

# Sanctions by the United Nations Security Council and the European Community

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## I. Introduction

The demise of monolithic Communist rule in Central and Eastern Europe, and the consequent collapse of the East-West conflict dramatically strengthened the system of collective security established by the United Nations. The most remarkable example of successful UN action in this field was the economic sanctions imposed against Iraq in response to the invasion of Kuwait. Various Security Council resolutions were rapidly passed under the Chapter VII procedure, and in most cases with unanimous support from Security Council members. Further measures aimed at applying economic coercion were adopted in international crises involving Libya and Yugoslavia.

The main type of economic sanction is the embargo; that is a government initiated ban on its nationals trading with another State for reasons pertaining to foreign relations, and in reaction to illegal or politically undesirable acts of the recalcitrant State. It may concern the import or export of goods, capital or services.<sup>1</sup> International organizations can also impose embargoes, as is provided by Article 41 of the UN Charter.<sup>2</sup> Therefore, the growing economic strength of the European Community might give rise to the question of whether it is empowered to adopt economic sanctions against third States. This is all the more true because under Article 113 of the Treaty of Rome, the common commercial policy fell within the EC's exclusive competence from the end of the transitional period (i.e. 1 January 1970).<sup>3</sup> By contrast only Member States are competent to govern foreign relations; in this respect there is only coordination among States in the form of European Political Cooperation (EPC), which is outside the Community legal order.<sup>4</sup> The question of whether the EC or its constituent Member States have

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1 Cf. B. Lindemeyer, *Schiffsembargo und Handelsembargo* (1975) 183.

2 Kuyper, 'International Legal Aspects of Economic Sanctions', in P. Sarcevic, H. van Houtte (eds), *Legal Issues in International Trade* (1990) 145; cf. Verhoeven, 'Sanctions internationales et Communautés européennes', 18 *RBDI* (1984-85) 79, 88. Sometimes the lack of passive legitimacy is used to justify previous EPC consultations, see, e.g., Vedder, 'Artikel 113', in E. Grabitz (ed.), *Kommentar zum EWG-Vertrag* (1989) para. 62, but cf. para. 65; see also *infra* text note 86 et seq.

3 Opinion 1/75, *Understanding on a Local Cost Standard*, [1975] ECR 1355; Case 41/76, *Donckerwolcke*, [1976] ECR 1921.

4 Title III Single European Act, OJ 1987 L 169/1. On the EPC see Stein, 'European Political Cooperation as a Component of the Foreign Affairs System', 43 *ZaöRV* (1983) 49; Nuttall, 'Interaction between European Political Cooperation and the European Community', 7 *YBEL* (1987) 211. Title V

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competence to impose economic sanctions is a widely debated issue.<sup>5</sup> State practice and doctrine confirm that the EC is empowered to impose autonomous economic sanctions, albeit after a decision is taken within the framework of EPC.<sup>6</sup>

The topic of the following discussion shall focus on a related issue. The Security Council has adopted a complete trade embargo against Iraq that has been implemented by the EC with Community measures. The same course of action was taken against Libya and Yugoslavia.<sup>7</sup> In all these cases the exclusive competence of the EC for the common commercial policy<sup>8</sup> was complemented by resolutions of the Security Council imposing a trade embargo.<sup>9</sup> It therefore can be asked whether, in abstract terms, one international organization is bound by binding decisions of another international organization when both organizations have the same Member States, but legislative competence in relevant fields has been transferred to one of the international organizations. In the case under discussion, the question is whether the EC is bound by public international law and/or Community law to implement the aforementioned resolutions of the Security Council.<sup>10</sup> In a leading commentary on the Treaty of Rome it is said that

trade policy embargoes which are based on a UN sanctions decision can also be imposed by the EC with no obligation on the EC to treat the UN measures as binding. This is so because, in the case of the UN a succession (by the EC) in the position of its Member States has not taken place.<sup>11</sup>

of the Treaty on European Union, signed 7 February 1992, provides for a common foreign and security policy and replaces the former EPC.

- 5 See Gilsdorf, 'Artikel 224', in H. Groeben, J. Thiesing, C. Ehlermann (eds), *Kommentar zum EWG-Vertrag* (1991) para. 26; Kuyper, *supra* note 2, at 166; Kampf, 'Artikel 113 EWG-Vertrag als Grundlage für Embargomaßnahmen seitens der EWG', 35 *RIW* (1989) 791; G. Stenger, *Das Handelsembargo im Außenwirtschaftsrecht. Praxis und Zulässigkeit* (1988); Meng, 'Die Kompetenz der EWG zur Verhängung von Wirtschaftssanktionen gegen Drittländer', 42 *ZaöRV* (1982) 780; Kuyper, 'Community Sanctions against Argentina: Lawfulness under Community and International Law', in D. O'Keefe, H.G. Schermers (eds), *Essays in European Law and Integration* (1982) 141.
- 6 See *infra* text note 86 et seq.
- 7 *Infra* text Sections II.B and II.C.
- 8 This had not been the case for Security Council Resolutions 232 (1966), dated 16 December 1966, and 253 (1968), dated 29 May 1968, imposing a full embargo on Southern Rhodesia, as they were effective before the end of the transitional period. Consultations among the governments of the six Member States had not brought about coordinated national measures, see Kuyper, 'Sanctions Against Rhodesia. The EC and the Implementation of General International Legal Rules', 12 *CML Rev.* (1975) 231, 238.
- 9 The Security Council had imposed against South Africa an arms embargo by Resolution 418 (1977), dated 7 November 1977, UNYB (1977) 161, which was implemented by the Member States because they were still competent in this respect under Art. 223(1)(b) of the Treaty of Rome; cf. also *BulleEC* (1977/11) para. 3.2.6.
- 10 See Kuyper, *supra* note 8; Maier, 'Zur Kompetenz der EG-Mitgliedstaaten zur Durchführung von Sanktionsbeschlüssen des Sicherheitsrats der Vereinten Nationen', 25 *RIW* (1979) 247; Petersmann, 'Internationale Wirtschaftssanktionen als Problem des Völkerrechts und des Europarechts', 80 *ZVglRWiss* (1981) 1; Klein, 'Zulässigkeit von Wirtschaftssanktionen der EG gegen ihre Mitgliedstaaten', 31 *RIW* (1985) 291; Laurwaars, 'The Interrelationship between United Nations Law and the Law of Other International Organizations', in *Festschrift Eric Stein* (1987) 466; Klein, 'Sanctions by International Organizations and Economic Communities', 117 *AVR* (1992) 101.
- 11 Vedder, *supra* note 2, at para. 65 (author's translation).

At first glance it therefore appears as if the addressee of the obligations under public international law<sup>12</sup> and the competent organ to act<sup>13</sup> are not the same. This article will briefly overview the most recent practice in relation to sanctions, before proposing a solution to this apparent dilemma.

## II. Recent Practice of Sanctions by the EC Against Third States

The Security Council handled the Iraq/Kuwait crisis with the surprisingly quick adoption of sanctions, whereas in other international crises, such as the alleged Libyan involvement in the Lockerbie bombing, the Security Council reacted only after being put under massive pressure. The rapid deterioration of the situation in Yugoslavia prompted the EC to impose negative and positive sanctions against the conflicting parties, even though at the time there was no Security Council decision on which to base them.<sup>14</sup>

### A. Iraq/Kuwait

The military annexation of Kuwait by Iraq on 2 August 1990 led the Security Council to adopt on the same day Resolution 660 (1990).<sup>15</sup> The Security Council thereby condemned the Iraqi invasion and requested Iraq's immediate and unconditional withdrawal of its troops from Kuwait. The political directors of the Ministries of Foreign Affairs of the EC Member States decided at a special meeting, which was held in the framework of EPC in Rome on 4 August 1990, to impose economic sanctions against Iraq and Kuwait.<sup>16</sup> At the same time consultations were held at the Security Council to adopt economic sanctions. In the joint EPC statement issued on 4 August 1990 these discussions were noted:

[T]he Community and its Member States will work for, support and implement a Security Council resolution to introduce mandatory and comprehensive sanctions.<sup>17</sup>

Even before a formal decision by the Security Council was made, the political directors had agreed on sanctions. This entailed placing an embargo on oil imports from Iraq and Kuwait, and suspending the system of generalized preferences in so far as it applied to Iraq.

The Commission of the EC forwarded corresponding proposals which called for Council regulations.<sup>18</sup> In response to Security Council Resolution 661 (1990)<sup>19</sup> of 6 August 1990

12 See *infra* Section III.A.

13 See *infra* Section III.B.

14 On the earlier practice see Stenger, *supra* note 5, at 25; Nuttall, *supra* note 4 and Dewost, 'La Communauté, les Dix et les "sanctions" contre l'Argentine: de la crise iranienne à la crise des Malouines', *AFDI* (1982) 215.

15 Text in ILM (1990) 1325; see the EPC statement of 2 August 1990, *Bull. EC* (1990/7-8) para. 1.5.9., where the Community and its Member States fully supported Resolution 660 (1990). For a general discussion of legal issues pertaining to sanctions imposed against Iraq see E. Lauterpacht *et al.* (eds), *The Kuwait Crisis* (1991); Berger, 'Crise du golfe, embargo et après crise', *RMC* (1990) 615. On the qualification of the Iraq/Kuwait conflict by international law see Graefrath, Mohr, 'Legal Consequences of an Act of Aggression: The Case of the Iraqi Invasion and Occupation of Kuwait', 44 *Austrian Journal of Public International Law* (1992) 109.

16 *Bull. EC* (1990/7-8) para. 1.5.11.

17 *Supra* note 16.

18 COM (90) 375, 376 and 391 final.

19 Text in ILM (1990) 1325.

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imposing an economic, trade, finance and arms embargo, the Commission within a very short period made new proposals to the Council.<sup>20</sup> The Council on 8 August 1990 adopted Regulation 2340/90 banning trade by the Community with Iraq and Kuwait.<sup>21</sup> The Regulation refers in its first preambular paragraph to the statement made in the context of EPC 'that economic measures will be taken against Iraq'. The next preambular paragraph notes that the Security Council resolution inflicts a trade embargo.<sup>22</sup> Finally it is emphasized that:

the Community and its Member States have agreed to have recourse to a Community instrument in order to ensure uniform implementation, throughout the Community, of the measures concerning trade with Iraq and Kuwait decided upon by the United Nations Security Council.<sup>23</sup>

After further statements<sup>24</sup> the Ministers of Foreign Affairs confirmed on 7 September 1990 that it was necessary to fully implement Security Council Resolutions 660 and 661 (1990).<sup>25</sup>

As a consequence, the existing Community measures were extended to all kinds of services (with the exception of financial services).<sup>26</sup> Furthermore, the Community regulation implemented paragraph 9 of Resolution 661 (1990) which requested appropriate measures to protect the assets of the legal Kuwaiti Government and its institutions.<sup>27</sup> EC Regulations 2340/90 and 3155/90,<sup>28</sup> as well as ECSC Decision 90/414,<sup>29</sup> were modified<sup>30</sup> in accordance with Security Council Resolutions 686 (1991) of 2 March 1991, and 687 (1991) of 3 April 1991.<sup>31</sup> The aforementioned Community acts refer to an agreement of 'the Community convened within EPC and its Member States'. In accordance with paragraph 29 of Resolution 687 (1991), the Council adopted on 7 December 1992 Regulation 3541/92 rejecting Iraqi claims with regard to contracts and transactions which had been frustrated by Security Council Resolution 661 (1990) and related resolutions.<sup>32</sup> The preambular paragraphs of Regulation 3541/92 mention Resolution 687 (1991) along with the agreement struck within the EPC. It is specifically noted that resort was made to a Community instrument 'in order to ensure uniform implementation,

20 COM (90) 390 final and COM (90) 393 final which were approved by the Commission on 7 and 8 August respectively.

21 OJ 1990 L 213/1; the Representatives of the Governments of the Member States meeting within the Council adopted a corresponding Decision 90/414/ECSC (so-called 'framework-decision') as regards products under the ECSC Treaty, OJ 1990 L 213/3.

22 Cf. *BulleC* (1990/7-8) para. 1.4.21.

23 Fourth preambular paragraph of Regulation 2340/90, *supra* note 21.

24 See *BulleC* (1990/7-8) paras. 1.5.14. and 1.5.16.

25 *BulleC* (1990/9) para. 1.4.4. Thereby the EC and its Member States also announced financial aid to three States in the crisis region which were implementing the embargo.

26 Regulation 3155/90, OJ 1990 L 304/1. The exception of financial services is explained by the Community's lack of competence; cf. Berger, *supra* note 15, at 618 and see the request for opinion 2/92, OJ 1992 C 255/4.

27 Cf. Art. 2 Regulation 3155/90, *ibid.*

28 *Supra* notes 21 and 26.

29 *Supra* note 21.

30 Regulation 3155/90 was modified by Regulation 542/91, OJ 1991 L 60/5. Regulation 2340/90 was modified by Regulation 811/91, OJ 1991 L 82/50 and Regulation 1194/91, OJ 1991 L 115/31. Decision 90/414/ECSC was modified by Decision 91/125/ECSC, OJ 1991 L 60/15, and 91/265/ECSC, OJ 1991 L 127/27.

31 The text of both resolutions can be found in 116 AVR (1991) 475. By Resolution 686 (1991) the Security Council suspended the embargo against Kuwait. Cf. Regulation 542/91, *supra* note 30, and Decision 91/125/ECSC, *supra* note 30.

32 OJ 1992 L 361/1. Cf. the joint statement within EPC, *BulleC* (1992/12) para. 1.5.5.

throughout the Community, of paragraph 29 of the United Nations Security Council Resolution 687 (1991).<sup>33</sup>

### B. Libya

Due to demands made by the USA and Great Britain on 21 January 1992, the Security Council adopted Resolution 731 (1992).<sup>34</sup> Under the terms of the resolution Libya was requested to renounce all support for international terrorism and to deliver persons suspected of attempting to blow up two aircraft. Further, on 31 March 1992 the Security Council passed Resolution 748 (1992),<sup>35</sup> under the provisions of Chapter VII of the UN Charter, and thereby imposed a selective trade embargo on arms and services against Libya. It was to take effect from 15 April if Libya had not by that date complied with Resolution 731 (1992). The deadline lapsed with no Libyan compliance. Consequently, on the basis of Article 113 of the Treaty of Rome, the EC adopted Regulation 945/92 banning the supply of certain goods and services to Libya in order to implement the Security Council resolution.<sup>36</sup> The first two preambular paragraphs quote Resolution 748 (1992) and the measures contained therein. The third preambular paragraph reads as follows:

The Community and its Member States meeting within the framework of Political Cooperation have expressed their full support of the measures decided upon by the Security Council.<sup>37</sup>

The Regulation does not make any explicit reference to the joint statement which was made within EPC on 7 April 1992,<sup>38</sup> as had been the case in former regulations imposing embargoes.

### C. Yugoslavia

The EC itself has always been involved in the peace process concerning the conflict in Yugoslavia;<sup>39</sup> and for a long while there was no consensus regarding who was responsible for the belligerent activities. Thus, any decision on sanctions by the EC was delayed. At the international level caution predominated. On 25 September 1991 the Security Council passed Resolution 713 (1991)<sup>40</sup> in which it expressed concern that the continuation of the situation in Yugoslavia could be regarded as a threat to world peace and international security. An arms embargo was imposed by paragraph 6.

The continuing deterioration of the situation in Yugoslavia led the NATO summit in Rome to adopt a decision on 8 November 1991 to impose sanctions and to apply countervailing positive measures.<sup>41</sup> The Community and its Member States later called on those Member

33 Sixth preambular paragraph of Regulation 3541/92, *ibid.*

34 Text in 25 *RDI* (1992) 202. For a general discussion of sanctions against Libya see Beveridge, 'The Lockerbie Affair', *ICLQ* (1992) 907.

35 Text in 96 *RGDIP* (1992) 462.

36 OJ 1992 L 101/53.

37 *Supra* note 35.

38 *BulLEC* (1992/4) para. 1.5.3. Thereby the Community and its Member States announced the scrupulous implementation of the provisions adopted by the Security Council.

39 See Lucron, 'L'Europe devant la crise yougoslave: mesures restrictives et mesures positives', *RMC* (1992) 7.

40 Text in 116 *AVR* (1991) 533.

41 *BulLEC* (1991/11) para. 1.4.4.

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States which were also members of the Security Council of the United Nations to invite the Security Council to reach agreement on additional measures to enhance the effectiveness of the arms embargo. They also decided 'to invite the UN Security Council to take the necessary steps towards imposing an oil embargo.'<sup>42</sup>

The formal decision by the Council of the EC on economic sanctions was taken on 11 November 1991.<sup>43</sup> Thus, an agreement on cooperation between the EC and Yugoslavia and corresponding protocols and Community acts, along with an agreement on coal and steel, were suspended as from 15 November.<sup>44</sup> Yugoslavia was also deleted from the list of beneficiaries of the Community General Scheme of Preferences for Tariffs for 1991 from the same date.<sup>45</sup>

As the situation continued to deteriorate, the Ministers of Foreign Affairs, meeting within EPC on 11 April 1992, asked the Commission 'to evaluate the modalities of possible economic sanctions.'<sup>46</sup> It was unanimously agreed that these measures would be directed against the Republics of Serbia and Montenegro, which had previously announced their unification under the name of the 'Federal Republic of Yugoslavia'. The Commission agreed upon the catalogue of measures on 21 May and forwarded it to the Council.<sup>47</sup> At the ambassadorial level, consultations were held among the Twelve on 27 May which led, under pressure from Great Britain and the Federal Republic of Germany, to a complete trade embargo, a ban on all export credits and suspension of scientific and technical cooperation. France had opposed the suspension of air transportation and a ban on oil, and Spain disapproved of the severance of sporting contacts. In contrast to the EC's stance in the Iraq/Kuwait crisis, the EC and its Member States urged the Security Council, which was already discussing these matters, to impose economic sanctions, in particular an oil embargo. By Security Council Resolution 757 (1992) of 30 May 1992,<sup>48</sup> imports and exports, as well as air transport from and to Serbia and Montenegro, transport and financial services thereto, and scientific, technical and cultural cooperation, were prohibited. As in the Iraq case, the Security Council resolution 'overruled' the political 'basic decision' on Community measures. When formally adopting the Community sanctions on 1 June, the Council of the EC paid regard to Resolution 757 (1992). An EPC statement of the same day reads, *inter alia*, as follows:

The Community and its Member States welcome United Nations Security Council Resolution 757 (1992) of 30 May 1992. They will take immediately all necessary legal steps in order to secure the immediate application of the provisions contained in the mentioned resolution.<sup>49</sup>

Regulation 1432/92,<sup>50</sup> which is based on Article 113 of the Treaty of Rome, prohibits any trade between the EC and the two Republics of Serbia and Montenegro. The preambular paragraphs

42 Cf. the declaration of 12 November 1991, *BulleC* (1991/11) para. 1.4.8.

43 See *Agence Europe* No. 5606 of 9 November 1991, 3. After approval by the European Parliament on 20 November 1991, the Council suspended the agreement on cooperation and trade between the EC and Yugoslavia. See Decision 91/602/ECSC, OJ 1991 L 325/23.

44 Decision 91/586/ECSC, OJ 1991 L 315/47; Regulation 3300/91, OJ 1991 L 315/1; Regulation 3301/91, OJ 1991 L 315/3, modified by Regulation 1155/92, OJ 1992 L 122/1; Decision 91/587/ECSC, OJ 1991 L 315/48 and Decision 91/588/ECSC, OJ 1991 L 315/49.

45 Regulation 3302/91 and Decision 91/589/ECSC, OJ 1991 L 315/46, 50.

46 *Agence Europe* No. 5728 of 13 April 1992, 3.

47 *Agence Europe* No. 5734 of 22 May 1992, 6.

48 Text in 96 *RGDIP* (1992) 1038.

49 *BulleC* (1992/6) para. 1.5.2.

50 OJ 1992 L 151/4; products under the ECSC Treaty were regulated by Decision 92/285/ECSC, OJ 1992 L 151/20, modified by Decision 92/314/ECSC, OJ 1992 L 166/35 Security Council Resolution

of this regulation refer to an EPC statement (without specifying its date) and the trade embargo imposed by Security Council Resolution 757 (1992).

By Resolution 787 (1992) of 16 November 1992,<sup>51</sup> the Security Council adopted provisions prohibiting shipment of certain products (e.g. crude oil, petroleum products, chemicals, rubber, tyres, vehicles) through the Republics of Serbia and Montenegro, unless certain conditions were met. Again, after an agreement within the EPC, the Council of the EC passed appropriate measures.<sup>52</sup>

### III. Analysis

In contrast with other international organizations, the Member States of the EC have transferred broad powers to EC institutions. Thus, in the special case of the EC the problem arises regarding how an international organization can participate in another international organization.<sup>53</sup> This is particularly true when all EC Member States simultaneously belong to other international organizations, or are contracting parties to multilateral conventions. Consequently it is possible that the delimitation of powers between the Member States and the EC, which has traditionally been considered as solely relevant for Community law, may play a role in the relations of the EC and its Member States towards third States. Similar problems are posed with respect to binding decisions by institutions of international organizations.

#### A. Addressee of a Security Council Resolution

The UN Charter expressly provides that only States are eligible for membership.<sup>54</sup> According to Article 25 Security Council decisions are binding on the members of the UN.<sup>55</sup> However, there is an emerging trend which advocates considering Security Council resolutions passed under Chapter VII as binding on non-members and members alike.<sup>56</sup> Some resolutions request

760 (1992), dated 18 June 1992, text in 96 *RGDIP* (1992) 1047, provides for exceptions to the embargo for humanitarian reasons. Regulation 2015/92 and Decision 92/388/ECSC, OJ 1992 L 205/2 and 5, make the appropriate modifications. In order to strengthen the embargo the Council adopted Regulations 2655/92 and 2656/92, as well as Decision 92/470/ECSC, OJ 1992 L 266/26, 27, modified by Regulation 40/93 and Decision 93/8/ECSC, OJ 1993 L 7/1, 11. These measures were implemented by Commission Regulation 2725/92, OJ 1992 L 276/18, and modified by Regulation 3031/92, OJ 1992 L 306/39.

51 Cf. *Bulletin of Legal Developments* 23/92, 280.

52 Regulation 3534/92 and Decision 92/555/ECSC, OJ 1992 L 358/16, 18.

53 See J. Groux, P. Manin, *The European Communities in the International Legal Order* (1984) 41, 93; on the relationship between EC and UN see Brückner, 'The European Community and the United Nations', 1 *EJIL* (1990) 174; on the participation of the EC in multilateral agreements see Neuwahl, 'Joint Participation in International Treaties and the Exercise of Power by the EC and its Member States: Mixed Agreements', 28 *CML Rev.* (1991) 717.

54 Art. 4(1) UN Charter; cf. the special participation clause for the EC in Annex IX United Nations Convention on the Law of the Sea.

55 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ Reports (1971) 52, and *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (provisional measures), ICJ Reports (1992) 16 (hereafter referred to as the *Libya case*).

56 This view places some reliance on the wording in Article 2 paragraph 6 of the Charter. Zemanek, 'The Changing International System: A Look at Collective Security and Permanent Neutrality', 43 *Austrian Journal of Public International Law* (1991) 277. On the Swiss position see Thürler,

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'all States, including States non-members of the United Nations' to act in accordance with provisions of the resolutions.<sup>57</sup> However, while the text of such resolutions might be interpreted in favour of widening the scope of its addressees to non-member States, the position of international organizations remains unchanged. Paragraph 24 of Resolution 687 (1991)<sup>58</sup> confirmed the force and scope of the embargo imposed by Resolution 661 (1990),<sup>59</sup> and went on to call upon 'all States and international organizations to act strictly in accordance with paragraph 24'.<sup>60</sup> A similar request can also be found in paragraph 7 of Resolution 748 (1992).<sup>61</sup> As no consistent practice in this respect can be established, the EC is not directly bound by these Security Council resolutions.

According to UN Charter Article 103,

[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligation under the present Charter shall prevail.

When establishing the EC, all but one of the Member States were under an obligation to either transfer to the EC all necessary sanctioning powers,<sup>62</sup> or to provide for an exceptions clause according to which they retained the power to act in conformity with their obligations under the UN Charter.<sup>63</sup> The only Member State to which this duty was not applied was the Federal Republic of Germany,<sup>64</sup> and only because in 1957 it was not yet a member of the UN.

In conformity with Article 103 of the UN Charter, Article XXI(c) of the General Agreement on Tariffs and Trade (GATT)<sup>65</sup> confers the contracting parties with the right to invoke obligations under the UN Charter against GATT provisions. However, it is not possible to deduce therefrom that Security Council resolutions are binding on the EC.<sup>66</sup>

If from the point of view of the UN Charter, a direct obligation on the EC has been ruled out, the position of the EC as to the UN might be different under Community law. The European Court of Justice (ECJ) has declared that, with regard to the rights and duties arising

'Comment: UN Enforcement Measures and Neutrality. The Case of Switzerland', 117 AVR (1992) 69.

- 57 E.g. para. 5 of Resolution 661 (1990), *supra* note 19, and para. 6 of Resolution 733 (1992) text in 96 *RGDIP* (1992) 253; see the extracts from the statement of the Federal Council on the Swiss position in the Gulf Crisis, 46 *Schweizer Zeitschrift für Internationales und Europäisches Recht* (1991) 561. Thürler, *supra* note 56, at 72 concludes that third States cannot be legally bound by such resolutions.
- 58 *Supra* note 31.
- 59 *Supra* note 19.
- 60 *Ibid.* See also the proposal for guidelines to facilitate the full application of paras. 24, 25 and 27 of Resolution 687 (1991) whereby international organizations are also to ensure effective application of the sanctions. Para. 29 of Resolution 687 (1991) is addressed to 'all States'; but see the Community Regulation 3541/92, *supra* note 32.
- 61 *Supra* note 35.
- 62 In the *Libya* case, *supra* note 55, at 16 the ICJ confirmed the *prima facie* binding force of Security Council resolutions and referred to the rule of primacy according to Art. 103 UN Charter.
- 63 Discussed further *infra* text Section III.B.
- 64 See Schenck, 'Das Problem der Beteiligung der Bundesrepublik Deutschland an Sanktionen der Vereinten Nationen, besonders im Falle Rhodesiens', 29 *ZaöRV* (1969) 257.
- 65 See Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception', *Mich.J.Int'l L.* (1991) 558.
- 66 As in the case of Art. 224 of the Treaty of Rome which regulates the relationship among the Member States, this provision pays regard to the primacy clause of Art. 103 of the UN Charter.



from the GATT, the EC has replaced the Member States as the relevant actor.<sup>67</sup> The ECJ formulated the following five reasons for this substitution:<sup>68</sup>

- (1) All EC Member States are contracting parties of GATT.
- (2) The EC retains powers in the field of tariff and trade policy.
- (3) The EC has shown its willingness to be bound by the GATT provisions. (This can be deduced from statements made by Member States when the Treaty of Rome was given the green light under GATT Article XXIV, and can also be assumed from Article 110 of the Treaty of Rome which mentions the objectives of the GATT. Further Article 234(1) of the Treaty of Rome stipulates that its entering in force is without prejudice to pre-existing multilateral agreements.)
- (4) The EC has acted in the framework of GATT by signing tariff and trade agreements as well as participation in other acts.
- (5) The contracting parties of GATT have recognized the substitution of the Member States with the EC at least by acquiescence.

While it is correct that the EC as an international organization is bound by the UN Charter insofar as it codifies general principles of public international law,<sup>69</sup> it cannot be reasonably argued that the UN Charter has any broader binding force.<sup>70</sup> The analysis of the binding character of Security Council resolutions has to start with the above-listed criteria set up by the Court of Justice. Until now, not only was there an absence of Security Council resolutions purporting to bind other international organizations, there was no EC practice of implementing them.<sup>71</sup> Thus, it is difficult to infer any broad conclusions from the GATT case.<sup>72</sup> The EC has enacted on several occasions economic measures within its competence for trade policy.<sup>73</sup> By implementing with Community acts the Security Council sanctions against Iraq, Kuwait, Libya, and Yugoslavia, the EC has been, at least indirectly, active within the framework of the UN.<sup>74</sup> While recognition of the EC legislation may be understood as having taken place implicitly by the UN members,<sup>75</sup> the more important question is whether the EC itself shares the opinion that it is bound by Security Council resolutions. In the Iraq/Kuwait affair, as well as in the Yugoslavia crisis, the EC Member States meeting within EPC made political decisions regarding

67 Cases 21-24/72, *International Fruit*, [1972] ECR 1219, para. 10 et seq.

68 Vedder, 'Artikel 234', *supra* note 2, at para. 18; Petersmann, 'Artikel 234', in H. Groeben, J. Thiesing, C. Ehlermann (eds), *supra* note 5, at paras. 14, 16 stresses the parallel GATT membership of EC and its Member States in practice.

69 Simma, Vedder, 'Artikel 210', in E. Grabitz, *supra* note 2, at para. 19 et seq.; H.-H. Nöll, *Völkerrechts-subjektivität der Europäischen Gemeinschaften und deren Bindung an das allgemeine Völkerrecht* (1986) 60 et seq., 129 et seq.

70 J. Groux, P. Manin, *supra* note 53, at 92 mention resolutions by the General Assembly of the UN which are also addressed to 'groups of States' if they have powers in the fields dealt with by these resolutions. See also *contra* Larwaars, *supra* note 10, at 473.

71 In the two cases of binding Security Council resolutions, *supra* notes 7 and 8, either the EC did not yet have relevant powers, or the Member States retained their competences.

72 See Maier, *supra* note 10, at 250; Klein, *supra* note 10, at 292; *contra* Kuyper, *supra* note 8, at 233.

73 See Stenger and Kuyper, *supra* note 5.

74 It remains however questionable how far the EC has taken part in the UN institutions, particularly the Security Council. It would be possible for the permanent members of the Security Council which simultaneously belong to the EC to participate in the name of the EC. Cf. Art. 30(7)(b) SEA.

75 Statements in this respect were not made public. The aforementioned wording of Security Council resolutions might indicate certain changes of normative expectations in the sense that resolutions are also addressed to international organizations as far as they possess corresponding powers. See also Klein, *supra* note 10, at 111.

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the adoption of sanctions. Security Council resolutions followed shortly thereafter and differ slightly as to content. When formally adopting Community measures the EC undertook the necessary adjustments to its initial measures. While this procedure suggested an intention by the EC to be bound by the Security Council resolutions, at present such an opinion is not sufficiently clear and manifest to satisfy the criterion mentioned above for substitution.<sup>76</sup>

Articles 5 and 234(2) of the Treaty of Rome require the Community institutions to show loyalty in the field of international law.<sup>77</sup> But this duty cannot serve as a basis under Community law for any international obligation of the EC to implement Security Council resolutions.<sup>78</sup>

As a preliminary conclusion it can be asserted that the EC is not bound by public international law to implement sanctions adopted by the Security Council.

### B. Power to Implement Security Council Resolutions

Article 103 of the UN Charter provides for a rule of primacy of obligations under the Charter in the event of conflict with other international duties. As has already been noted, in 1957 the founding Member States of the EC, except the Federal Republic of Germany, were already members of the UN (two of them were even permanent members of the Security Council). This form of paramountcy of the UN Charter was the inspirational source of Article 224 of the Treaty of Rome.<sup>79</sup> According to this article, a Member State may derogate from general Treaty of Rome provisions and adopt autonomous measures 'in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.' On the other hand, Article 234 of the Treaty purports to secure the pre-existing international legal positions of third parties as they were before the formation of the EC, and stipulates that the Member State concerned and the EC shall attempt to solve any conflict between Community and public international law. Whereas Article 234 of the Treaty of Rome regulates the solution of possible conflicts between two legal orders, Article 224 confers in a special situation,<sup>80</sup> wide derogative powers to the Member States concerned which can affect all Treaty provisions within the limits set by Article 225.<sup>81</sup> Security Council resolutions that failed by a veto or were not fully determined do not fall under 'accepted' obligations.<sup>82</sup> Under the strict terms of Article 224 Member States therefore were empowered to adopt measures in order to implement Security

76 In Case 204/86, *Greek Republic v. Council*, [1988] ECR 5323, para. 28, the ECJ for the first time judged the legal status of a Security Council resolution (namely Resolution 541 (1983) regarding Cyprus) as within Community law. The non-mandatory nature of the measure might have been the reason for the Court denying it any effect. It did not answer the argument put forward by the Greek Government that the EC was bound on the basis of the principle of substitution. Cf. Advocate General Mancini, at 5353.

77 Cf. Petersmann, *supra* note 68, at para. 10: According to Art. 234(2) of the Treaty of Rome in order to solve incompatibilities between Member States' obligations under international law and those under Community law, the *ultima ratio* are adjustments of secondary Community legislation. Therefore the Community institutions are obliged to cooperation and support, Case 10/61, *Commission v. Italian Republic*, [1962] ECR 1, 10.

78 Petersmann, *supra* note 68, at para. 20; Petersmann, *supra* note 10, at 26, excludes any binding force of Security Council resolutions because wording addresses only UN Members.

79 Gilsdorf, *supra* note 5, at para. 16.

80 Insofar as Art. 224 is *lex specialis* to Art. 234 of the Treaty of Rome; Kuyper, *supra* note 8, at 235; Gilsdorf, *supra* note 5, at para. 16.

81 Cf. Hummer, 'Artikel 225', in E. Grabitz (ed.), *supra* note 2.

82 Gilsdorf, *supra* note 5, at para. 18.

Council resolutions as on economic sanctions against, for example, Southern Rhodesia.<sup>83</sup> Measures were taken by Member States in this regard which were designated by the Council and Commission as legal. The derogation clause of Article 224 of the Treaty of Rome itself provides, however, for consultation among all Member States 'with a view to taking together the steps needed to prevent the functioning of the common market being affected' by autonomous measures. When these discussions occur they may lead to the adoption of a Community act.

On the other hand, Article 224 does not prevent the EC from imposing Community sanctions, provided that it has corresponding powers. Article 113 of the Treaty of Rome confers upon the EC competence to establish a common commercial policy. The Court of Justice has ruled that since the end of the transitional period the EC has exclusive powers in this respect.<sup>84</sup> As the ECJ has given a broad interpretation to the scope of measures falling within Article 113,<sup>85</sup> most Community scholars regard trade embargoes as being subsumed within this provision.<sup>86</sup>

Even though the EC has acted collectively to impose sanctions on only a limited number of occasions, its practice reveals a decision-making process with two phases. First, the Member States meet within the EPC and agree upon the imposition of economic sanctions by Community acts.<sup>87</sup> They are then actually implemented by measures (mostly regulations) based on Article 113 of the Treaty of Rome.<sup>88</sup> It has rightly been pointed out<sup>89</sup> that the EPC mechanism under international law principles precedes the proper legislative process within Community law. In the last analysis, this duality might reflect a compromise between the Member States' interests to preserve their sovereignty as to matters of security policy on the one hand, and the interests of the EC to guarantee the uniform application of law within the whole of the Community on the other. It can also be seen as the result of the aforementioned concurrent powers.

What is the legal significance of the Community practice<sup>90</sup> of generally agreeing upon the imposition of sanctions against third states in the framework of the EPC?<sup>91</sup> Because of the organizational separation of EPC from the legislative process provided for by the founding Treaties, EPC as such does not have a direct impact on the Community legal order. In this respect, two points need to be emphasized. First, presuming that the EC has sanctioning power under Article 113, EPC decisions are irrelevant for Community law. In so far as there is no limitation on the competences of the Community institutions,<sup>92</sup> this practice *praeter conventionem* can be tolerated. Second, scholars who deny any Community power argue that by using the

83 A written question on this point can be found in OJ 1976 C 89/6, 8; for a criticism see Kuyper, *supra* note 8, at 233.

84 *Supra* note 3.

85 Vedder, *supra* note 2, at paras. 21 et seq., 55 et seq.; according to Art. 71 of the Treaty establishing the European Coal and Steel Community, Member States still remain competent for trade policy as regards products under this Treaty. For that reason 'framework decisions' were adopted parallel to the EC regulations.

86 See the authors listed *supra* note 5 with the exception of Stenger.

87 This contrasts with the coordinated, but nationally implemented measures put in place during the Iran crisis.

88 Many scholars agree with this 'two-step procedure' because of the interconnected powers of Member States and the EC; cf. Vedder, *supra* note 2, at para. 62; Stenger, *supra* note 5, at 61.

89 Cf. Kuyper, *supra* note 8, at 236, 243; Kampf, *supra* note 5, at 795; Gilsdorf, *supra* note 5, at paras. 25 and 30. Gilsdorf stresses the fact that matters within Community powers and those of general nature may overlap.

90 Another matter is the practice of the Council to enact trade embargoes. Since this practice is now established, there should be no further doubt about the Community power.

91 Cf. Art. 31(3)(a) and (b) Vienna Convention on the Law of Treaties (1969); see R. Bieber, G. Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts/The Dynamics of EC-law* (1987).

92 See Case 43/75, *Defrenne*, [1976] ECR 455, 475.

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EPC mechanism and any practice of the Member States thereto no extension of Community powers could be effected. Any modification of the Treaty demands the participation of the competent national institutions.<sup>93</sup>

In the only three cases concerning the implementation of Security Council resolutions by the EC, consultation within the EPC took place. In two cases, however, the statements adopted by EPC were modified in the light of Security Council resolutions and thereby their relevance was diminished. The regulation adopted pursuant to the Security Council embargo against Libya does not even mention the discussions held within EPC. The publication of an EPC statement shortly after the adoption of the Security Council resolution inflicting sanctions against Serbia and Montenegro illustrates that the EPC mechanism still plays a role, albeit a symbolic one. The Treaty on European Union will insert a new Article 228a<sup>94</sup> into the Treaty of Rome which will codify the aforementioned practice of the Member States within EPC.

In the case of a Security Council resolutions, it could be argued that the distribution of powers within the European Community (and in particular Article 224 of the Treaty of Rome) obliges the Member States of the EC to implement these Security Council resolutions by a Community act.<sup>95</sup> This view is supported by the fact that Member States have always agreed to implementation of Security Council resolutions by Community institutions whenever the former has passed measures concerning an international crisis.<sup>96</sup> This contrasts with incidents such as the Falklands war, a dispute which did not give rise to a Security Council resolution. The Member States were divided when the Community attempted to take joint action during this conflict.<sup>97</sup>

Under international law, UN member States are obliged to implement Security Council resolutions by all necessary means. Article 48(2) of the UN Charter expressly stipulates that:

[s]uch decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

As these Security Council resolutions are primarily addressed to the UN members, each member is obliged to implement them. The EC Member States thus retained powers in order to be able to fulfil their international obligations.<sup>98</sup> Provided that consultations among the Member States and the Commission (as is required by Articles 224 and 225 of the Treaty of Rome) take place within EPC,<sup>99</sup> and such consultations lead to agreement upon common steps, the EC, i.e. the Commission and Council, are obliged to take all the necessary measures to implement the

93 Stenger, *supra* note 5, at 62 with further references.

94 It reads as follows: 'Where it is provided, in a common position or a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal by the Commission.'

95 Cf. Vedder, *supra* note 2, at para. 65.

96 Discussions about the scope of Community measures against Serbia and Montenegro and in particular the exclusion of an oil embargo were overruled by the Security Council resolution; see *supra* text note 45 et seq.

97 For example Denmark and Ireland were opposed to prolonging an embargo imposed by the Community against Argentina. Cf. Meng, *supra* note 5, at 788.

98 See *supra* text note 63 et seq.

99 Consultations in the sense mentioned in Arts. 224 and 225 of the Treaty of Rome need not be carried out by a particular institution; therefore the EPC framework is appropriate. Art. 30(3)(b) SEA states that the Commission is 'fully associated' in EPC, but it does not preside over the right to initiate or vote; cf. Nuttall, *supra* note 4.

EPC decision. Thereby the Member States temporarily renounce<sup>100</sup> their powers under Article 224<sup>101</sup> and 'activate' the Community power.<sup>102</sup> Formally speaking, the Commission cannot be forced to use its right of initiative, particularly if one categorizes EPC decisions as irrelevant to Community law. Resort has to be made to the principle of loyalty which is applicable to Community institutions<sup>103</sup> in order to confer an obligation with this effect.<sup>104</sup> Therefore, as a matter of Community law, the EC is responsible for implementing Security Council resolutions.

#### IV. Conclusions

As the EC is neither the addressee of Security Council resolutions nor the successor of its Member States' rights and obligations under the UN Charter, the Member States have agreed that the EC cannot breach its Member States' international duties (as implied by Article 224 of the Treaty of Rome). The consultations among Member States correspond to the Community interest to avoid distortions of competition. If they lead to an agreement upon the implementation of Security Council resolutions by Community acts and the renunciation of autonomous action, the Community institutions are bound under Community law to adopt all the necessary measures.<sup>105</sup>

100 After this 'harmonization' Art. 224 of the Treaty of Rome cannot serve as basis for any derogation from the Treaty unless new circumstances within the meaning of this provision. This follows from the narrow interpretation of Treaty exceptions by the ECJ; cf. Meng, *supra* note 5, at 799.

101 Once a matter has been discussed within EPC, coordinated international action by Member States is no longer permissible because Art. 113 of the Treaty of Rome gives exclusive competence to the EC. Otherwise the Member States could exclude themselves from Community control for certain areas, as occurred with the framework decision on the ban of new investments in South Africa, OJ 1986 L 305/45.

102 In the context of concurrent powers, no unanimous decision is necessary for a Community act, but only a qualified majority as provided for by Art. 113(4) of the Treaty of Rome. Member States opposed to this can invoke Art. 224 of the Treaty.

103 Grabitz, 'Artikel 5', in E. Grabitz (ed.), *supra* note 2, at paras. 15 et seq.

104 Cf. the similar obligation of the Treaty of Rome under Art. 234(2), *supra* note 77; an analogous duty can also be deduced in this case, Petersmann, *supra* note 68, at para. 20.

105 Cf. Klein, *supra* note 10, at 109; Petersmann, *supra* note 10, at 27; Hummer, Schweitzer, 'Artikel 52', in B. Simma (ed.), *Charta der Vereinten Nationen Kommentar* (1991) at para. 58.