to release environmental information, as well as measures to give the public greater access to documents produced by the Council and Commission. The Directive permits Member States to refuse to release information when it threatens the 'confidentiality' of 'international relations' or 'national defence', or where it affects 'public security', but provides expressly that 'information shall be supplied in part when it is possible to separate out information' on such items. Persons may seek 'administrative and judicial review' of refusals or inadequate replies 'in accordance with the relevant national judicial system'. The Council and Commission disregarded the Parliament's attempts to limit the scope of the exceptions and improve the scrutiny of their application.[74]

Access to documents held by the Union institutions is governed by a Code of Conduct agreed in late 1993 and implemented shortly afterward.[75] Access to documents *might* be denied to protect institutional confidentiality and *must* be denied in certain circumstances—notably public security and the conduct of international relations. The Court of First Instance has ruled that the Council was wrongly exercising its discretionary power without consideration of individual circumstances, and in early 1997 ruled that the Commission was also applying the Code wrongly.[76] However, there has not yet been a judgment on a decision by the Council or Commission to classify documents within the 'public security' category.[77]

The Court of First Instance will rule on such a dispute in the pending *Tidningen Journalisten* case.[78] The applicants received a number of documents relating to Europol from the Swedish authorities and requested the same documents from the Council. Most were refused, by application of the 'public security' clause. The applicants have published two of the requested

[73] *Re: a Turkish Drugs Pedlar* [1993] 3 CMLR 276 (Administrative Court of Appeal, North Rhine-Westphalia); Case C–434/93 *Bozkurt* [1995] ECR I-1475; Case C–171/95 *Tetik*, judgment of 23 Jan 1997, not yet reported; see S. Peers, 33 *CML Rev* 103 (1996).

[74] Directive 90/313, OJ 1990 L 158/56, Arts 3 and 4. See Parliament's amendments at OJ 1989 C 120/231.

[75] Code of Conduct, OJ 1993 L 340/41; Council Decision, OJ 1993 L 340/43, amended OJ 1996 L 325/19; Commission Decision, OJ 1994 L 40/58, amended OJ 1996 L 247/45; see generally D. Curtin and H. Meijers, 'The Principles of Open Government in Schengen and the European Union: Democratic Retrogression?', 32 *CML Rev* 391 (1995).

[76] Respectively Case T-194/94 *Carvel* v *Council* [1995] ECR II-2765; Case T-105/95 *WWF* v *Commission* judgment of 7 Mar 1997, not yet reported; see also Case T-85/96 *Van der Wal* v *Commission* pending, OJ 1996 C 233/16.

[77] Nor has any litigant challenged the classification of archival material: see Art 3(2) of both Council Reg 354/83 and Commission Decision 359/83/ECSC, OJ 1983 L 43.

[78] Case T-194/95 *Tidningen Journalisten* v *Council*, pending, OJ 1995 C 299/31.

documents on the Internet, along with a full list of requested documents and the Council's pleadings in the case.[79] One requested document details the need for a special room for Europol Drugs Unit liaison officers and the furniture and office equipment with which the room would have to be supplied. The other is a proposal for the system of access to information held by Europol. The list of the refused documents indicates that several of them deal with the right of access to information, while others deal with a possible extension of Europol's or the Europol Drugs Unit's mandate. The remainder are either reports of meetings held, without making clear which Europol issues were discussed, or were discussions about security of information in the Europol system. The last category of information might potentially be sensitive and threaten the public security if released, depending on the detail of information included, but it is certain or highly probable that the remaining documents do not threaten the public security.

The Council has argued that the case is inadmissible because the applicants already had the documents. In the alternative, the Council has hinted that the Court of First Instance should not exercise jurisdiction over third pillar documents because of Article L TEU, which restricts the European Courts' jurisdiction over second and third pillar issues;[80] but its core claim is that its judgment as to whether public security was threatened by the documents is not reviewable.

(v) Miscellaneous derogations

The ECSC Treaty only allows for 'health and public policy' restrictions on abolishing nationality restrictions on employment, while the Euratom Treaty allows for restrictions on workers equivalent to Article 48(3) EC as well as a general secrecy clause and provisions for security of information and restrictions on access to fissile material.[81]

There are three notable security derogations in the secondary legislation of the Community: the Equal Treatment Directive, the Environmental Impact Assessment Directive, and the Data Protection Directive.[82] The derogation in the first directive was the subject of the *Johnston* judgment,[83] in which the Court of Justice ruled that the United Kingdom could not prevent judicial examination of a ban on reserve policewomen carrying guns, despite the national security threat that the United Kingdom faced in Northern Ireland, in light of both the general principles of EC law and Article 6 of the Directive, requiring remedies to be available in case of breach. However, the requirements of public order resulting from the security crisis might justify restricting

[79] At website; http://www.jmk.su.se/dig/jour-vs-eu/euindex.html.

[80] The *Carvel* case, see above n 76, dealt partly with third pillar documents, and no such jurisdictional issue was raised then.

[81] Respectively, ECSC Treaty, Art 69(1); Euratom Treaty, Arts 96, 194, 24–8, and 195.

[82] Respectively, Directives 76/207, OJ 1976 L 39/40; 85/337, OJ 1985 L 175/40; 95/46, OJ 1995 L 281/31. The proposed telecommunications data protection Directive (Common Position 58/96: OJ 1996 C 315/30) contains identical derogations to the latter.

[83] See above n 5.

women carrying guns, even though the Directive made no express reference to public order. The proviso could be relevant to a potential reference on whether gays and lesbians may be excluded from the military.[84]

The national security derogations in the Data Protection Directive are explicit and so need not be inferred by the Court. Member States can restrict certain rights and obligations provided for in the Directive if such a restriction is a 'necessary measure' to safeguard 'national security' and 'defence', among other items. There is also a restriction on the Directive's scope: it does not apply to topics covered by the second and third pillar of the EU Treaty, 'and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters)'. However, there is a remedies clause very similar to that in the Equal Treatment Directive, so it is submitted that courts cannot be prevented from ruling on the validity and proportionality of the derogations; and they should also be able to rule on the scope of the exceptions.[85]

Finally, the Impact Assessment Directive exempts defence installations from its scope. The exemption was added to the Commission's original proposal, and the Parliament suggested deleting it during the recent negotiations to amend the Directive, although the Council did not agree.[86] It should be emphasized that the clause is not a general national security exception available to Member States but merely exempts a particular class of developments from the Directive. It is submitted that, by analogy with the case-law on dual-use goods, mixed civil-military developments cannot qualify for the exception.

(vi) General national security derogations

Articles 223 and 224 EC provide for 'general' exemptions from the EC Treaty's rules on certain national security grounds, subject to review by the Court of Justice pursuant to infringement actions brought under Article 225 if the derogations 'distort the conditions of competition in the common market'. It is not widely recognized that these clauses are based on the exceptions of GATT Article XXI, but it is submitted that the variations from the GATT model in the EC Treaty should be taken into account in the interpretation of the Articles.

Article 223 provides for two separate exceptions. First, a Member State is entitled to withhold information 'the disclosure of which it considers contrary to the essential interests of its security' (Article 223(1) (a), based on GATT Article XXI(a)). This proviso has never been considered by the Court, or even

[84] *The Queen* v *Ministry of Defence, ex parte Smith* [1996] QB 517 (QB); [1996] QB 547 (CA); on appeal to the House of Lords. On the Directive's scope, see Case C–13/94 *P* [1996] ECR I-2143 and Case C–249/96 *Grant* pending on gays and lesbians in the military, see *Perkins*, referred to the Court of Justice in early 1997.

[85] Respectively Arts 13(1) (a) and (b), 3(2) and 22, Directive 95/46; Arts 14(1), 1(3) and 14(2), Common Position 58/96.

[86] Art 1(4), Directive 85/337. Original proposals: OJ 1980 C 169/14; OJ 1983 C 110/5; proposals for amendment, OJ 1994 C 130/8; OJ 1995 C 287/83; OJ 1996 C 81/14; Common Position 40/96, OJ 1996 C 248/75, final text, Directive 97/11, OJ 1997 L 73/5.

by an Advocate General. Many of the circumstances in which a Member State will wish to withhold information are or will be addressed in more specific derogations in the Treaty or secondary legislation, most notably Article 6 of Directive 64/221.[87]

The general clause has been considered by the Queen's Bench in the United Kingdom, which referred (and later withdrew) questions to the European Court of Justice on Gerry Adams' objection to an order imposed by the United Kingdom authorities excluding him rom the United Kingdom mainland.[88] The court applied Article 223(1) (a) to find that the United Kingdom Government did not have to give reasons for denying Mr Adams entry to the United Kingdom mainland, and did not refer the point to the Court of Justice. As submitted above, Mr. Adams should have been entitled to a review of the Government's refusal to disclose information because Directive 64/221 imposes judicial control of such disclosure, and rights equivalent to those in the Directive are extended to all persons moving and residing in the Community.

The United Kingdom Government had further argued that Article 223 provided *grounds for refusing entry* to Adams, but the Court did not explicitly rule on this point.[89] It is submitted that this argument ignored the express wording of Article 223. The Court of Justice clearly established in *Johnston* that there is no general derogation for 'public safety' in the EC Treaty and that Article 223 is not to be given a 'wide interpretation'. No possible interpretation of the Article can support the view that it gives Member States a 'national security' derogation on matters other than the disclosure of national security information and the arms industry. Any wider application of Article 223 is entirely without merit and should be rejected by national courts and the Court of Justice.

Nevertheless it is evident that some Member States have been treating the second part of Article 223 'broadly and divergently', albeit while restricting their interpretation to the subject-matter of the derogation.[90] Article 223(1) (b) *et seq* provides that:

Article 223(1) (b)

Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

Article 223(2)

During the first year after entry into force of this Treaty, the Council shall, acting unanimously, draw up a list of products to which to provisions of paragraph 1(b) shall apply.

[87] See above s IIA(i), 366–8.

[88] See above n 9.

[89] At 187 f. The Government's alternative argument was that a public security exception existed for Art 8a EC, which Adams was claiming rights under, by analogy with those provided for by specific exceptions in the Treaty. On this alternative argument, see above n 7, the Opinion in *Shingara* and *Radiom*.

[90] See 'Defence Communication', above n 40.

Article 223(3)

The Council may, acting unanimously on a proposal from the Commission, make changes in this list.

It can be seen that although the initial exception in Article 223(1) (b) is potentially very broad, it is limited by the requirements of Articles 223(2) and (3) to draw up and update a specific list. A list was drawn up by the Council in 1958, but has never been updated.[91] The obligation to draw up this list is a deliberate variation upon GATT Article XXI(b) (ii), and the GATT Article has broader scope, applying to all goods supplied to a military establishment. However, the EC Treaty Article extends to 'production' of military material, unlike the GATT clause, and does not need to except 'fissionable material', in light of the separate status of Euratom protected by Article 232(2) EC.

Although the Court of Justice has been asked three times to rule on the effect of this exception, it has answered the questions referred by reference to other Articles of the EC Treaty or secondary legislation. The Court simply disregarded Germany's argument in *Ugliola*; addressed Article 36 instead in *Aimé Richardt*; and in *Leifer*, once it had decided that exports of dual use goods could be restricted under the Export Regulation, it concluded that it was 'therefore unnecessary to consider whether the national measures at issue [could] also be justified on the basis of Article 223(1) (b) . . . of the EC Treaty'.[92] The Court apparently (but not quite explicitly) decided that where a more specific exception in the EC Treaty or secondary legislation applied, a Member State could not rely upon the general derogation of Article 223(1) (b) EC.[93]

If a Member State did find itself bereft of a *lex specialis* to rely upon, when can it invoke Article 223(1) (b)? It is clear that Member States cannot invoke the Article in connection with defence-related employment conditions or internal or external trade in dual-use goods (even before the dual-use goods Regulation was agreed). But in the non-harmonized areas of State aids, competition and procurement policies, or trade in purely military goods, Member States may still wish to invoke Article 223 in the continuing absence of a more specific derogation. Member States are divided on the effect of Article 223(2)—the United Kingdom holds that Article 223(1) (b) may apply to more products than those on the present list drawn up by the Council, or any future such list; France and Germany hold that it cannot; and Greece, Spain, and Italy hold that the conditions of the Article are easily fulfilled.[94] The Commission has consistently argued that the clause is very restrictive, and can only apply to the products placed on the requisite list by the Council.[95] This view was followed by Advocate General Jacobs in his *Aimé Richardt* Opinion.[96] In practice, Member States have invoked Article 223(1) (b) as justification for not notifying a

[91] Ibid.

[92] *Ugliola*, see above n 25; *Aimé Richardt*, above n 6; *Leifer*, above n 48, para 31.

[93] See Advocate General Jacobs' Opinion in *Werner* and *Leifer*, above n 48, para 63, for a more explicit statement.

[94] Ibid, para 62.

[95] 'Defence Communication', see above n 40.

[96] See supra n 6, para 30.

number of substantial mergers in the defence industry under the Merger Regulation, and the Commission has turned a blind eye.[97] The Commission has itself declined to examine the military-related portion of State aid granted by one Member State.[98]

Although Article 223(2) and 223(3) are carefully ambiguous about whether the lists to be drawn up are exhaustive or non-exhaustive, it is submitted that such lists are exhaustive, for three reasons. First, Article 223 is a wholly exceptional clause which should not be interpreted widely. Any ambiguities in its meaning should therefore be resolved in favour of the narrowest interpretation possible. Secondly, the Member States deliberately decided to impose a list requirement by variation from the GATT. Finally, Member States' security concerns are already addressed by EC Treaty Articles and secondary legislation.

Article 224 raises some similar issues to Article 223, and is similarly subject to the control of the Court of Justice under Article 225. The Article provides that:

> Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension consisting of threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

The clause is a variation upon GATT Articles XXI(b) (iii) and XXI(c). The GATT clauses do not allow suspensions for internal crises, refer to 'emergencies' rather than threats of war, and refer only to implementation of UN obligations, not international obligations generally. It can be presumed that the Member States inserted the first proviso because of the broader scope of the EC Treaty, that the reference to 'threat of war' was a deliberate narrowing of the GATT clause, and that 'international commitments' was intended to encompass NATO obligations. Additionally, invocation of the GATT clause on emergencies and war is expressly for the subjective appreciation of the parties—'. . . which it considers necessary'—a clause which is *not* repeated in Article 224.

Although the Article appears to impose only a consultation obligation, Article 225 EC assumes that the Member States have powers to act pursuant to Article 224, and no case has questioned that assumption. Article 224 has been pleaded in five references to the Court of Justice as well as the Article 225 case brought by the Commission against Greece.[99] In no references did the Court find it necessary to rule on the interpretation of the Article, nor did it have an opportunity to rule in the infringement action. However, the Court stated its

[97] 'Defence Communication', see above n 40, 36.

[98] Commission Decision on Spanish aid to Endesa, see above n 42.

[99] See above n 25, *Ugliola*; n 5 *Johnston*; n 6 *Aimé Richardt*; n 48 *Werner*, and *Liefer*; and n 49 *Commission* v *Greece*.

view of the relationship between Article 224 and the rest of the Treaty in *Johnston*.[100]

The *Johnston* judgment is somewhat ambiguous, but it appears to be addressing two separate issues: whether Article 224 could justify a ban on all judicial review of a government decision, and whether it could justify the restrictions on reserve policewomen. The United Kingdom and Danish Governments raised a third argument, claiming that the Court could only interpret Article 224 when the Commission brought an infringement action under Article 225.[101] The Court did not address the issue explicitly,[102] but of course it dismissed it implicitly by addressing the questions on the meaning of Article 224 that had been referred to it in *Johnston* and subsequent cases. It is submitted that the Court was correct to disregard the intervenors' arguments: Article 225 is explicitly a derogation *only* from the infringement procedure of Articles 169 and 170 EC. There is no mention of restrictions upon references from national courts, and the European Court was right not to invent an exception to the Community legal order when the Treaty does not even hint at one.[103]

On the first point—the ban on judicial review—the Court found that the right to an effective remedy was a general principle reflected in the constitutions of the Member States and the European Convention on Human Rights, but then seemed to leave open the possibility that a Member state could theoretically abolish review depending on the subject matter,[104] holding that 'none of the facts before the Court and none of the observations submitted to it suggest that the serious internal disturbances in Northern Ireland make judicial review impossible or that measures to protect public safety would be deprived of their effectiveness because of such review by the national courts'. Here the Court appears[105] to be submitting the United Kingdom Government's case to an analysis of the merits and ruling against it—although only on the facts, not on principle.

As for whether women could be restricted from Royal Ulster Constabulary jobs, both the Court and the Advocate General concluded that the issue could be addressed under the specific derogation provided under the Equal Treatment Directive, and so need not be addressed under Article 224.[106] This *lex specialis* approach was followed by Advocate General Gand in his *Ugliola* Opinion and by Advocate General Jacobs in his *Aimé Richardt*, *Werner*, and *Leifer* Opinions, although in *Werner* and *Leifer* Advocate General Jacobs briefly addressed the substance of the Article 224 argument.[107] The Advocate General

[100] See above, n 5.

[101] Ibid at 1673 and 1676.

[102] Advocate General Darmon dismissed it explicitly at ibid 1656, para 3 of his Opinion.

[103] See, by analogy, the Court's ruling that interim measures were available under Art 225: *Commission* v *Greece* (FYROM sanctions), see above n 43, paras 38–45, especially 42.

[104] See above n 5, 1682 and 1692, paras 18 and 60 of the judgment.

[105] Ibid; the following sentence in para 60 of the judgment is quite ambiguous.

[106] Ibid, 1658, para 5 of Opinion; 1692 para 60 of judgment.

[107] Respectively see above n 25, 373–5, paras 32 and 33, n 6, 4643–4, paras 51 and 52, and n 48, 3213, paras 62 and 63 of each Opinion of Advocate General Jacobs.

did not believe that the restriction on exporting dual-use goods from a Member State to Libya could possibly meet any of the criteria for invoking Article 224. Germany had not blocked the exports in order to meet international commitments, because Security Council Resolutions did not cover the products. This echoed the Commission's submission in *Aimé Richardt* that the CoCom arrangement did not entitle a Member State to invoke Article 224, as the arrangement was informal.

An extended interpretation of Article 224 could not possibly be avoided under the *Commission* v *Greece* infringement action, which was withdrawn in autumn 1995 after Greece and FYROM reached a settlement of their most severe differences. The Court declined to address most of the substantive issues in its interim ruling of June 1994, holding only that there was a strong *prima facie* case against Greece, but that there was insufficient urgency to grant interim relief, in part because the interests for which Article 225 could be invoked were only interests of the Community, not third States.[108] Advocate General Jacobs' Opinion in this case, delivered before it was withdrawn, remains therefore the only lengthy analysis of Article 224.

In the Advocate-General's view, Greece had indeed breached EC obligations, as the embargo affected both goods in transit and the EC's common commercial policy.[109] Although much of the secondary legislation at issue contained provisions equivalent to Article 36, as already noted,[110] Advocate General Jacobs believed that an embargo fell outside the scope of those clauses. Moreover, the Regulation then in force concerning trade with the ex-Yugoslav States contained no such clause. Although the embargo had foreign policy *aims*, it had commercial policy *effects*, and so fell within exclusive EC competence. As noted above, the Court had reached the same conclusion summarily in the interim measures ruling, and has now confirmed it decisively in the *Centro-com* judgment.[111]

The more difficult question was whether Greece was entitled to invoke the exception. Although Article 225 only appears to authorize the Court to examine *abuse* of the safeguard by a Member State, not its *existence*, an examination of the validity of the existence of the measure would obviously be appropriate if a national court has referred a question on it. Advocate General Jacobs presumed it would similarly be valid in an Article 225 proceeding.[112] Although the Advocate General did not elaborate, there are good grounds for his conclusion: if a Member State invokes Article 224 without any defensible reason for doing so, it can surely be described as an 'abuse' of the exception. Such considerations apply equally to Article 223.

The Greek Government had pleaded two of the three exceptions available under Article 224—civil unrest and war or threat of war. Advocate General Jacobs did not accept reliance upon the first ground, holding that civil unrest under Article 224 was a narrower concept than 'public security' under Article

[108] See above n 49, paras 70 and 89–102 of judgment.
[109] See above n 46, paras 33–43 of Opinion.
[110] See above s IIA(ii) 371.
[111] See above n 50.
[112] See above n 46, para 50 of Opinion.

36—'a situation verging on a total collapse of internal security'. On the facts, Greece had not provided evidence to show that such a 'massive breakdown of public order' had occurred.[113] This approach seems appropriate in light of the more restrictive wording of Article 224 and the severity of the derogation it allows from the entire EC Treaty. In any event, in light of *Cullet*, it is questionable whether Article 224 could have been invoked here even if its interpretation had to be identical to that of Article 36.

In the Advocate General's view, Greece could only be successful on the second head of Article 224 if a threat of war existed. He argued that the test for finding such a threat was the subjective view of the Member State:

> Because of differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third state. . . . What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless.[114]

The reasons for this conclusion were that war was by nature unpredictable, and that it was indeed the subjective views of parties to a conflict which led to wars in the first place: '[i]f such matters were to be judged exclusively by what external observers regarded as reasonable behaviour, wars might never occur'.[115] The Advocate General observed that this principle occurred in ECHR jurisprudence, but did not point out that it also appeared in the second pillar of the Treaty on European Union.[116] In this case, there was more than enough evidence upon which Greece could conclude *subjectively* that a threat of war existed. Advocate General Jacobs stressed repeatedly that he did not take a view on whether Greece's appraisal was right or wrong. In effect, the test he proposed was similar to that prevailing in British administrative law: could a reasonable Member State, acting reasonably, have come to this conclusion?

The subjective view of a Member State under Article 224 that a 'threat of war' existed could not be susceptible to intense judicial review, as there was 'a paucity of judicially applicable criteria that would permit this Court, or any other court, to determine whether serious international tension exists and whether such tension constitutes a threat of war'.[117] So although judicial control existed—indeed, it was required by Article 225 EC—it did not amount to a full review of the *merits* of the Member State's decision, but only of a check to ensure that some minimum grounds existed upon which a Member State could reach a subjective conclusion that there was a threat.

It is hard to find support from the Treaty for Advocate General Jacobs' view that the test is subjective. Indeed, Article 224 deletes the reference to measures that states 'consider necessary' found in GATT Article XXI and (twice) in Article 223 EC. Nevertheless, it is submitted that his conclusions are correct. Given the

[113] Ibid, paras 47–9 of Opinion.
[114] Ibid, para 54 of Opinion.
[115] Ibid, para 58 of Opinion.
[116] He did note this in his *Werner* and *Leifer* Opinion, see above n 48, 3207, para 43.
[117] See above n 46, 1526–7, para 50 of Opinion.

difficulty of determining whether a 'threat of war' exists by *any* standard—subjective or objective—even an objective analysis would have to take subjective factors into account. Here there did seem to be sufficient antagonism that, in all the circumstances, a threat of war existed. It is not clear from the Article just *how much* threat should exist for the Article to be triggered, but in order to balance Member States' right to self-defence with the risk of abuse it is submitted a 'threat of war' exists for the purpose of Article 224 not when war is nearly certain, but when there is some possibility, more than negligible, that war might break out.

More questionably, Advocate General Jacobs also concluded that the Court's review of a Member State's possible abuse of Article 224 powers should not be intense. The Commission had submitted that the Court had its normal powers of review of Member States' acts—including assessment of misuse of power, manifest error of appraisal, and general principles (mentioning equal treatment and proportionality). Greece argued that the Court could only search for 'misuse of powers' comparable to the very narrow appraisal that could be carried out pursuant to the same term in Article 173 EC. Advocate General Jacobs appears to accept the Commission's arguments that all principles of Community law can be pleaded in determining whether a Member State has misused Article 224—although again he argues that intensity of the Court's review on each point cannot be searching. In this case, the Advocate General argues that an equal treatment issue does not arise, and that the Court cannot effectively review the merits of a Member State's act to look for a misuse of power to apply a proportionality test without entering into a non-justiciable political analysis. Significantly, he also argues that proportionality can only be pleaded in regard to the Community interests mentioned in Article 225 (protection of competition in the common market).

These conclusions—which would also be applicable to a case alleging abuse of Article 223—are problematic. Neither party to the proceedings mentions that human-rights protection is also an important general principle of Community law. Nor does Advocate General Jacobs. This was likely because the Greek embargo by itself, as attacked by the Commission, did not raise human-rights issues. However, what if persons had been expelled or prosecuted for not sharing the Greek Government's view of the situation, or severely punished for 'breaking' the sanctions? It is well known that many measures taken in response to a war or threat of war, or the other subject-matter of Article 224 raise serious human-rights issues.[118]

These concerns could be addressed without necessarily overturning the conclusions of Advocate General Jacobs. First, it is arguable that the 'common market' referred to in Article 225 includes the free movement of people. Even if it does not, there is no such restriction of scope when the Court receives a reference. Secondly, any restrictions imposed on EC nationals must respect the proportionality and human rights principles protected by the Court. It is

[118] Indeed, see the Court's judgment in *Bosphorus*, above n 3, and Advocate General Jacobs' own Opinions in *Bosphorus*, *Werner* and *Leifer*, above n 42, and *Ebony Maritime*, above n 47.

submitted that the Court should find an abuse of Article 224 if EC nationals are expelled or prosecuted for criticizing acts relating to the Member States' use of the derogation, and that penalties for breach of any sanctions imposed cannot be severe. There would also be an abuse if EC nationals are being treated more stringently than the Member States' nationals who breach the sanctions.

To date, every mention of Articles 223 or 224 made by the Court or its Advocate Generals has indicated that the Articles must be interpreted narrowly. The Court has expressly stated that the Articles cannot be given a wide interpretation, and apparently adopted a *lex specialis* approach when there is a more specific derogation in the Treaty or secondary legislation. It has also apparently been willing to assess whether Member States were correct to invoke Article 224, and Advocate Generals have examined this issue expressly. The scope of the Articles has already been narrowed considerably and might well be narrowed further in subsequent case-law.

B. COMMON FOREIGN AND SECURITY POLICY (CFSP)

The EU Treaty expressly recognizes in Article J.1(2) that one of the major goals of the EU's foreign policy is to 'strengthen the security of the Union and its Member States'. Furthermore, CFSP acts are often intended to further *international* security goals, even where there is no direct threat to the Member States and the European Union. However, Article J.3(6) allows that Member States can derogate from a Joint Action if there is a sudden change of circumstances.

As discussed above,[119] many CFSP measures are implemented by first pillar acts, or are exercises of a derogation granted by the Community from the Community's powers over commercial policy. Additionally, in one case to date, a second pillar measure has been combined with a third pillar one.[120] Whenever a second pillar measure is implemented in EC law, or connected with a justiciable third pillar measure, its interpretation will be subject to the general principles of EC or third pillar law.

C. JUSTICE AND HOME AFFAIRS POLICIES

The borderline between the first pillar and the third pillar of the European Union is presently a matter of considerable dispute, particularly in the areas of visas and border controls.[121] Some of this dispute might be solved by the Dublin draft revisions to the EC and EU treaties, but for the time being a number of issues are clearly intertwined, and therefore, all visa and border control issues are considered together in this section, followed by some emerging issues in national security and the third pillar.

[119] See above s IIA(iii) 371–4.

[120] See Peers, above n 48.

[121] See S. Peers, 'The Visa Regulation: Free Movement Blocked Indefinitely', 21 *EL Rev* 150 (1996); S. Peers, 'Border in Channel: Continent Cut Off', 19 *Journal of Social Welfare and Family Law* 108 (1997); Case C–170/96 *Commission* v *Council* (transit visas), pending.

i) Internal border controls

The Schengen Convention, implemented in seven Member States since March 1995 and signed by a further six Member States, provides for the abolition of border controls but allows Member States to maintain checks on their internal borders on 'public policy' or 'national security' grounds.[122] This derogation has been used by France since the Convention was first implemented, initially for a year against all States implementing Schengen, and since March 1996 only against Belgium and Luxembourg. The initial use of the derogation as expressly for reasons of national security, but its use since March 1996 has been purportedly to prevent drugs from entering France from the Netherlands.

Since the Schengen Convention contains no judicial organs, the dispute over the French Government's use of the exception has taken place at intergovernmental level. This would change if border controls were abolished by either the EC Treaty or EC legislation. Although such abolition might be some time off, due to opposition of the United Kingdom Government (of any political composition), it is possible that the Schengen Convention or elements of it will be integrated into the European Community and/or the third pillar by means of a United Kingdom and Irish opt-out. It is not yet established whether Article 7a EC requires the abolition of border controls in the European Union by the end of 1992, but it sees unlikely that the Article confers direct effect.[123] If the Article does confer direct effect, it probably contains an implicit security derogation,[124] but if not, its effect will depend entirely on secondary legislation.

Under the Commission's proposed border controls directive of 1995, Member States would be able to impose or retain internal border controls for thirty days, where there is a 'serious' threat to public security, with the length and severity of controls no more than 'what is strictly necessary to respond to the serious threat'.[125] Such reimposition would be renewable, and would be subject to consultation of the Commission and other Member States. These are more stringent requirements on re-instigation of controls than those under the Schengen Convention.[126] The Convention does not require a 'serious' threat to invoke controls; has no explicit time limit on re-invocation; and is not subject to a 'proportionality' rule. If the more stringent conditions of the

[122] Art 2(2) of Convention. The non-members are the UK and Ireland.

[123] See *Flynn* [1995] 3 CMLR 397 (QB); [1995] Imm AR 594 (CA); Case C–445/93 *Parliament* v *Council* Order of 11 July 1996 (unreported) and generally Peers, 'Border in Channel', above n 121; Toth, 'The Legal Status of Declarations Attached to the Single European Act', 23 *CML Rev* 803 (1986).

[124] Free movement is to be 'ensured in accordance with the provisions of this Treaty', presumably incorporating all of its derogations.

[125] Art 2, draft directive, COM (95) 347, 12 Jul 1995; OJ 1995 C 289/16. In late 1996, the Parliament proposed to strengthen Art 2 slightly, OJ 1996 C 347/60. However the Commission did not adopt the relevant amendments, COM (97) 106, 20 Mar 1997.

[126] Art 2 of Convention.

proposed directive had applied, the French Government's decision to maintain border controls after the implementation of Schengen might have been defeated after a challenge. The controls against Belgium and Luxembourg maintained after March 1996 were imposed for 'public policy', rather than 'public security' reasons, but they appear particularly vulnerable on necessity and proportionality grounds. Will drug dealers not think of driving to France via Germany?

ii) Free movement of third-country nationals

Free movement of third-country nationals is also covered by the Schengen Convention, which allows all third-country nationals, resident or non-resident in the Schengen States, to circulate for three months throughout the States implementing the Convention. There is an exception for individuals representing a threat to 'public policy, national security or the international relations' of any of the States implementing Schengen: such persons would either be denied entry at external borders or expelled after entry, once the threat they allegedly posed was discovered. A separate exception covers all those persons who have ben 'reported as a person not to be permitted entry' under the list compiled by the Schengen organs. The decision to list someone is to be based on the 'threat to public order or national security and safety which the presence of the alien in national territory may pose'. Criminal offences or potential criminality are cited as *non-exhaustive* reasons why a person might represent such a threat.[127]

The right of free circulation would be implemented by the European Community and the European Union if separate measures now before the Council were adopted. First, the right to circulate for three months after crossing the *external* borders of the Community would be guaranteed by the proposed External Frontiers Convention (EFC).[128] This would be subject to the same conditions set out in the Schengen Convention,[129] albeit with slightly more restrictive procedural requirements for being placed on the list of banned persons.[130] However, the European Frontier Convention would allow a Member State to suspend free circulation of third-country citizens entirely on the sole ground of 'urgent reasons of national security' and under strict

[127] Arts 5(1) (circulation after crossing external borders); 19(1), 19(2), 20(1), and 21(1) (internal borders); 5(1) (e) (denial of entry); 23(3) (expulsion); 5(1) (d), pursuant to Art 96 (list). According to Art 94(4), States can invoke security grounds for refusing to send information relating to several categories of 'suspected persons' about whom data is to be held by the Schengen Information System, but dangerous aliens are not one of the categories for which States can invoke the derogation.

[128] Art 8(1) of the EFC, COM (93) 684, 10 Dec 1993; OJ 1994 C 11, read with the definition of 'short stay' in Art 1(g). The Convention is blocked at time of writing because of disputes over its application to Gibraltar and the role of the Court of Justice. See generally K. Hailbronner, 'Visa Regulations and Third-Country nationals in EC Law', 31 *CML Rev* 969 (1994).

[129] Art 7(1) (c) of the EFC, incorporating both the criteria for individual refusal and the inclusion on a joint list of persons. The list applying to all Member States would be drawn up under the proposed European Information System Convention (9277/1/95, 1 Dec 1995).

[130] Compare Art 10(3), proposed EFC, with Art 96 of Schengen.

conditions; in comparison, the Schengen Convention does not appear to allow for suspension of free circulation.[131]

Secondly, the right to circulate across *internal* borders would be guaranteed by another directive proposed by the Commission in 1995.[132] Again, this right would be subject to the possibility of expulsion under the same conditions as the Schengen Convention, but unlike the Frontiers Convention, the directive would not provide for the 'emergency' suspension of the circulation right in its entirety.[133] However, since the Community's competence (at present) to agree this directive was contested by a number of Member States, there is also an alternative proposal for a third pillar Joint Action to implement visa-free circulation of third-country nationals.[134] This would only cover third-country citizens *already resident* in a Member State, and would impose conditions on their *entry*, rather than providing for later expulsion. The Joint Action would repeat the national security and international relations exceptions in the Commission's text, but would follow the provision in the EFC that would permit Member States to suspend application of this 'free' movement for reasons of national security.[135]

Finally, the Member States can 'deviate' from the Joint Action of 1994, which allows for visa-free circulation of third-country schoolchildren resident in a Member State, for 'urgent reasons of national security'.[136] Citizens of the European Union can rest easy in the knowledge that each Member State retains the power to counter any threat to its national security that might be posed by third-country schoolchildren.

iii) Residence of third-country nationals

Three of the four measures adopted on admission to date contain relevant provisions. There are varying security or public order derogations in the Resolutions on family reunification, self-employment and students, but not on the Resolution on workers.[137] Third-country nationals already resident in the Member States can be expelled or refused an initial long-term residence permit on security grounds, although in the latter case the resident is entitled

[131] Art 8(4) of the EFC; Art 2(2) of the Schengen Convention only allows for re-imposition of border checks. Suspension of free circulation under the EFC would have to 'take into consideration the interests of the other Member States' and would be subject to a proportionality test and a requirement to inform other Member States.

[132] COM (95) 346, 12 Jul 1995; OJ 1995 C 306/5. The European Parliament proposed the deletion of the 'international relations' exception, OJ 1996 C 347/62, but the Commission did not accept this amendment, see above n 125.

[133] Proposed directive, Arts 3(3) and 4(5).

[134] Not published in the Official Journal: see proposal of June 25, 1996, ASIM 98, 8609/96.

[135] Proposed Joint Action, Art 4.

[136] Art 4, Joint Action (OJ 1994 L 327/1). It is clear that this is based on Art 8(4) of the proposed EFC, like Art 4 of the proposed Joint Action on free movement. *Quaere* whether 'deviation' from the travel right allows less leeway to a Member State than 'suspension' of that right.

[137] The first Resolution is published in John Handoll, *Free movement of Persons in the EU* (Wiley, 1995) 646 and Elspeth Guild and Jan Niessen, *The Emerging Immigration and Asylum Policies of the European Union* (Kluwer, 1996) 251. For the others, see respectively OJ 1996 C 274/7, point 10; OJ 1996 C 274/10, point A(9); OJ 1996 C 274/3.

to 'the maximum legal protection' provided for in that Member State.[138] Within asylum policy, the 1992 Resolution on Manifestly Unfounded Admissions for Asylum allows the Member States to retain accelerated procedures for 'serious reasons of public security'.[139]

The Commission had announced an intention to draft a Convention on immigration in its 1996 work programme, and reiterated this promise in early 1997. There was no indication what this Convention would contain at time of writing, although it seemed likely that it would contain the existing derogations. If the Convention is agreed (if only on a 'flexible' basis among some Member States) and the Court of Justice is given power to interpret it, the Court will have the opportunity to interpret these exceptions.

Finally, the Schengen Convention provides that one Schengen State may object if another State wishes to grant or renew a residence permit to a third-country national listed as a person not to be permitted entry to the Schengen territory. The proposed External Frontiers Convention contains provisions to the same effect, by reference to the Convention's 'joint list'.[140]

iv) Other third pillar measures

The EU's third pillar is now in its early adolescence, and there are indications of how future developments will affect national security concerns. The Customs Information System and Europol will be addressing threats to the national security of the Union,[141] but there are also some national security derogations that may have an important impact. Member States can withhold information from the Europol system if the information jeopardizes 'essential national security interests' or relates to operations or activities of 'State security' intelligence agencies, and a security vetting procedure is established for staff. Europol itself may refuse to send information to third States or bodies if the information might 'jeopardise the security' of a Member State.[142]

The most significant derogations affect individual rights: a Member State may refuse to supply Europol data held on a person on 'security grounds', and Member States combatting fraud against the Community or international corruption may derogate from the relevant Conventions' ban on concurrent *non bis in idem* (double jeopardy) if the offence was directed against their security.[143] The first pillar Directive on telephone privacy bans tapping of phones without legal authority, but its scope is limited to the first pillar.[144]

[138] OJ 1996 C 80/2 points IV(1) and VI. See S. Peers, 'Undercutting Integration: Developments in EU Policy on Third-Country Nationals', 22 *EL Rev* (1997) 76.

[139] Point 11 of Resolution, published in Handoll and Guild and Niessen, see above n 137, 636 and 161.

[140] Art 25, Schengen Convention; Art 11, EFC, referring to Art 10.

[141] Part of the CIS' remit is to assist in fighting illegal trade in goods 'covered by Articles 36 and 223' EC (Art 1(1), CIS Convention, see above n 2). Europol will deal with terrorism two years at the latest after the Convention's entry into force (Art 2(2), Europol Convention, see above n 2).

[142] Respectively Arts 4(5), 31 and 18(4), Europol Convention.

[143] Art 19(3), Europol Convention; Art 7(2), PIF Convention; Art 7(2), PIF Corruption Protocol; Art 10(2), proposed Corruption Convention (unpublished 1996; the Member States had agreed on all elements of the Convention at time of writing except whether the ECJ would have jurisdiction).

[144] See above n 82; and see third pillar Resolution on lawful interception of telecommunications, OJ 1996 C 329/1 and the *Halford* case pending before the European Court of Human Rights.

D. CONCLUSIONS

Each pillar of the Union provides for distinct security derogations, but there are a number of common themes. First of all, the proportionality of measures taken to protect national security interests is almost always an issue. It was particularly important in *Aimé Richardt, Campus Oil, Commission* v *Greece* (oil imports)[145] and *Johnston*,[146] and was mentioned in *Commission* v *Greece* (GFYROM sanctions),[147] *Werner, Liefer*,[148] and the three sanctions cases.[149] It would clearly be relevant to many potential national security issues, notably Internet or broadcasting restrictions or derogation from double jeopardy under third pillar measures, where credit must surely be given for the full pecuniary fine and for the full length of any *sentence* imposed in the other Member State (not just the portion of the sentence actually served).

In many cases, proportionality of acts subsequent to national security claims is left for national courts to determine. This was particularly true of *Johnston, Aimé Richardt*, and *Campus Oil*, and is likely to be true of many potential cases. However, where the Community courts have to adjudicate on an infringement action or an annulment action, they will have to rule on proportionality themselves.[150] National courts should examine the Community courts' approach to proportionality and national security in all cases to determine the appropriate standard to apply in relevant cases before them.

It has often been observed that national courts are Community courts as well, and that the effective application of EC law is highly dependent upon the co-operation of national courts. This is inevitably particularly true of national security issues, where the courts may have developed a culture of reluctance to question national security decisions of a Member State and may be unwilling to take a more stringent approach at the behest of the European Court of Justice. There are problems applying EC law in all Member States, but they may well increase with the sensitivity of the subject: one survey of British deportation of EC nationals shows that in many cases courts and tribunals apply an incorrectly low threshold when reviewing Government decisions to deport on public-policy grounds.[151] For some judges and tribunal members, a 'sufficiently serious threat' to one of the 'fundamental interests of society' means the same thing as 'detriment'. One can expect even more sporadic application of EC law on 'public security' and deportation.

It may be even more difficult for national courts to adjudicate upon the national security threats faced by other Member States, as they will be compelled to do under several third pillar instruments. On the other hand, Member States have increasing obligations to trust and respect the security decisions of their EU partners, as the integration process increasingly leads to a common concept of 'Union security', jointly administered by the Union and

[145] See above n 6. [146] See above n 5. [147] See above n 46.
[148] See above n 48. [149] See above n 3, 50, and 53.
[150] Cf. *Commission* v *Greece* (both cases) see above n 6 and 49, and *Tidningen Journalisten* see above n 78.
[151] C. Vincenzi, 'Deportation in Disarray: the Case of EC Nationals', (1994) *Crim Law Rev* 164.

its Member States and mutual recognition obligations extend to the second and third pillars.

III. National security derogations under the European Convention on Human Rights

A full examination of the national security derogations from the European Convention on Human Rights is beyond the scope of this paper, but as the Convention applies *de facto* to the EC institutions, governs the interpretation and application of EC acts, and controls Member States' derogations from EC law, it is relevant to all the issues discussed in Section II A. It also governs the Member States' acts in the third pillar. Since the Convention provides for a minimum standard of human rights protection in all its participants, it is clear that whenever a State is precluded from invoking a national security derogation under the Convention, it cannot invoke a derogation under EC or EU law.

Like the EC Treaty, the Convention provides for both a general derogation—Article 15—and specific derogations from some of its substantive rights in Articles 8–11, guaranteeing respectively the right to family and private life, freedom of thought, conscience and religion, freedom of expression, and freedom of association. There are also two specific national security derogations from the First, Sixth, and Seventh Protocols to the Convention,[152] from the rights of freedom within and departure from national territory and from the procedural rights available to aliens facing individual expulsion measures.[153] However, unlike the EC Treaty, the general derogation can never be invoked to suspend certain rights in the Convention and two of its Protocols—the right to life, freedom from torture, *et al*, freedom from slavery, the bar on retroactive criminal liability, the ban on the death penalty, and the ban on double jeopardy (which probably only applies within one State).[154]

A. NON-DEROGABLE RIGHTS

Two of the non-derogable rights are particularly relevant to third pillar measures. First, it is now clearly established that an ECHR signatory cannot 'refoul' an asylum applicant to a State which might subject him to torture or inhuman treatment prohibited by Article 3 ECHR, even if the person presents an a risk to the national security of the State and even though the Geneva Refugees Convention *does* permit refoulement in such circumstances. Procedurally, an ECHR signatory breaches Article 13 of the Convention, requiring effective remedies, if it subjects Article 3 claims by asylum seekers whom the State believes are a national security risk to a merely advisory procedure in which

[152] Only the First Protocol has been ratified by all EU Member States.
[153] Art 2(3), Fourth Protocol; Art 1(2), Seventh Protocol.
[154] Respectively Arts 2, 3, 4(1) and 7, Convention; Art 3, Protocol 6; Art 4(3), Protocol 7.

they have no right to legal representation or a review of the evidence against them.[155]

Although Article 3 issues do not generally arise within the first pillar, they might be relevant to Turkish workers of Kurdish descent protected by EC-Turkey Decision 1/80, if the European Court of Justice finds that the Decision regulates expulsion. The Advocate General's Opinion in *Shingara* and *Radiom*, which attacks the same special procedure for 'security threats' which was condemned by the Human Rights Court in *Chahal*, would extend the effects of *Chahal* much further. If the Opinion is followed, such special procedures will be invalid when applied to *anyone* claiming an EC law immigration right. *Chahal* is also relevant to the accelerated asylum procedures which a third pillar Resolution purports to authorize, and to the Conclusions attached to the Dublin Convention of 1990 which compel Member States to expel asylum applicants to any possible third State before considering another Member State.[156]

On the other hand, the Seventh Protocol's ban on derogation from double jeopardy does not limit the relevant derogations from the pending third pillar Conventions and Protocol, because the Protocol expressly only applies within a single State. Article 7 ECHR does not contain a ban on double jeopardy of any sort, according to the Strasbourg Commission.[157] Arguably Article 6 ECHR, providing for trial guarantees, does protect persons from double jeopardy, but this Article can be subject to security derogations and in any event the Commission has ruled that it cannot preclude convictions in separate States.[158] None the less, given Member States' inability to derogate from the double jeopardy rule at all in internal situations, and the importance of the rule as one of the foundations of human rights protection, it is submitted that the relevant derogations from the third pillar Conventions should be construed extremely strictly by the Court of Justice.

B. GENERAL DEROGATION

Although the Court of Human Rights has never suggested a hierarchy between the general and specific derogations, in practice the Court has always allowed States to resort to the specific derogations if the subject-matter of a dispute is covered by one. The result is that the general derogation of the Convention has only been the subject of litigation in relation to those Convention articles lacking a specific derogation—notably Articles 5 and 6 (detention and trial rights). Indeed, on occasion, the Court has compelled States to use the general derogation when restricting these rights, judging that a special detention or trial

[155] *Chahal* v *UK*, 15 Dec 1996 not yet reported, now followed on the Art 3 issue by *Ahmed* v *Austria*, 17 Dec 1996, not yet reported. The Human Rights Court decided the Art 13 issue in *Chahal* by a 19-0 vote.

[156] For text and critique, see Guild and Niessen, above n 137 at 161.

[157] *X* v *Austria*, Application No. 7720/76, 3 Digest 32 (1978).

[158] *S* v *FRG*, Application No. 8945/80, 39 DR 43 (1983).

regime is too severe to be justified under Article 5 or 6.[159] This is comparable to the EC law analysis of Advocate General Jacobs in *Commission* v *Greece* (FYROM sanctions), suggesting that economic sanctions are too sweeping a measure to be justified under the specific derogations of secondary legislation. The rights protected in Articles 5 and 6 might have relevance to future third pillar measures if Member States undertake harmonization of normative criminal and evidence law and grant Europol operational powers, as proposed in the Dublin draft revisions of the Treaties.

Article 15(1) ECHR provides that '[i]n time of war or other public emergency threatening the life of the nation', signatories may derogate from the Convention 'to the extent strictly required' by the situation'. Article 15(2) restricts this derogation, as discussed above, and Article 15(3) imposes a notification requirement.

The Human Rights Court has made it clear that a State's invocation of the general national security derogation is reviewable, as are the subsequent measures in light of the derogation.[160] The scrutiny of the derogation is often light,[161] and only once has either Strasbourg organ found that a State was not entitled to invoke the derogation.[162] The scrutiny of the subsequent measures has usually not been intensive, although the Court has applied a proportionality test and recently ruled for the first time in *Aksoy* v *Turkey* that a State's measures are too severe to be justified under the general derogation, finding (in wording very similar to the Court of Justice's in *Johnston*) that 'the Government have not adduced any detailed reasons before the Court as to why the fight against terrorism in South East Turkey rendered judicial intervention impracticable'.[163]

Since a Member State using Article 15 ECHR will usually be derogating from civil and political rights, not the economic and social rights of the EC treaty, the use of Article 224 or other powers of derogation from EC law will not usually attract the notification requirements of Article 15(3) ECHR. The Convention proviso has also attracted a sweeping reservation from France, of somewhat questionable validity.[164]

C. SPECIFIC DEROGATIONS

The specific derogations for national security in the two Protocols have not yet been litigated before the Convention organs. The Explanatory Memorandum to the Seventh Protocol (which is merely persuasive) states that the emergency

[159] *Lawless* v *Ireland*, A/3 (1961); *Brogan* v *UK*, A/145-B (1988); *Fox, Campbell and Hartley* v *UK*, A/182 (1990); but see *Murray* v *UK*, A/300-A (1994).

[160] For a general overview, see Chap 16, D. Harris, O. Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths 1995), and literature cited therein.

[161] See *Brannigan and McBride* v *UK* A/258-B (1993).

[162] The Commission in 12 *YECHR* (the *Greece* case) 1.

[163] Judgement of 18 Dec 1996, 100/1995/606/694, para 78; see earlier *Lawless*, above n 159; *Ireland* v *UK* A/25 (1978); *Brannigan and McBride*, above n 161.

[164] The Strasbourg Court will strike down reservations incompatible with the Convention: see *Loizidou* v *Turkey*, A/310 (1995).

removal of residents on national security grounds should none the less be proportionate. The procedural rights of the Protocol must be available after the emergency expulsion; significantly, the Memorandum purports to bar judicial control of national security disputes by suggesting that a government's claim to this effect should be *conclusive.*

For EC nationals and their family members in one Member State (and possibly EEA nationals and most Turks facing expulsion) internal free movement rights and rights against expulsion are obviously governed by the more stringent requirements of EC law discussed above. Third pillar measures have not to date required higher standards than the Protocol, but the European Convention on Human rights at least provides a minimum standard for derogations.

The national security derogations in Article 8, 10, and 11 ECHR have each been litigated before the Convention organs. Under Article 8, the Court of Human Rights has accepted that States can tap telephones and vet job applicants as security risks in the interests of national security.[165] Presumably non-nationals with established family life in a Member State could be deported if they were a threat to national security, a matter not yet considered by the Strasbourg Court, although significantly the Commission has found that a State cannot expel a person on security grounds unless there has actually been a conviction.[166] Under Article 10, the Strasbourg Court has held that the Convention does not govern access to public service employment, but a person fired from a public job for holding beliefs that threaten national security is protected. Persons can theoretically be expelled or refused entry to a State for holding a particular viewpoint; material risking a threat to military order or relating to national security can be banned; and the Commission has ruled inadmissible claims by persons whose dangerous voices could not be broadcast.[167] Finally, under Article 11, the Commission's view is that membership in a banned group can be punished by a conviction to protect national security.[168]

The Court has insisted upon States producing sufficient evidence that a national security threat exists in relation to Article 10, although it does not engage in intensive reviews of the claim.[169] The merits of the government's claims that material will disrupt 'military order' have to be examined and have been rejected on the facts. So have the State's claims that stale revelations

[165] *Klass* v *FRG*, A/28 (1978); *Leander* v *Sweden*, A/116 (1987).

[166] See case-law on family life beginning with *Berrehab*, A/138 (1988) and the Commission ruling on Art 8 in *Chahal*, 20 EHRR CD 19 (the Court declined to consider the point).

[167] *Glasenapp* v *FRG, A/104 (1986); Kosick* v *FRG*, A/105 (1986); *Vogt* v *Germany*, 21 EHRR 205 (employment); *Piermont* v *France*, 20 EHRR 301 (movement); *Engel* v *Netherlands, A/22 (1976); VDSO and Gubi* v *Austria*, A/298 (1994); *Observer and Guardian* v *UK* (the *Spycatcher* case), A/216 (1991); *Bluf!* v *Netherlands*, 20 EHRR 189 (dangerous materials); *Purcell* v *Ireland*, Application No. 15404/89, 70 DR 262 (1989); *Brind and McLaughlin* v *UK*, Application No. 18714/91 18759/91, 77-A DR 42 (1994) (dangerous voices).

[168] *Kuhnen* v *FRG*, Application No. 12194/86, 56 DR 205 (1988). The Commission ruled the GCHQ case inadmissible (*CCSU* v *UK*, Application No. 11603/85, 50 DR 228 (1987)).

[169] *Spycatcher*, see above n 167, para 69; see dissent of Judge Walsh, para 4.

about the security services threaten the national security, and that a person's political expression threatens public order.[170]

Furthermore, proportionality is always a consideration when governments invoke national security derogations. It imposes limited safeguards on secret surveillance, prevent States from banning materials already in wide circulation elsewhere, and prevents governments from firing persons when their views present little threat and have minimal impact on their conduct in a non-sensitive position. Each of these issues intersects with Community or Union law. The restrictions which the Strasbourg organs place upon derogations from Article 8 must be observed as minimum standards when Member States derogate from EC or EU obligations, whether to vet Europol applicants, exercise derogations from data-protection obligations in the directives and third pillar measures, or expel persons covered by first or third pillar measures with family life in a Member State. If the Strasbourg Court ultimately follows the Commission's view of Article 8 in *Chahal*, the effect on EC free-movement law will be substantial—no existing residents with established family life could be expelled on security grounds unless they had a criminal conviction.

The case-law controlling derogations from Article 10 is even more crucial. First of all, the analysis of proportionality in *Spycatcher* and *Bluf!* will severely restrict any attempts by Member States (or measures taken by the European Community or European Union) to control Internet access, once material supposedly raising a 'security threat' is widely copied to other servers. It will then be in broad circulation and so it will be disproportionate under either Article 59 EC or Article 10 ECHR to block access to particular servers. Secondly, the proportionality test for firing 'dangerous' employees must be borne in mind when applying EC free-movement law.[171]

Finally, the *Piermont* case has important implications for the application of EC and third pillar free-movement law. Both the ban on entry and the expulsion of Ms Piermont were unjustified interferences with her freedom of expression, even though she had *no free movement right* under EC law or the European Convention on Human Rights. Coupling Article 10 ECHR with a free-movement right, it will be virtually impossible for a Member State to justify expulsion or refusal of entry of an EC national on the grounds that his or her political expression alone threatens national security. Depending on the *Kol* judgment, it might be virtually impossible to deport a Turkish worker or family member for political views either. As for third-country nationals generally, the first or third pillar measures which allow Member States to restrict free circulation if a person presents threats to national security or to 'international relation' must be read in light of *Piermont*. Article 16 ECHR does allow for restricting the political rights of 'aliens' but even the minority in *Piermont* admitted that it has a restricted material scope.[172] It is possible that the Article

[170] *VDSO; Spycatcher; Bluf!*; and *Piermont*, see above n 167.

[171] See above s IIA(i), 368.

[172] The majority ruled that it could not apply to an MEP. It is submitted that in light of EU citizenship, Art 16 surely cannot now apply to *any* EU nationals in other Member States.

only restricts the involvement in the formation of political parties; in any event, it is submitted that it can have little or no application in conjunction with a free-movement right, to persons covered by EC-Turkey Decision 1/80, or to long-term residents of a Member State, in light of their protected legal status under EC law and the EU's integration policy.

IV. Approaches to Justiciability

Judges can take a number of approaches to the justiciability of national security claims, ranging on a spectrum from full review of the merits of each decision to a complete ban on even indirectly reviewing such decisions at the margin.[173] The first, and most restrictive approach, would be to bar judicial supervision of a class of decisions which will frequently have national security implications, or alternatively to impose a ban on judicial supervision of particular decisions case-by-case on national security grounds. A second, slightly more flexible approach would be to reject such *per se* non-justiciability of certain classes of decisions, but to defer from reviewing government claims that either a threat to national security existed or that a particular decision taken in light of that threat was valid. Thirdly, judges could review the merits of the government's act. The stringency of such a review could range from a full *de novo* review of both the existence of a security threat and of the merits of the act itself to a check for at least some indications that the decision was indeed validly taken on national security grounds with restraint from analysing the merits of the actual decision.

The first of these options, *per se* non-justiciability of certain classes of decisions, was reflected in the United Kingdom courts' reluctance (prior to he 1980s) to review any exercise of the Crown prerogative by the executive. It is reflected more definitively by Article L TEU, which purportedly bars all second pillar acts, most third pillar acts, and Articles A-F TEU from the review of the Court of Justice. Unlike the Crown prerogative, the *per se* non-justiciability under Article L is maintained not by judicial deference but by constitutional fiat.

Although the European Court of Justice has refused to accept a reference on the meaning of Article B TEU,[174] the barrier of Article L is far from impregnable, and contains four major openings. The Court of Justice can be awarded power to settle disputes or rule on interpretation of third pillar Conventions;[175] the Court can probably 'police the boundaries' between the

[173] See the analysis of UK judges' views in B. Dickson, 'Judicial Review and National Security', in B. Hadfield (Ed) *Judicial Review: a Thematic Approach* (Gill & Macmillan, 1995); and see now *ex parte Smith*, above n 77, and *The Queen* v *Secretary of State for Foreign and Commonwealth Affairs, ex parte Manelfi*, High Court judgment of 25 Oct 1996, unreported, transcript CO/4317/95 (UK national with non-UK parents whose application to work for the UK intelligence-gathering agency, GCHQ, was refused).

[174] Case C–167/94 *Grau Gomis* [1995] ECR I-1023.

[175] See above n 2.

various pillars;[176] the human rights principles enunciated in Article F(2) have long been part of Community law, and continue to remain so;[177] and much of the Common Foreign and Security Policy is implemented by the EC'S (justiciable) Common Commercial Policy. Furthermore, the Court is willing to refer to the non-justiciable clauses as an aid to interpretation.[178] However, if the second pillar expands to incorporate peace-keeping, peace-making, and crisis-management tasks, much of its scope will not be incorporated into EC law and so a number of important EU acts will indeed be entirely non-justiciable.

The alternative variant of *per se* non-justiciability is a case-by-case ban on judicial supervision of certain decisions. Inspired explicitly by human rights principles, the European Court of Justice rejected case-by-case bans in its *Johnston* judgment in the firmest possible terms. The Court did not restrict the principle of an effective remedy to cases in which a directive required one, and so it is clear that case-by-case bans are not compatible with EC law, whether legislation provides explicitly for a remedy or not.[179] It is submitted that case-by-case automatic non-justiciability could never be justified under the third pillar either, given its subordination to human rights principles. It is further submitted that the neither the European Community or the European Union can compel Member States to create such a ban in secondary legislation, for exactly the same reasons.

The second option is that of refusal by a court to examine either whether there are grounds for a decisions taken for national security reasons or whether such a decision is substantively correct on the merits. Once the government cries 'national security', the judges instantly proclaim their willingness to follow unquestioningly. Such automatic obedience could only be described, with great respect, as the 'Pavlovian option'. This approach is characteristic of some British courts until recent years, and is effectively a *de facto* version of the *per se* non-justiciability of the first option.

Is this option compatible with EC or EU law? The Court of Justice has never ruled on the issue explicitly, but it is submitted that it cannot be compatible.[180] In every dispute over a national security claim by a government upon which the Court of Justice, an Advocate General, or the Strasbourg Court has

[176] See Case C–170/96 *Commission* v *Council*, pending (transit visas); Case C–268/94 *Portugal* v *Council* (drugs policy and EC–India agreement) above n 59; the restriction in scope of the Data Protection Directive and its proposed daughter, see above n 82; and the Council's hopeful defence in Case T–194/95 *Tidningen Journalisten*, see above n 78.

[177] See Advocate General Jacobs' Opinion in *Bosphorus*, above n 3. The position would be clarified if the Dublin draft revisions are accepted.

[178] See Case C–473/93 *Commission* v *Luxembourg*, [1996] ECR I-3207 (Art F(1)); Opinion 2/94 [1996] ECR I-1759 (Art F(2)); Opinion in *Werner* and *Leifer*, see above n 48 (Art J4); Commission submissions on EU foreign policy in *Commission* v *Greece* (FYROM sanctions) above n 49.

[179] The Court might distinguish *Johnston* in its pending *Shingara* and *Radiom* judgment, see above n 7, on the grounds that Art 9 of Directive 64/221 already allows for a sufficient remedy.

[180] In its *Shingara* and *Radiom* judgment, the Court might find that the advisory authorities provided for under EC free-movement law are valid, given that they are subject to judicial review and that UK courts now search for minimal evidence in such cases that the Government sought to combat a national security threat (see Dickson, above n 173).

pronounced, at least the existence of a national security threat was examined. Given the supremacy of the Community legal order, the need for a derogation should always have to be proven, for breaches of EC law could otherwise occur with impunity. Furthermore, the protection of human rights in the EC/EU legal order would be severely compromised if courts declined to review a government's (or the European Union's) declaration that a national security threat existed.

Two such third pillar situations have been described above—the potential Member State derogation from double jeopardy under the PFI and Corruption Conventions and the provision for a joint (black)list and refusal to grant or renew a residence permit under the Schengen Convention and the proposed External Frontiers Convention. In the first case, the Court of Justice should require that national courts conduct a searching review of whether a security issue genuinely existed before an extradition request is sent to the requested State. It is vital that this critical review take place at an early stage so that the potentially accused person has an opportunity to prevent the additional trial from taking place at the earliest possible point.

The Schengen/EFC blacklists and residence permit refusals are a more complex matter. In the former case, it is clear that Schengen and EFC signatories do not intend to inform people that they are on the list. In the case of the permit refusals, the threat to national security or international relations has arisen in a Member State other than that refusing the permit. Discussions on the Frontiers Convention in draft form indicated that the measures implementing this clause would not be agreed (or at least, not published) until after the Convention entered info force.[181] The same 'early warning' protection should be applied here so that persons (particularly those applying for renewal of a permit) have an opportunity to contest 'national security' or 'international relations' claims made by Member States as soon as they arise. But the scrutiny of the validity of the claim itself raises very delicate problems, for immigration authorities in one Member State may be unwilling to challenge another Member State's determination that there is a threat to its national security. Nor do they have the power to compel the authorities of another Member State to provide further reasons justifying the authorities' claims. The best interim solution, pending further (upward) harmonization of procedural requirements, would be for national tribunals in the requested Member State to insist upon full compliance with national procedural requirements, as long as those requirements provide minimum scrutiny of the existence of a threat.

The final option is to review the government's decision, whether lightly or intensively. A 'light' review would check for the existence of a threat and then refrain from analysing the merits of the action which the Member State or the Union wishes to take. This would at least require the courts to establish whether a national security threat exists—which, as suggested above, appears to be the basic requirement of EC law. It should then be harder for govern-

[181] See 14th Report of the [UK] House of Lords' Select Committee, 1993–4.

ments to engage in flagrant abuse of their derogations, and might also act as a deterrent to abuse. But those powers could none the less be abused if authorities are not subject to some judicial supervision of the acts they subsequently take. The intensity of review should depend upon two criteria—the subject matter and the severity of interference with rights protected under the European Convention on Human Rights or under EC Law.

The first criteria explains the approach which Advocate General Jacobs took in *Commission* v *Greece* (FYROM sanctions)—whether a 'threat of war' existed could not be subject to searching judicial analysis *because of the subject-matter*. Neither could substantive assessment of whether the Government was abusing its powers to derogate from EC law by *imposing economic sanctions*. Whether the test for reviewing the government's actions is objective or subjective, rarely will the subject-matter of a national security claim be so little susceptible to review. For example, the Court of Justice did not hesitate to assess the existence or the exercise of the national security claim in *Campus Oil* and *Commission* v *Greece* (oil imports).

The actual and potential cases discussed above indicate why it is essential that courts review governments' national security claims when the subject-matter permits. It is impossible to know from public information whether Mr Gallagher actually posed a security threat, but with great respect to the Queen's Bench, it is hard to accept the United Kingdom Government's contention that Gerry Adams did in 1993. Undoubtedly many individuals associated with Mr Adams indeed posed a very severe threat, but Adams was proposing merely to make a public visit to the House of Commons. It is difficult to imagine what violent havoc this well-known and recognizable figure (who would presumably be under surveillance) could have caused during this brief sojourn: did the government's informers indicate that he was planning to stab audience members during his Commons talk, or shove Westminster passers-by under tour buses?

In the *Adams* case, the national court did accept that the subsequent decision to refuse entry could possibly be subject to review of the merits, including a proportionality test, in light of the EC law rights and human rights issues involved.[182] Similarly, even though the need for Greek sanctions against FYROM may be difficult to test, if freedom of (political) speech had been at issue, in conjunction with EC law rights, the right to such speech could only have been protected by requiring the national courts to assess strictly the need for the Government to impose restrictive measures. Democratic States survived and successfully carried out extensive military action despite sustained public criticism during the Gulf War, and it would similarly seem certain that where only a *threat* of war arguably existed, a Member State derogating from the EC Treaty could not infringe the fundamental rights of its critics in so doing.

Reviews of government measures must necessarily require the government to give full reasons for believing that a national security threat exists and that

[182] See above n 9.

the impugned measures were necessary to meet it. This requirement must, however, necessarily stop short of requiring the government to make public information that would jeopardize the identity of informants or investigative techniques. Yet is is not beyond the ability of Member State or the European Union to arrange an *in camera* procedure that would allow the existence of such a threat and the need for the subsequent measures to be assessed. Such a procedure was suggested by the Court of Human Rights in *Chahal* (referring to Canadian practice in immigration disputes).[183]

A good case study of the justiciability issues is the Council's refusal to supply Europol information to a journalist group, discussed above.[184] After challenging the admissibility of the action itself, the Council has indirectly pleaded the first variant of the first option—automatic non-justiciability because of Article L. More explicitly, the Council 'trusts' that the Court will apply the second option, and review neither the use of the security exception (or 'condition') or its application to the particular documents.

As submitted above, the third option is the minimum approach which has been followed to date and it should continue to be followed in future by the EC Courts. The facts of this case show amply why. It is apparent from the two documents published on the Internet and the summaries of the others that the Council cannot defend its refusal to supply several of the documents if the third option is applied. The refusal to provide information on the Europol Drug Unit's liaison room office requirements is surely manifestly irrational. Some or all the documents which the Council refused to release have possibly been withheld because the Council was concerned about *confidentiality*, not public security. Since refusal to release documents on the former ground is discretionary, and indisputably reviewable, there is a serious possibility that the Council has been misusing its powers and that such misuse will continue if the Court of First Instance backs the Council's position in this case. If the Court finds that access to third pillar documents is a non-justiciable issue, or adopts the Pavlovian approach and rules that it will not review any claim of 'public security', the path will be clear for the Council to keep its third-pillar decision-making even more secret or to freely abuse the 'public security' exception (and other exceptions), since its classification of a large number of documents could never be challenged. A full review of the merits might well reveal that none of the Council's refusals should be upheld. But once Europol is established, there will be many documents that genuinely should be withheld on security grounds, and a victory by the journalists might lead to the risk that certain information which should be classified might have to be disclosed.

As submitted above, the EC Courts' approach should vary depending upon the subject-matter of the information. Where Europol information relates to operational activities, there is a clear risk that security will genuinely be compromised if information is disclosed. In such circumstances the courts need

[183] See above n 155. [184] See above s IIA(iv) 377–8.

only satisfy themselves that the operational documents relate to a genuine security threat. Where the link to an operational act is less, the courts should embark on a review of the merits, but with considerable discretion granted to the institutions. And where there is no link to operational actions at all, but rather discussion of Europol's (or other bodies') future development, or proposals for normative third-pillar legislation or policy harmonization, there should be an exceptionally stringent review of the merits of refusal, given the justiciability of the subject-matter, the limited (if any) threat to public security, and the high interest in enforcing citizens' rights to freedom of information. *In camera* procedures can be established if necessary. Judicial reticence in forcing public disclosure of wrongly classified materials will not aid the fight against illicit activity in Europe: it will only aid the *Council's* illicit goal of treating democratic supervision of its policies with contempt.

V. Conclusions

No discussion of national security in the European Union is complete without recalling the historical context in which the Union developed. The Treaty of Rome, and earlier the Treaty of Paris, was signed because Member States hoped that closer integration would prevent gross abuses of nationalism from ever again scarring Europe. There is seemingly no risk today that Member States will commit abuses on such a scale. But there are certainly precedents for more limited abuses in the name of national security: blacklisting, censorship, internment, and inhumane treatment have frequently been practiced by democratic States in the last several decades.

In light of this history, judges cannot trust the State without question. Depending on the subject matter and the risk of harm to ECHR or EC rights at stake, courts should ideally subject government actions to full *de novo* review. If such review is impossible, they should at least establish that there is reason to believe a national security threat existed and that the related action was not irrational, unreasonable or disproportionate in light of that threat. And these principles must apply not only when Member States derogate from EC or EU law, but when the Member States act as EU or EC agents or when the EC or EU takes measures. The intent of creating an 'ever-closer union' is to reduce the risk of abuses of nationalism; but that risk will remain in the absence of stringent judicial control.

VI. Postscript

On 17 June 1997, the Court of Justice delivered its judgment in the Joined Cases of *Shingara* and *Radiom*.[185] As noted above, these cases were the first opportunity the Court has had to rule on the application of the 'public security'

[185] See supra n 7.

exceptions of the EC Treaty or secondary legislation to the free movement of people. In its judgment, the Court declined to address the question of the validity of Article 9 of the Directive. Although the Advocate General had argued that part of the Article was invalid because it breached a general principle of judicial control, its validity had not been the subject of a question by the UK court. Since the Court did not address the issue directly, the issue of the Article's validity remains open. However, the Court did reiterate its prior case-law that any competent authority a Member State sets up under Article 9 must review the 'expediency' (i.e. the merits) of a decision to expel or refuse entry to a Community national.

Later that same day, the negotiators at the Intergovernmental Conference finalized the text of the 'Amsterdam Treaty', revising the Treaty on European Union. Obviously this postscript cannot address all the amendments to the Treaty relevant to the foregoing article, but several amendments are of critical importance. The Court of Justice will now have power to rule on all measures adopted under the present third pillar, whether 'transferred' to the first pillar or remaining in the third (Articles H, in new EC Treaty Title, and K.7 in 'third pillar'). It will also be able to rule on the present Schengen Convention and measures adopted under it, once the Convention and its implementing measures are transposed into acts adopted under the first or third pillar of the Union. However, Member States may choose to opt out of its jurisdiction over third pillar acts.

There are also two separate limitations on the *class of acts* which the Court can interpret: it is barred from ruling on any measure or decision 'relating to the maintenance of law and order and the safeguarding of internal security' under the 'Schengen acquis' or the abolition of border controls (Articles B(2), Schengen Protocol, and H(2) and in new EC Treaty title). Under the remaining third pillar, it may not review either the exercise of Member States' responsibilities for 'the maintenance of law and order and the safeguarding of internal security' or 'the validity or proportionality of operations' carried out by national law enforcement agencies (Article K.7(5)). These limitations are clear attempts to apply the first variant of the first model of judicial control, and bar a Court from reviewing an entire class of State or Community actions. However, a Declaration attached to Article K.2 specifies that activities of Europol and co-ordinated EU police actions must be subject to *national* judicial review.

The remaining security exemptions in the EC Treaty have not been amended, and it should be noted that there is no bar on the Court of Justice reviewing security exemptions that may be invoked in most (non-Schengen) fields of immigration and asylum law. The restriction on the Court's power to review security exemptions is, if anything, slightly reduced, compared to the present situation. It remains to be seen whether national courts, backed up by the Court of Human Rights, prove able to ensure that individual rights can be protected under the revised constitutional structure.