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Thesis Title: The Application of International Economic Sanctions: The United Nations, European Community and 'Yugoslavia'

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Degree: Master of Jurisprudence (M.Jur.)

ABSTRACT

The thesis is concerned with the international mechanism for the imposition and implementation of economic sanctions and the role of the European Community within it.

Chapter 1 examines the classification of responses available to States to violations of international obligations. It deals with the conditions which must be satisfied for the legitimate introduction of counter-measures by States, restrictions placed upon their exercise, and their relationship to the law of treaties. Finally it is concerned with the conditions which must be met to enable the Security Council of the United Nations to impose sanctions against a State, and with the obligations which stem from such measures on Members of the UN.

The relationship of the European Community to the UN Security Council is discussed in the second Chapter. The questions of whether the EC needs to seek authorisation from the Security Council to introduce sanctions and whether it is bound by the latter's resolutions are considered. The power of the EC to apply counter-measures in defence of its own interests and of those of its Member States is examined.

Chapter 3 is concerned with the basis in European Community law for the EC to apply counter-measures and to implement UN sanctions. This involves a discussion of the respective competences of the Community and its Member States in the field of external relations to determine in which of them is competent to take particular measures.

Chapter 4 consists of a chronological account of the sanctions introduced by the United Nations and the European Community against Serbia and Montenegro and of the events which led to their adoption.

The final Chapter examines the measures adopted by the European Community, the resolutions of the UN Security Council which imposed sanctions against Serbia and Montenegro and their implementation by the European Community and by the United Kingdom.

The Application of International Economic Sanctions: The United Nations, European Community and 'Yugoslavia'

Stephen D. Cole

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Submitted to the University of Durham for the degree of Master of Jurisprudence
(M.Jur.) September 1993

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DECLARATION

This thesis contains no material which has previously been submitted for a degree in this or any other University.

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Naulilaa Incident Case 1928 Annual Digest Vol 4, 1927-28, Case No 179 pp274.

INTRODUCTION

Since it depends on the willingness of each Nation to trade or not to trade with another, and to regulate the manner in which it wishes to trade, a right over commerce is evidently a right to be exercised at will (jus merae facultatis), a power without qualification, and which is therefore not subject to prescription.

VATTEL, The Law of Nations, or the
Principles of Natural Law,
1758, Book 1, Chapter VIII,
para 95.

The exercise of sovereign economic rights to acquire advantages has long been a feature of international society. History is rich in illustrations of domination and coercion by economic strength. The dual attributes of a strong navy and economic leverage provided States with the means of applying pressure for securing compliance with their wills in both the Old and New Worlds. Following the prohibition on the use of force in the post-1945 era has been greater reliance placed on the exercise of economic power.

Modern international law tempers the rights of States to apply pressure on other nations. The UN General Assembly's Declaration on Principles of 1970¹ expounds the following restriction.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and secure from it advantages of any kind.

A State will be in breach of international law if it undertakes economic coercion which violates specific treaty commitments, is in violation of general principles of international law (such as freedom of the high seas), or violates the principle of non-intervention.² In all other circumstances the right of the State to regulate its trade with other States is supreme. But, in addition, measures which are illegal on one or more of

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1. General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States In Accordance With The Charter Of The United Nations 1970 Gen Resn 2625 (XXV) Oct 24 1970 (adopted without vote).
 2. Bowett "Economic Coercion and Reprisals By States" 13 *Virginia Journal of International Law* (1972) pp1-12 at pp2-3.



these grounds may be justified if they are economic measures of self-defence, or economic sanctions authorised by a competent international organ, or economic counter-measures.³ This thesis is concerned with the law relating to the latter two categories.

Counter-measures may be employed against a State to coerce it to comply with international law. They consist of the breach of an obligation owed to another State which is justified by a previous international wrong committed by that State. The measures must comply with the restrictions prescribed by international law. They are not limited to trade or even economic obligations but the greatest level of coercion is likely to be achieved by the use of measures of such a nature.

The role of sanctions has been greatly enhanced in last few years due in part to the end of the Cold War and the new found consensus in the UN Security Council. They have now acquired the importance in the maintenance of international peace and security provided for them in the provisions of the UN Charter. The increase in the frequency of their use since 1990⁴ after a determination of a breach of or threat to international peace and security is testimony to their importance in law enforcement.

The increase in the use of sanctions by the UN has had implications for the European Community. The EC Member States have implemented Community legislation to apply UN sanctions in order to minimise the disruption to the single market. This poses problems in relation to the powers of the Community and to the relationship between EC and Member State competences. The membership in the UN of all EC Member States raises important questions on the relationship between the Community, which holds a substantial part of the Member States' economic powers, and the UN Security Council.

The crisis in the former Yugoslavia has developed the role of the Community as an actor in foreign affairs, principally due to the location of the conflict on European territory. This has involved the EC in using its economic strength to coerce the Serbian and Montenegrin governments both in concert with UN measures and independently of them. The central concern of this thesis is the position of the Community within international structures for law enforcement and the related problems outlined above.

3. Ibid pp6-12.

4. Comprehensive sanctions have been imposed against Iraq (1990) and Serbia and Montenegro (1992), arms embargos against Iraq (1990), Somalia (1992) and Yugoslavia (1991), air services restrictions against Libya (1992), and a freezing of assets and embargo on sale and supply of petroleum and petroleum products against Haiti (1993). In the preceding thirty-five years of the UN comprehensive sanctions were imposed against Rhodesia (1966) and an arms embargo against South Africa (1977).

CHAPTER 1

THE LAW OF INTERNATIONAL COUNTER-MEASURES AND SANCTIONS

I. Categories of Reaction

Fundamental to a system of law based on the equality of its sovereign subjects is the absence of a central compulsory enforcement mechanism. One major characteristic of international law is its self-policing nature. States are permitted to take steps to seek compliance of a defaulting State with a norm of international law. Such a power is not unfettered and requirements must be met to prevent the enforcing State from acting outside the law.

The prohibition on the use of force contained in Article 2(4) of the Charter of the United Nations has done much to change the face of the enforcement of international law. It is only since 1945 that States have been prohibited from using force for any reason other than self-defence. Otherwise enforcement can only be undertaken by peaceful means: States are now required to use non-forcible methods in their search for the implementation of an international obligation.

The categories of non-forcible measures each have precise legal meanings and constraints. These remedies are acts of retorsion, acts of reciprocity, counter-measures, and sanctions.

1. Retorsions

'Retorsion is the technical term for retaliation for discourteous or unkind or unfair and inequitable acts of the same or a similar kind.'⁵ Such acts are not illegal under international law. They are distinguished by the fact that they are not taken in response to an internationally wrongful act. Their purpose is to retaliate by an act which does not breach a legal obligation, such as the severance of diplomatic relations or withdrawing from treaty negotiations. There is no requirement that the retaliatory measure bear any equivalence to the provoking act since the former is within the discretionary competence of the reacting State.

2. Acts of Reciprocity

5. Oppenheim's *International Law Vol II: Disputes, War and Neutrality*. 7th Edition ed. Lauterpacht para 29.

The purpose of a State temporarily not performing its legal obligations, in the form of either reciprocal acts or counter-measures, is to achieve the restoration of legality in its relationship with another State. The two remedies are closely linked in requiring the existence of a preceding internationally wrongful act, but they are distinct. The measure which constitutes the response is, in both cases, itself a breach of an international norm. But the difference lies in the scope of that act which itself governs the requirements for the legality of the response. For the wider the scope of the act, the more stringent the conditions are for its legal introduction.

Where the response is to take an 'identical or equivalent'⁶ measure to the preceding wrongful act, it is an act of reciprocity. Reciprocity is the notion of re-establishing the equality between the States. The legitimacy of the reciprocal act in international law is by virtue of it being an expression of the principle of the equality of states. The legal requirement for a State to make proper reparation for a wrongful act⁷ is 'necessarily counterbalanced by a right to reparation which may or may not be exercised.'⁸

The responding State is permitted to take action which is the same or equivalent to that taken by the offending State without further justification than the existence of the first internationally wrongful act. Reciprocity is not necessarily linked to obtaining payment of compensation for material damage caused by the illegality, but is connected to the unlawful act itself. The fact that there has been an illegal act is sufficient to justify the taking of a reciprocal act by the State whose rights have been infringed. The wrongful act has tipped the balance in the relationship between the States, and the State whose rights have been breached may take an equivalent measure to reset the balance. The existence of the illegality gives the State the right to obtain restitution, that is to re-acquire equality with the offending State. Reciprocity has to do with the nature of the legal relationship between the two rather than the mere payment of compensation.⁹

The response to the wrongful act in the form of reciprocity is the non-performance of the corresponding obligation of the State whose rights have been infringed. But that obligation must be equivalent to the breached norm. This would be the case in a treaty providing for the exchange of students, the nationals of each State having the right to pursue a year of study in the Universities of the other. If one State failed to permit students to take up such places, the other State would be entitled to refuse the reciprocal advantage to nationals of the offending States.

6. Zoller *Peacetime Unilateral Remedies: An Analysis of Countermeasures* pp51.

7. *Chorzow Factory Case (Merits)* PCIJ Ser A, No 13, p47: as quoted by Zoller pp 47.

8. Zoller, *Peacetime Unilateral Remedies*, pp47.

9. Zoller, *Peacetime Unilateral Remedies*, pp63-67.

A measure of reciprocity involves no notion of coercion or punishment. It is purely the means for the wronged State to get back on equal terms with the offending State. Any measure going beyond pure equivalence becomes an act of coercion and so requires legitimisation as a counter-measure.

3. Counter-Measures

The circumstances of the case may mean that the taking of a reciprocal act does not or would not achieve equality or compliance by the offending State with the international norm that has been violated. Where 'the internationally wrongful act is continuous in character, insofar as non-performance of a reciprocal obligation may not be serious enough to cause the offending party to mend its ways . . . the wronged party will seek not only redress for the wrong suffered, but also a return by the law-breaker to compliance with the law.'¹⁰ The measure then becomes a method of law enforcement.

Where the purpose of the response exceeds the search for mere reciprocity or equivalence, it constitutes a counter-measure. Counter-measures are introduced to seek the performance of the breached obligation, and may involve a compensatory element. They contain no element of punishment but do exceed the search for the restoration of equality in the legal relationship between the States and seek a change of behaviour on the part of the offending State. Although the effect of it may be to achieve this and even to act as a deterrent to future breaches, a State may not apply the counter-measure to any greater extent than is necessary to achieve the restoration of legality. A counter-measure which remains in place after performance of the norm has been achieved with a view to discouraging future breach is illegal.

It is this difference between coercing States into performing the breached obligation and getting back on equal terms with that State by not performing one's obligation that lies at the root of the distinction between counter-measures and acts of reciprocity. The right of a State to introduce counter-measures is restricted by the conditions established by international law discussed below. In contrast, provided the responding act is truly reciprocal, the State requires no other justification than the preceding breach of an obligation owed to it by another State.

The term 'counter-measures' has effectively replaced that of 'reprisals'. The most important restriction on the use of such measures is Article 2(4) of the UN Charter. It was on the remedy of reprisals that the prohibition on the use of force had most impact: for reprisals were generally of a forcible nature until the twentieth century. This proscription, of course, did nothing to affect the legality of non-forcible reprisals, but perhaps because of the association of reprisals with the use of force, the

10. *Ibid.* pp69.

word 'counter-measures' has been developed. The term stems from the *Air Services Award Tribunal* (1978),¹¹ the International Court of Justice in the *Hostages case* (1980),¹² and the International Law Commission in its codification of the rules governing state responsibility.¹³

It may not always be clear whether the response to the preceding wrongful act is a counter-measure or an act of reciprocity. They are both breaches of international obligations and have no effect on the existence of the norm which is breached in their implementation. They are of the same nature however counter-measures are of a more severe form. The relationship is accurately described by Zoller:

Both reciprocity and reprisals are without bearing on the legal existence of the non-performed international obligation and cover all international treaty or customary obligations. But the main difference is that reprisals unlike reciprocity are not subject to equivalence. While reciprocity gives rise to non-performance of an obligation similar (by identity or by equivalence) to the violated obligation, reprisals consist in the non-performance of a different rule.¹⁴

So a counter-measure to the illegal freezing of assets belonging to the nationals of the responding State could take the form of the non-performance of a trade treaty. But the difficulty in distinguishing between reciprocal acts and counter-measures arises when that non-performance is of the same treaty which the offending State has breached. It may be problematic to judge whether a particular measure is aimed at equivalence (ie act of reciprocity) or at coercion (ie counter-measure). However reciprocity will exist 'when the obligation involved [is] the same as, or a counterpart of, the obligation breached.'¹⁵

4. Sanctions

There is a growing body of opinion¹⁶ which views sanctions as distinct from counter-measures. It is the distinction between punishment and coercion which lies at the basis

11. Case Concerning the Air Services Agreement of 27 March 1946, 1978, International Law Reports Vol 54 1979 pp304.

12. Case Concerning United States Diplomatic and Consular Staff in Tehran (Judgment) ICJ Reports, 1980, pp3.

13. ILC Yearbook 1979 Vol II Pt (ii) pp115.

14. Zoller, *Peacetime Unilateral Remedies*, pp43

15. ILC Yearbook 1984 Vol II Pt (ii) pp264 para 32.

16. Zoller, *Peacetime Unilateral Remedies*, pp106; Bowett "Economic Coercion and Reprisals by States" *Virginia Law Journal of International Law* 13 (1972) p1; Acevedo "The US Measures Against Argentina Resulting From The Malvinas Conflict" *American Journal of International Law* 54 (1984) p341

of the difference between them. Sanctions are punitive in nature, and consist of such measures as oil and arms embargos. Punishment is characterised by final and irreversible effects on the victim.¹⁷ Measures which carry such effects are not within the lawful power of States. For one State does not have the right to punish another. To contend the opposite would be to deny the basis of international law: the equality of states. The Declaration on the Principles of International Law 1970¹⁸ proclaims that all States enjoy sovereign equality and that one aspect of that is that 'states are juridically equal.' One equal is in no legal position to punish another equal. Punishment, if it may be imposed at all, may be inflicted only by the international community which, in practice, means the United Nations. Measures of a collective nature which impose punishment on an individual State are labelled as 'sanctions.'

The difference was articulated by Professor Bowett in 1972 when he wrote:

There remains a substantial difference between individual state action by way of reprisal and collective organisational action conceived by sanction. The former still rests on a delict to the State whereas the latter involves the quite different concept of community action to punish delictual action of a quite specific character (ie threat to or breach of international peace).¹⁹

Punishment is the sole preserve of international organisations. The most extensive measures available and widest competence to enforce them lie with the Security Council of the United Nations. It was this punitive jurisdiction which engendered the International Law Commission (ILC) in its commentary to Article 30 of its Draft Articles on State Responsibility '... to reserve the term sanction for reactive measures applied by virtue of a decision taken by an international organisation following a breach of an international obligation having serious consequences for the international community as a whole.'²⁰

II. The Legality Of Counter-Measures

The Portuguese-German Mixed Arbitral Tribunal in the *Naulilaa case* stated in 1928:

17. Zoller, *Peacetime Unilateral Remedies*, pp56-59.

18. General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States In Accordance With The Charter Of The United Nations 1970 Gen Resn 2625 (XXV) Oct 24 1970 (adopted without vote).

19. Bowett, *Economic Coercion*, pp9.

20. ILC Yearbook 1979 Vol II Pt (ii) pp121 para (21).

A reprisal is an act of self-help (selbsthifehandlung) by the injured state responding - after an unsatisfied demand - to an act contrary to international law committed by the offending state. It has the effect of suspending momentarily, in relations between the two states, the observance of the rule of international law in question ... It would be illegal in the absence of a prior act contrary to international law justifying it. Its object is to effect reparation from the offending state for the offence or a return to legality by the avoidance of further offences.²¹

The Tribunal also made reference to the requirement that the counter-measure be proportionate to the perpetrated wrong. But the case was heard before the prohibition on the use of force. The right of a state to introduce counter-measures is now, therefore, dependent on the following conditions being fulfilled:

- i) the counter-measure must be of a non-forcible nature
- ii) it must be in response to a preceding internationally wrongful act
- iii) it must be preceded by an unsatisfied demand for redress
- iv) it must comply with the requirement of proportionality.

There are circumstances, however, in which a state is restricted in the type of counter-measure that it may institute, which are examined later.

1. The Counter-Measure Must Be of a Non-Forcible Nature

Any action taken by a state, with the exception of the exercise of self-defence, must not involve the use of force (Art 2(4) UN Charter). The prohibition is spelt out in the Declaration on the Principles of International Law 1970:²²

States have a duty to refrain from acts of reprisals involving the use of force.

It is clear that economic coercion does not equate with 'force', unless perhaps it is extremely severe and endangers international peace.

2. The Counter-Measure Must Be in Response to a Preceding Internationally Wrongful Act

21. Naulilaa Incident Case 1928 Annual Digest Vol 4, 1927-28, Case No 179 pp274.

22. General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States In Accordance With The Charter Of The United Nations 1970 Gen Resn 2625 (XXV) Oct 24 1970 (adopted without vote).

The existence of a wrongful act committed against a State is the fundamental requirement for the legitimacy of a counter-measure introduced by that State. Since the counter-measure itself is a violation of an international norm, the State initiating it will engage international responsibility if there was no previous breach by the other State. The formulation of this rule was stated by the International Law Commission in Article 30 of its Draft Articles on State Responsibility:

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.²³

An interest of the reacting State must generally have been prejudiced by the wrongful act to entitle it to take counter-measures. There is no requirement as to the gravity of the breach. A State is permitted to react whatever the severity of the violation in general international law. However the breach must be 'material' within the terms of Article 60 of the Vienna Convention on the Law of Treaties if the State proposes to terminate or suspend the operation of a treaty.

The only State which may introduce counter-measures is the one whose rights have been infringed. On many occasions the provoking breach takes the form of the violation of the term of a treaty in which case Article 60 of the Vienna Convention applies. On other occasions it will be in breach of general international law such as the freezing of assets or breach of humanitarian or maritime law. The origin of the violated norm affects neither the right of the State to respond nor the manner in which it does so.²⁴

The nature of the harm sustained can take the form of a direct or indirect injury to the State. The first involves the infliction of an injury on the State per se, and so the injury carries with it the right to pursue the responsible State. An indirect injury is one suffered by an individual who is a national of the State or a corporation which that State may represent. The State is able to seek reparation and compliance by way of counter-measures from the offending State provided the rules of nationality of claims and exhaustion of local remedies are satisfied. For an individual there must be a genuine link between him and the State (*Nottebohm case*).²⁵ The International Court of Justice (ICJ) affirmed in the *Barcelona Traction case*²⁶ that the right of diplomatic

23. ILC Yearbook 1979 Vol II Pt (ii) pp115.

24. The employment of any counter-measure is subject to the restrictions examined on pages 11-13 of this Chapter.

25. *Nottebohm Case (Second Phase) Judgment*, ICJ Reports, 1955 pp4.

26. *Case Concerning The Barcelona Traction, Light and Power Company Limited (Second Phase, Judgment)* ICJ Reports 1970 pp3.

protection over a corporation lies with the State 'under the laws of which it is incorporated and in whose territory it has its registered office'²⁷. Recourse to counter-measures can be envisaged in response to unlawful expropriation, or the freezing of assets of nationals or corporations of the State, or other unlawful treatment of its nationals by another State

There are two notable exceptions to the requirement that the reacting State's rights were infringed by the previous illegal act. They are where the act is in breach of an *erga omnes* obligation and where the counter-measures are introduced following the passing of a resolution by the UN Security Council under Chapter VII of the Charter.

International law recognises the existence of certain obligations which a State owes towards the international community.

In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person including protection from slavery and racial discrimination.²⁸

However by drawing attention to the fact that international human rights treaties 'do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality,'²⁹ the ICJ has limited the scope of reaction of States to breaches of these rights to the procedures under specific human rights treaties. It may be that action could be taken under the rules of customary international law. Where the preceding internationally wrongful act constitutes a breach of an obligation *erga omnes* the State introducing counter-measures does not need to have had its rights directly infringed.

International law may require States to take action, which may resemble counter-measures, but which are not categorised as such. In regard to counter-measures States have a discretion as to whether to introduce them, but where the UN Security Council imposes sanctions under the provisions of Chapter VII of the Charter they are under a duty to act. By virtue of Article 25 of the Charter, States are under an obligation to carry out any mandatory sanctions passed in accordance with Chapter VII. These sanctions may or may not be in response to a breach of international law because the Security Council needs to determine only that there is a threat to or there has been a breach of the peace - not whether a State has violated international law.

27. Ibid. at para 70.

28. Ibid. at para 33.

29. Ibid. at para 91.

There is no requirement that the State imposing the sanction should itself be the victim of a wrongful act since the measures are introduced by the international community as a whole.

It is pertinent to note the concept of solidarity in multilateral treaties. This consists of two notions: solidarity *stricto sensu* and solidarity *lato sensu*.³⁰ They cannot however be said to have been accepted as part of modern general international law, but do provide a possible means for more effective enforcement of international obligations since they would provide for joint actions by States. In a multilateral treaty if State A breaches the obligation it owes to State B, according to the notion of solidarity *stricto sensu*, the other State parties have the auxiliary right to require State A to perform its duty, and can apply counter-measures to coerce it to do so.³¹ By virtue of the notion of solidarity *lato sensu*, State A is under a secondary duty to State C to perform the obligation owed to State B because State C has an interest in upholding the rules of the treaty and in preventing misinterpretation by subsequent state practice.³² The concept naturally involves deeper considerations than these, but does not yet form part of generally accepted international law.

3. The Counter-Measure Must Be Preceded By an Unsatisfied Demand For Redress

The *Naulilaa case*³³ makes express reference to the requirement that a demand for satisfaction must be communicated to the offending State before legitimate counter-measures can be introduced. Although the United States argued in the *Air Services Award case*³⁴ that such a condition related only to armed reprisals, the Tribunal ruled that a State had a right to resort to counter-measures 'within the limits set by the general rules of international law pertaining to the use of armed force'.³⁵ Under customary international law a prior demand used to be required before a legitimate armed reprisal could be launched, and so this extends to peaceful counter-measures.

Difference of opinion has arisen over the commentary of the International Law Commission to Article 30 of the Draft Articles on State Responsibility. It lists four requirements for the legitimacy of counter-measures including '... that the offence to which the reprisals are intended to be a response must not be such as to entail any consequences other than to give rise to the right of the injured party to obtain

30. Hutchinson "Solidarity and Breaches of Multilateral Treaties" *British Yearbook of International Law* (1988) pp151-215; pp156-7.

31. *Ibid.* pp160.

32. Hutchinson *Solidarity* pp165-6.

33. *Naulilaa Incident Case* 1928 Annual Digest Vol 4, 1927-28, Case No 179 pp274.

34. *ILR* 1979 Vol 54 pp320.

35. *Ibid* pp337 para 81.

reparation; that if such is the case, the injured party must have made a prior attempt to obtain reparation.³⁶

Zoller³⁷ interprets this as meaning only those measures involving the search for equivalence require a prior demand, while those which go further carry no such requirement. However, Elagab³⁸ considers that the distinction relates to delictual and 'criminal' responsibility of States. He claims that where the counter-measure is solely in pursuance of a State's delictual responsibility an unsatisfied demand for redress must precede it.

The question needs to be addressed of how much time can elapse between the making of the demand and the introduction of the counter-measures. There can be no rule stipulating the exact time limit because of the wide range of situations which can arise. The exigencies of one situation in which time is of the essence, such as immediate threat to human life, will differ to those in which the circumstances are less urgent, such as a trade treaty violation. It is submitted that the concept of reasonableness should be applied to each situation on the facts of the case to determine whether sufficient time was given for the demand to provide a solution. All the circumstances should be considered and, one can agree with Elagab³⁹ that where the demand is unlikely to meet with success then counter-measures can be introduced almost immediately.

Professor Bowett⁴⁰ considers that wider requirements than a mere unsuccessful demand for redress are needed. For he has stated that before counter-measures are used 'redress by other means must be either exhausted or unavailable.'⁴¹ It can be appreciated that where the offending State is totally unco-operative and refuses all approaches on the matter that a simple demand for redress would satisfy Bowett's requirement.

There are wider circumstances, however, in which it is conceivable that further steps have to be pursued before the initiation of counter-measure is permitted. For by virtue of Article 2(3) of the UN Charter, Member States 'shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. Article 33 commits parties to disputes which are likely to endanger international peace and security to seek a solution by peaceful means. This can be interpreted generally as a duty to negotiate, at least in the case of disputes

36. ILC Yearbook 1979 Vol II Pt (ii) pp118 footnote 595.

37. Zoller, *Peacetime Unilateral Remedies*, pp126.

38. Elagab *The Legality of Non-Forcible Counter-Measures In International Law* pp66.

39. *Ibid.* pp78.

40. Bowett, *Economic Coercion*, pp9.

41. *Ibid.* pp10

falling into this category. It needs to be asked whether the use of counter-measures is precluded until this duty is fulfilled.

If the offending State is totally unwilling to co-operate then the legitimacy of any counter-measures must be recognised. In the *Hostages case*⁴² the ICJ did not rule the US measures unlawful because the two parties failed to negotiate.

The question of whether counter-measures may be used while negotiations for the resolution of the dispute are being undertaken was addressed by the *Air Services Award Tribunal*.⁴³ Although the agreement at the source of the dispute contained an obligation of continuing consultation, the Tribunal still considered that general international law did not exclude the use of counter-measures during negotiations.⁴⁴ It is, of course, possible that a particular agreement would preclude their use in such circumstances. But the lack of a more strictly defined duty to negotiate makes it doubtful that on its own it can exclude the use of counter-measures. This is clearly opposed to Bowett's assertion.

A second means of achieving redress is the submission of the dispute to judicial or arbitral proceedings. Can it be said that where this has occurred the injured State is precluded from imposing counter-measures? For if a matter is sub judice not all means of redress have been 'exhausted' or are 'unavailable'.

The *Air Services Award Tribunal* was faced directly with this question. While acknowledging some sympathy for the assertion that resort to counter-measures is unlawful when arbitral or judicial proceedings are taking place, it did not accept it. The Tribunal stated:

If the proceedings form part of an institutional framework ensuring some degree of enforcement of obligations, the justification of counter-measures will undoubtedly disappear, but owing to the existence of that framework rather than solely on account of the existence of arbitral or judicial proceedings as such.⁴⁵

Only if a framework satisfying these conditions exists is resort to counter-measures prohibited. Otherwise the mere presence or availability of judicial machinery is insufficient to deprive the injured State of its right to respond by way of counter-measures. Until the dispute is actually submitted to that machinery for resolution, 'the

42. Case Concerning United States Diplomatic and Consular Staff in Tehran (Judgment) ICJ Reports, 1980, pp3.

43. Case Concerning the Air Services Agreement of 27 March 1946, 1978, International Law Reports Vol 54 1979 pp304.

44. Ibid. pp340 para 91.

45. Ibid. pp340 para 94.

period of negotiation is not over⁴⁶ and the rules appertaining to the legitimate use of counter-measures apply.

The Tribunal went on to say that different rules apply once the judicial body is seized of the dispute. The case becomes sub judice. It ruled that:

To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears.⁴⁷

This means that if the arbitral or judicial body retains the power to impose interim measures of protection on the parties that competence removes the right to implement counter-measures and 'may lead to an elimination of existing counter-measures to the extent that the tribunal so provides as an interim measure of protection.'⁴⁸ The Tribunal countenanced the possibility that the right to introduce or maintain counter-measures would not be removed completely where the power of the arbitral body to grant interim measures is narrowly defined.⁴⁹

Professor Stein draws the conclusion from the *Hostages case* that where the order for interim measures has been 'flouted by the addressee of the order, the right to initiate new non-forcible counter-measures revives.'⁵⁰ Although the ICJ did expressly disapprove of the attempted rescue attempt by the US to free the hostages, it did not criticise the non-forcible measures also taken while the Court was preparing its judgment, such as a prohibition on Iranian exports. These were taken in contravention of the judicial order not to take any action which 'may aggravate the tension between the two countries or render the existing dispute more difficult of solution,'⁵¹ but were not condemned. Iran breached the order by continuing to hold the hostages, and Stein suggests that the 'implied condition of reciprocity in every interim measures order' was acknowledged by the Court.⁵² He continues that a State cannot be required to suffer on-going prejudice to its interests in the interim, and so [m]easures not involving the use of force are permissible when judicial remedies have been employed and have proved unavailing.⁵³

46. Ibid. pp340 para 95.

47. Ibid. pp340 para 96.

48. Ibid. pp341 para 96.

49. Ibid. pp341 para 96.

50. Stein "Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt" *American Journal of International Law* (1982) pp499-531.

51. Case Concerning United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, ICJ Reports 1979 pp7.

52. Stein, *Contempt, Crisis and the Court*, pp517, footnote 79.

53. Ibid, pp517.

It can be concluded that the right to introduce counter-measures is unaffected by any duty to negotiate or by the existence of arbitral or judicial machinery. It is only when the dispute is submitted to such a body which has effective means of imposing interim measures of protection that the right is lost completely. It would, therefore, depend on the facts and on the competence of the judicial machinery whether a State is lawfully placed to initiate counter-measures.

4. The Counter-Measure Must Comply with the Requirement of Proportionality

What was acknowledged by the Tribunal in 1928 in the *Naulilaa case*⁵⁴ as a tendency 'to limit the notion of lawful reprisals and to prohibit excesses' has now developed into a general principle of international law. A measure taken in response to an unlawful act must 'have some degree of equivalence with the alleged breach.'⁵⁵ The *Air Services Award Tribunal* recognised this as a 'well-known rule.'⁵⁶

Proportionality differs from equivalence. Equivalence can only be achieved where the wrongful act and counter-measure have a relationship which is capable of exact evaluation.⁵⁷ This would usually be expressed in terms of money or monetary value. So where the reacting State has an obligation which is the same as the obligation breached by the offending State equivalence can be achieved by non-performance of that duty as a response. This is the essence of the act of reciprocity.

Proportionality is the requirement where either equivalence cannot be achieved or the State decides to react by way of counter-measure rather than by reciprocity. It does not require a response exactly the same as the violated obligation, but the counter-measure must bear some correlation to the violation.⁵⁸ Proportionality applies where the wrongful act and the response are violations of obligations which are not in a relationship which is capable of exact evaluation. As the *Air Services Award Tribunal* stated the task of assessing proportionality can at best be accomplished by 'approximation.'⁵⁹

The requirement can also be stated in terms that the response must not be disproportionate to the wrongful act. The concept of proportionality, like that of reasonableness, is fairly wide in scope. This means that there may be a band of measures which may all be proportionate varying in degrees of consequences. Compared to equivalence, in the case of proportionality there is a wider scope of what

54. *Naulilaa Incident Case 1928 Annual Digest Vol 4, 1927-28, Case No 179 pp274.*

55. *ILR 1979 Vol 54 pp338 para 83.*

56. *Ibid, pp338 para 83.*

57. *Zoller, Peacetime Unilateral Remedies, pp49.*

58. *Elagab, Legality of Non-Forcible Counter-Measures, pp94.*

59. *ICR 1979 Vol 54 pp338 para 83.*

is acceptable since one can only approximate. In other words it is only when a measure is clearly disproportionate that the rule of proportionality has been breached.

There can be no fail-safe list of criteria to be applied when judging the proportionality of a measure. It is clear that proportionality can be qualitative as well as quantitative. This distinction was drawn by Professor Riphagen in the work of the ILC.⁶⁰ Quantitative proportionality relates to the substance of the counter-measure, while qualitative proportionality concerns types of behaviour.⁶¹

While normally the concept of proportionality is attributed to the substance of the wrongful act and counter-measure, *the Air Services Award Tribunal* initiated another way of looking at it. This is illustrative of the wide scope of the notion of proportionality for it can be examined from different angles to ensure the presence of correlation:

In the Tribunal's view it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries.⁶²

The effect of this is to look at not just the losses incurred because of the breach and counter-measures as they affect the loss of business to the airlines, but also at the wider results of the measures on how they affect the States concerned.⁶³ So with regard to the general air transport policy of the United States and its implementation, the Tribunal concluded that the American counter-measures were not disproportionate to the wrongful act of France. This gives rise to a wider appreciation of the dispute and to a wider perspective in deciding on the issue of proportionality.

III. Restrictions On Counter-Measures

The legitimacy of counter-measures is subject to other rules of international law. These forbid the use of certain types of counter-measures, and their use generally in certain

60. Fourth Report on Part 2 & 3 of Draft Articles on State Responsibility pp15 para 41.

61. Zoller, *Peacetime Unilateral Remedies*, pp131.

62. ILR 1979 Vol 54 pp338 para 83.

63. Elagab, *Legality of Non-Forcible Counter-Measures*, pp91.

circumstances. For reprisals which violate a rule of jus cogens, or which violate a norm of a humanitarian treaty or which offend against the rules of diplomatic relations are illegal. Other constraints exist but those mentioned constitute the most important.

1. Jus Cogens

The recognition of the existence of rules of jus cogens establishes a hierarchy of international legal norms. International obligations of States of both treaty and customary origin may not conflict with peremptory norms. Article 53 of the Vienna Convention on the Law of Treaties 1969 defines a peremptory norm as one 'accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' The work of the International Law Commission indicates that the idea of jus cogens is part of the general law of state responsibility and is not restricted to the law of treaties.

The exact content of the rules of jus cogens is still being evolved, but there is general recognition of certain rules having the status of peremptory norms. Examples offered during the contemplations of the International Law Commission included the illegal use of force, genocide, piracy, and the slave trade.⁶⁴ Professor Brownlie⁶⁵ quotes the section of judgment of the ICJ in the *Barcelona Traction case*⁶⁶ referring to obligations owed 'towards the international community as a whole' - ie not to engage in acts of aggression, genocide, slavery, and racial discrimination - as examples of rules of jus cogens.⁶⁷ He also adds the principle of sovereignty over natural resources and that of self-determination.⁶⁸

The effect of the supremacy of such rules is that counter-measures which violate them are unlawful, and the State which does so engages international responsibility. In addition counter-measures cannot be introduced to obtain performance of an international obligation which violates a rule of jus cogens.

2. Human Rights Norms

64. ILC Yearbook 1966 Vol II pp248.

65. Brownlie *Principles of Public International Law* 4th Edition pp513.

66. *Barcelona Traction Company Case* ICJ Reports 1970, pp18.

67. The International Court of Justice used such norms as examples of obligations erga omnes, and it is important to recognise the distinction between them and rules of jus cogens.

68. Brownlie, *Principles.*, pp513.

Despite the lack of clarity as to the content of the rules of jus cogens, certain fundamental human rights, eg freedom from genocide and slavery, constitute peremptory norms. But even beyond these norms, human rights obligations act as a restriction on the legitimacy of counter-measures. This is because of their exceptional standing. Meron expresses this succinctly:

Conceptually, counter-measures are based on the principle of interstate reciprocity, which, generally speaking, is foreign to human rights.⁶⁹

The 'application of the obligations by one party does not depend on the application of the obligations by another party.'⁷⁰ The increased awareness of the need to protect human rights has led to the evolution of the principle that they cannot be breached by a State as a form of counter-measure. The rule found expression in Article 60 of the Vienna Convention on the Law of Treaties 1969. It states that the rules governing the termination or suspension of a treaty 'do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'. This is also a rule of customary international law since the provisions of Article 60 'may in many respects be considered as a codification of existing customary law of the subject'.⁷¹

In his dissenting opinion to the *South West Africa Cases*,⁷² Judge Tanaka said that 'the principle of the protection of human rights has received recognition as a legal norm under three main sources of international law, namely (1) international conventions, (2) international custom, (3) the general principles of law.'⁷³ It is in these that the rule has its origin. The result of its application is that no State may violate human rights norms under any circumstances. So, rightly, one State may not respond to the torture of its nationals by torturing nationals of the offending State. Human rights may not be suspended or temporarily breached. The fundamental human rights are obligations erga omnes, and so any State can respond to their breach by taking counter-measures which do not themselves violate a humanitarian norm.

3. Rules of Diplomatic Relations

69. Meron "Human Rights and Humanitarian Norms as Customary Law" pp238-239.

70. Zoller, *Peacetime Unilateral Remedies*, pp90.

71. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) ICJ Reports 1971 pp47.

72. *South West Africa, Second Phase, Judgment*, ICJ Reports 1966, pp6, pp300.

73. Ibid pp300, quoted by Elagab, op. cit., pp101.

The law relating to diplomatic immunities and privileges, as enounced in the Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963, has been ruled to constitute a self-contained legal regime. In the *Hostages case*,⁷⁴ the ICJ addressed the question of whether the actions of Iran constituted a response to alleged crimes of which the latter accused the United States in a letter to the Court, such as conspiracy by the CIA in a coup d'etat in 1953 and the restoration of the Shah in Iran. The ICJ stated that even if the crimes had been committed by the United States (no proof was proffered), the act of Iran in supporting the holding of the American embassy staff could not be regarded as a legitimate counter-measure to the American actions. 'This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.'⁷⁵

The existence of these means precludes the legality of counter-measures which are violations of diplomatic law. The inviolability of the diplomatic agent and premises, inter alia, cannot be departed from in the form of a counter-measure. Any breach of diplomatic law has to be dealt with in accordance with that legal regime, and its rules cannot be violated in response.

Some scholars have questioned the conclusion reached by the Court. But Professor Riphagen, Special Rapporteur on State Responsibility to the ILC, included the following Draft Article 12 in Part Two of the Draft Articles:⁷⁶

Articles 8 and 9 do not apply to the suspension of obligations

a) of the receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff⁷⁷

Draft Articles 8 and 9 relate to the right of States to take reciprocal acts or counter-measures in response to a wrongful act. Mr Riphagen stated that it was due to the ICJ's judgment in the *Hostages case* was the reason for including subparagraph (a) of Draft Article 12.⁷⁸ In answer, Mr Reuter did not consider that the only response to a breach of diplomatic privileges and immunities is the breaking off of diplomatic relations or to declare certain individuals *persona non grata*. He took the view that 'in so far as more general obligations such as humanitarian obligations were not involved, the injured State could respond in kind to a manifest violation of the rules on privileges

74. *Case Concerning United States Diplomatic and Consular Staff in Tehran* (Judgment) ICJ Reports, 1980, pp3.

75. *Ibid.* pp38 para 83.

76. ILC Yearbook 1984 Vol I p260.

77. *Ibid.* pp260.

78. ILC Yearbook 1984 Vol I pp263 para 27 & 28.

and immunities. For instance, in the event of the violation of a unanimously accepted rule concerning the diplomatic bag, the injured State should be entitled to act in the same way as the State responsible for the violation. In such circumstances, the regime of privileges and immunities did not seem to be particularly self-contained.⁷⁹

Professor Simma⁸⁰ subscribes to the same view and considered the categorisation of the rules of diplomatic immunity as a self-contained regime to be 'jurisprudential overkill.'⁸¹ This is because that system falls back on general international law in allowing the temporary detention of a diplomatic agent caught *in flagrante delicto*; in the non-exclusion of self-defence; or, in exceptional circumstances, in the permissibility of the taking of measures to prevent the diplomatic agent from committing offences.

The judgment of the ICJ that diplomatic privileges and immunities can be abused as a form of counter-measure has not been universally accepted. Within the International Law Commission itself members differed on the accuracy of the ruling. In its report to the General Assembly on the work of its thirty-sixth session⁸² the Commission stated that some members 'questioned the rule as proposed in too general a way.'⁸³ As written in the report of the following year, the suggestion was later made that its scope should be limited to such immunities as were essential for the continuance of smooth international relations.⁸⁴

IV. Counter-Measures And The Law Of Treaties

The preceding discussion has concerned the customary international law which governs the legitimacy of counter-measures. The obligations which are often breached as a form of response are, however, treaty provisions. The law of treaties was codified in the Vienna Convention on the Law of Treaties 1969. This constitutes a separate legal regime and so it becomes important to consider the relationship between these rules and the customary law of counter-measures.

Article 60 of the Convention is the provision governing the 'termination or suspension of the operation of a treaty as a consequence of its breach.' Discussion is facilitated by examining termination and suspension separately in a comparison with counter-measures.

79. Ibid. pp264 para 30.

80. Simma "Self-Contained Regimes" *Netherlands Yearbook of International Law* 1984 pp111.

81. Ibid. pp121.

82. ILC Yearbook 1984 Vol II Pt (ii) pp99.

83. Ibid. pp103 para 374.

84. ILC Yearbook 1985 Vol II Pt (ii) p23 para 142.

1. Termination

One of the effects of the termination of a treaty carried out in accordance with the Convention is that it 'releases the parties from any obligation further to perform the treaty' (Art 70(1)). In other words neither party is any longer under a legal duty to perform the treaty term, and so cannot be forced to comply with it. This then makes impossible the classification of the termination of a treaty as a counter-measure. For the precise purpose of the latter is to attempt to obtain compliance with an international norm. If the response to a breach of a treaty is to terminate that agreement then the offending State is released from its obligations under the instrument, and so compliance cannot be achieved.

Strictly speaking, therefore, termination of a treaty under Article 60 is not a counter-measure. Zoller reaches the same conclusion by invoking the idea of punishment and its incompatibility with the concept of counter-measures⁸⁵. Termination is of a different legal regime to that of counter-measures.

2. Suspension

The same clear-cut distinction cannot be drawn between the suspension of treaties and counter-measures. It needs to be asked whether the provisions of Article 60 of the Convention are to be classified as counter-measures or whether they too under a different legal regime.

The two concepts are, at least, closely related because they both involve the temporary non-application of a legal obligation. Article 72 states that, unless otherwise is stipulated by the agreement or is agreed by the parties, the suspension of a treaty:

- a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension.
- b) does not otherwise affect the legal relations between the parties established by the treaty.

This means that in the cases of both the suspension of a treaty - in whole or in part - and a counter-measure, there is a temporary dispensation from fulfilling the legal norm in question. But the legal effects are different.

The suspension of a treaty under Article 60 has effect on the very existence of the treaty. The suspended provisions are temporarily denied any legal force and the

85. Zoller, *Legality of Non-Forcible Counter-Measures*, p73.

States are released for the period of suspension from complying with them. However during that time they must 'refrain from acts tending to obstruct the resumption of the operation of the treaty' (Art 72(2)).

Counter-measures do not release the parties - temporarily or otherwise - from the binding nature of the norm violated in response to the unlawful act. Whereas above the provisions are suspended, here they are merely non-performed. The offending State must continue to apply the treaty or norm which has been breached in the form of response; and so must the injured State outside of the strict limits of the counter-measure.

The legal effects are different, but when is the non-application of a treaty a suspension and when is it a counter-measure? The answer lies in the concept of 'material breach' in Article 60 of the Convention. Under this provision, the operation in whole or in part of a treaty may be terminated or suspended *only* if there has been a 'material breach' by the other State (or another in the case of multilateral treaties).

'Material breach' is defined in Article 60(3) as:

- a) a repudiation of the treaty not sanctioned by the present Convention
- or
- b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

It is only in the case of a serious breach that the innocent party is entitled to suspend the treaty. This differs from counter-measures which, as stated, can be initiated in response to any breach however minor.

A *prima facie* answer to the question would then be that suspension of a treaty under Article 60 applies only to material breaches, whereas counter-measures apply to both material and non-material breaches. There would seem to be an overlap of operation whereby in the case of material breaches non-application of the treaty could either be a counter-measure or suspension within the meaning of Article 60. This gives rise to an interesting debate the result of which is not clear.

It is established, however, that where the international wrongful act consists in the violation of a term of a treaty which does not fall within the definition of 'material breach', the victim State can legitimately introduce counter-measures.

The problems arise with regard to material breaches. Professor Harris⁸⁶ states the view that the '*lex specialis* in the customary international law of treaties' replaces the law of counter-measures. But he recognises that the International Law Commission

86. Harris *Cases and Materials on International Law* 4th Edition pp15.

(responsible for the draft Vienna Convention) may have intended the two legal regimes should exist side by side.

Elagab justifies his assertion for their co-existence on the basis that Article 73 ensures that the provisions of the Convention have not superseded the law of counter-measures.⁸⁷ That Article states that the Convention's provisions 'shall not prejudice any question that may arise from international responsibility of a State'. According to Elagab, by interpreting Article 60(3)(a) to conform with the limitation of Article 73, 'the non-performance of a treaty obligation as a lawful counter-measure can never constitute a material breach for the purposes of Article 60.'⁸⁸

Zoller also takes the view that the Convention left the right to invoke the principle of reciprocity in the law of treaties untouched.⁸⁹ She refers to the *Hostages case*:⁹⁰ 'The Court firmly refused to conclude that the counter-measures taken by the United States in response to "what the United States believed to be grave and manifest violations of the 1955 Treaty itself" could have "in any effect" affected the legal existence of the treaty between the parties.'⁹¹ Accordingly Zoller sees no need in distinguishing between material and non-material breaches because reciprocity is of 'general application.'⁹²

The Vienna Convention, in its preamble, states that 'the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention'. It can, therefore, be properly said that where a State is faced with the 'material' breach (within the definition of Article 60) of a given treaty it has a choice of suspending that treaty or of initiating counter-measures. Legitimate suspension will only take place if the procedural requirements of the Vienna Convention (Art 65-68) are complied with, which is a lengthy operation (minimum of three months, except in special emergency). But, as Sinclair points out, 'the aggrieved party must continue compliance with a treaty which the other party is violating, while the protracted procedure of dispute settlement is in progress.'⁹³ Sinclair refers to the possibility illustrated by Jimenez de Arechaga⁹⁴ that the principle of *inadimplenti non est adimplentum* would permit the responding State to 'suspend provisionally its own performance of the treaty.' The latter goes on that the injured State puts itself in danger of engaging international responsibility if the dispute settlement procedure ends in the

87. Elagab, *Legality of Non-Forcible Counter-Measures*, pp157.

88. *Ibid.* pp157.

89. Zoller, *Peacetime Unilateral Remedies*, pp18.

90. Case Concerning United States Diplomatic and Consular Staff in Tehran (Judgment) ICJ Reports, 1980, pp3.

91. Zoller, *Peacetime Unilateral Remedies*, pp18.

92. *Ibid.* pp18.

93. Sinclair *The Vienna Convention On The Law Of Treaties* 2nd Edition pp189.

94. Official Records First Session 49th Meeting.

conclusion that there was no material breach by the other State. This respectfully cannot be so. For legitimate counter-measures can be taken even in the case of non-material breaches by the other party.

The State faced with the choice of suspending the treaty which has been 'materially' breached and of introducing counter-measures needs also to consider the scope of both. This is in addition to the different legal consequences. For a State has more scope for action with counter-measures. The reprisal taken can be breach of a treaty which is separate from the one violated. It is conceivable that this could amount to the suspension of the second treaty. But the procedural requirements of the Convention would not apply because it would be undertaken under the law of counter-measures. Article 60 only relates to the suspension of the treaty of which there has been a material breach.⁹⁵

This invites the question of whether the breach of one treaty justifies the termination of a different treaty by the responding State. This is a different question to the termination of the breached treaty because in the present scenario the breached obligation remains in existence and the purpose of obtaining due performance of it is still open. By analogy, according to Zoller's argument,⁹⁶ because such a termination would have final effects on the offending State such a measure would constitute punishment and would be impermissible as a counter-measure. The issue cannot, however, be regarded as closed.

Suspension in accordance with Article 60 has, like counter-measures, no requirement of equivalence, but it must be proportionate to the material breach in compliance with the general rules of international law.

V. The Standing Of Third Parties

A counter-measure is only lawful if it is introduced against a State which has previously breached an international obligation. If the imposing State aims its measure against a State which has not breached a norm, the former will engage international responsibility.⁹⁷ But the situation is more likely to arise where the counter-measure is not intended to affect an innocent State, but does so. The question to be addressed is what duty, if any, does the reacting State owe to that third State.

95. Elagab, *Legality of Non-Forcible Counter-Measures*, p158: where he quotes Mr de Luna of the ILC commenting on Draft Article 20 "Termination or Suspension of a Treaty Following upon its Breach."

96. Zoller, *Peacetime Unilateral Remedies*, pp56-59.

97. The *Cysne Case* 1930 Annual Digest Vol V 1929-30 Case No 287 487.

In its commentary on the Draft Articles on State Responsibility,⁹⁸ the International Law Commission (ILC) did not consider whether the injury caused to a third State invalidated the legitimacy of a counter-measure. But given the complex inter-state relations and inter-dependence which exist today it is not reasonable to contend that injury to a third parties should render an otherwise legitimate counter-measure as illegal. Reed⁹⁹ suggests that a distinction should be drawn between 'severe' and 'non-severe' injuries along the lines of 'material breach' within the meaning of Article 60 of the Vienna Convention on the Law of Treaties.¹⁰⁰ According to her counter-measures which result in 'severe' injuries on a third State should be rendered invalid.

In any case the responding State has inflicted injury on an innocent State and thus engages an obligation of reparation towards it. The ILC stated in its commentary that 'the legitimate application of a sanction against a given State can in no event constitute per se a circumstance precluding the wrongfulness of an infringement of a subjective international right of a third State against which no sanction was justified.'¹⁰¹ The imposing State has a duty to compensate the third State for any injuries caused. If it fails to do so the injured third party may introduce counter-measures of its own.¹⁰²

VI. Sanctions and the UN Security Council

The nearest that the international community has come to centralising reaction to internationally wrongful acts is the Security Council of the United Nations. The right of the individual State to introduce counter-measures and the competence of the Security Council to implement sanctions co-exist. The conditions of legality differ greatly.

The Security Council possesses a recommendatory and a mandatory role. These powers are examined in the context of its ability to initiate sanctions.

1. Chapter VI of the UN Charter

The binding nature of resolutions of the Security Council taken under Chapter VI has been the subject of academic discussion and judicial pronouncement for some time.

98. ILC Yearbook 1979 Vol II Pt (ii) p87

99. Reed "Reviewing the Doctrine of Non-Forcible Counter-Measures: Resolving the Effect of Third-Party Injuries" 29 *Virginia Journal of International Law* (1988) pp175-209.

100. Ibid. pp182-83.

101. ILC Yearbook 1979 Vol II Pt (ii) pp120 para 18.

102. Elagab, *Legality of Non-Forcible Counter-Measures*, pp113.

The practice of the Security Council has led to the view that they are not binding on Member States. But the Charter is not couched in such terms.

The question revolves around Article 25 by virtue of which Member States are bound 'to accept and carry out the decisions of the Security Council.' In the context of sanctions the Council may act under Chapter VI (Pacific Settlement of Disputes) or Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression). It is generally recognised that resolutions under Chapter VII are mandatory, but questions surround those taken under Chapter VI.

The advisory opinion of the ICJ in the *Namibia case*¹⁰³ provides authority that Article 25 applies to Chapter VI.

It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to 'the decisions of the Security Council' adopted in accordance with the Charter. Moreover that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council.¹⁰⁴

As a result it is possible for Article 36 (1) to be used as the basis for a resolution which the Member States are bound to implement. That Article, placed within Chapter VI, empowers the Security Council to 'recommend appropriate procedures or methods of adjustment' to resolve disputes between Member States the continuance of which 'is likely to endanger the maintenance of international peace and security' (Art 33). This would be the basis in Chapter VI on which sanctions would be recommended or imposed. The Article is set in terms of 'recommendation' and so how is it to be determined whether the resolution is a 'decision' within the meaning of Article 25?

The ICJ adopted a teleological approach in the *Namibia case* and stated:

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted,

103. Legal Consequences for States of the Continued Presence in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1971), Advisory Opinion, ICJ Reports, 1971, pp16.

104. Legal Consequences for States of the Continued Presence in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1971), Advisory Opinion, ICJ Reports, 1971, pp16, pp52-53.

the discussion leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.¹⁰⁵

Thus a resolution under which the Council 'solemnly calls upon all Member States'¹⁰⁶ or 'recommends' would be purely recommendatory, whereas those in which it 'requires' or 'demands' would be mandatory. It is important to ensure that the Council is not acting under Chapter VII since it has used language such as 'calls upon' having determined the existence of a threat to the peace in which case the resolution is binding.¹⁰⁷

The ICJ decided that the Security Council resolution which it was concerned with in the *Namibia case* had as its legal basis neither Chapter VI or VII but Article 24. The Court approvingly cited the statement of the Secretary General to the Security Council of 10 January 1947 that 'the powers of the Council under 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII . . . the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of international peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.'¹⁰⁸ The method of interpretation stated above apply to resolutions based on this article as much as any other.

The legal consequences of a Security Council resolution will differ according to whether that resolution is binding or recommendatory. If sanctions are introduced in terms of a mandatory resolution, the State is required to apply them, even though this may involve breaching obligations owed to the State against which the sanctions have been imposed. The consequences are the same as those examined under Chapter VII resolutions below, and involve no international responsibility.

If the sanctions are merely recommended it remains within the discretion of each Member State whether to implement them. But a question remains over its international responsibility to the State which is the subject of the recommendation. The sanction has only been recommended and not authorised. The State is under no 'obligation' within the terms of Article 103, and so the resolution would take precedence. This means that if the implementing State owes a treaty obligation to supply weapons to the State against which an arms embargo has been recommended it would engage international responsibility if it did not fulfil the terms of the treaty. However in its commentary to the draft articles on state responsibility the ILC stated

105. Ibid. pp53.

106. Resolution 181 (1963) Doc S/5386.

107. Resolution 221 (1986) imposing oil sanctions against Southern Rhodesia.

108. *Namibia case*, ICJ Reports (1971) pp52.

that compulsory sanctions are not wrongful since they are adopted in accordance with the Charter and that '[t]his view would moreover, seem to be valid not only where the duly adopted decision of the Organisation authorising the application of a sanction is mandatory for the Member States but also where the taking of such measures is merely recommended.'¹⁰⁹ The matter would then still seem to be open to debate, but it is of great practical importance to States considering the application of sanctions recommended by the Security Council. The better view would be that such States would not avoid international responsibility where the sanctions are merely recommended.

2. Chapter VII of the UN Charter

The UN Charter endows the Security Council with the power to bind Member States where there is a threat to the peace, breach of the peace or act of aggression. The Council has primary responsibility for the maintenance of international peace and security (Art 24) and is given the means to perform that function in the provisions of Chapter VII. The positioning of Article 48 within that Chapter strengthens the provision in Article 25.¹¹⁰ The obligation of Article 48 to carry out the decision of the Security Council applies only when the resolution includes 'required action.' The essence of this concept is the difference between mandatory and authoritative resolutions. In discussing the role of the provision in the Security Council resolutions on the Iraqi invasion of Kuwait, Oscar Schacter states:

[T]he sanctions not involving the use of force imposed by Resolution 661 under Article 41 are given obligatory effect by Article 48 . . . [It] was not applicable, however, to the use of armed force authorised by the Council in Resolution 678 . . . Hence, by its own terms Article 48 did not apply to such permissive action, whereas it did apply to the mandatory economic and transportation embargoes required of all members.¹¹¹

The Council may not take any action until it has made a determination under Article 39. The organ has to 'determine the existence of any threat to the peace, breach of the peace or act of aggression' before it is permitted to impose measures under the terms of Chapter VII.

109. ILC Yearbook 1979 Vol II Pt (ii) pp119 para 14.

110. Article 48 provides that mandatory resolutions of the Security Council '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.'

111. Oscar Schacter "United Nations Law in the Gulf Conflict" 85 *American Journal of International Law* (1991) pp452-473; p463.

Article 39 states that once the Security Council has done this it shall 'make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain international peace and security.' Such recommendations do not bind States, but the Council can continue with a search for peaceful resolution of the dispute, even alongside enforcement action taken under Chapter VII.¹¹²

The Charter enables measures to be taken which do not involve the use of force. Article 41 is the basis for the introduction of non-forcible measures such as economic sanctions. The sole conditions for their introduction are compliance with Article 39 and fulfilment of the voting provisions of the Charter. The requirements for the valid introduction of counter-measures have no relevance. States are under an obligation to implement such measures as are agreed by the Security Council. Article 41 includes a non-exhaustive list of possible measures which are the complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

The implementation of Security Council resolutions under Chapter VII is through the Member States. The obligation to give effect to the resolutions means that Member States must accommodate their internal law to be able to do so.¹¹³ Through their constitutional process States must apply the decisions even though that may involve breaching existing agreements or duties owed to the State against which the Security Council has imposed the sanctions. There is no question of responsibility arising to that State for breach of the obligations because the duty to implement the sanctions will take precedence over the obligation owed to the offending State. This was reaffirmed in the ruling of the ICJ in the request by Libya for the indication of provisional measures against the United States and United Kingdom in relation to the latter's demand for Libya to hand over two individuals suspected of involvement in the bombing of Flight 103 over Lockerbie.¹¹⁴ The Court was faced with the question of whether the provisions of the Montreal Convention¹¹⁵ under which Libya had jurisdiction to deal with the accused or whether a Security Council mandatory resolution requiring Libya to hand the individuals to the USA or UK should take precedence. The ICJ stated that 'in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement including the Montreal Convention.'¹¹⁶

112. Ibid. pp164

113. Ibid. pp168 para 52fa

114. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, ICJ Reports 1992 pp3.

115. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971.

116. ICJ Reports, 1992, p14.

Article 41 gives examples of the substance of sanctions that can be introduced, but it needs to be asked if there are any limits to the power of the Security Council. Article 39 provides that the measures to be imposed have the purpose 'to maintain international peace and security.' The Council is constrained by this purpose and cannot act outside it. It has been argued that this does not confer on the Security Council the power to punish States because the measure it imposes can be terminated or lifted. Zoller states that '[A]s the Charter of the United Nations stands, the contention that the organs of the United Nations may resort to sanctions has no sound legal base.'¹¹⁷ She accepts that it may introduce counter-measures, but not sanctions in their true punitive nature.

It is true that the Security Council is limited by the Charter of the UN. But the constituent treaty gives the organ the power to take measures to maintain international peace and security. This can conceivably include the punishment of States. It is correct to say:

Although compulsive measures may be purely remedial, ie limited to the restoration of the status quo ante, they need not be so. They may be in the nature of a penal sanction. Thus conceived they give expression to the correct view that certain manifestations of unlawful conduct on the part of sovereign States are liable both to repression and to punishment by the collective efforts of the general international organisation.¹¹⁸

It is within the competence of the Security Council to impose measures which inflict final effects upon States, which is Zoller's view of punishment.¹¹⁹

The exercise of this penal competence is evident in such recent resolution as Resolution 687 (1991). Acting under Chapter VII, the Security Council decided, inter alia, that 'Iraq shall unconditionally agree' not to acquire nuclear weapons or nuclear-weapons-usable-material; to place such under effective control of the International Atomic Energy Agency; to provide details of their location; and to accept on-site inspection and destruction of such materials. The resolution refers to Iraq's breaches of the Treaty on the Non-Proliferation of Nuclear Weapons 1968. The measures taken under this resolution are of a punitive character and are legitimate because the Security Council had 'its objective of restoring international peace and security.'¹²⁰

VII. Conclusion

117. Zoller, *Peacetime Unilateral Remedies*, p107-08.

118. Oppenheim, *International Law*, 7th Edition, pp160 para 52(b).

119. Zoller, *Peacetime Unilateral Remedies*, pp56-58.

120. S/Res/687 (1991) ILM Vol XXX No3 May 1991 pp847; p849.

The regulation of the use of counter-measures is now clearly defined and is a relatively well developed area of international law. The unsatisfactory nature of the enforcement of the law left in the hands of States is the potential for greater exertion of this right by those in a stronger economic position at the expense of poorer States. A centralised method of enforcement would have to be developed for the inequality to be eliminated.

This Chapter has concentrated on the right of States to enforce international law, but international organisations are equally entitled to protect their own interests within the terms of their constituent treaty. They are restricted by the same conditions of application of counter-measures to which States are subjected. The European Community is a particular and unique international body. The economic interests of the Member States and the methods available to protect those interests are closely tied to the organisation. This engenders particular problems when the interests of an individual Member State are infringed and in the relationship between the EC and the UN Security Council when the latter exercises its sanction-imposing competence.

CHAPTER 2

INTERNATIONAL LAW AND THE APPLICATION OF COUNTER-MEASURES AND SANCTIONS BY THE EUROPEAN COMMUNITY

I. Sanctions

The competence to impose sanctions lies in the hands of the United Nations Security Council on the basis of the Charter but the EC may not do so because its constitutive treaties do not provide it with the power to initiate them. The nature of the UN system requires implementation of its decisions by its members and by other international organisations. The purpose of this section is to examine whether the Community may be required or authorised under international law to implement United Nations sanctions. This raises two major questions:

- i) Can the EC introduce measures of the nature of those listed in Article 41 of the UN Charter without the authorisation of the Security Council?
- ii) Is the EC bound by Security Council resolutions?

The need to consider these questions stems from the precedence of the UN Charter over the EC constituent treaties secured by Article 103 of the Charter and by Article 234 of the EEC treaty. The obligations owed by the Member States to the UN supersede those owed to the EC.

1. Prior Authorisation of the Security Council

Article 53 of the Charter permits the use of 'regional arrangements or agencies' by the Security Council for the 'enforcement action.' It also provides that:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council.

The prohibition in the second sentence of the Article raises the question whether the EC as a potential 'regional arrangement or agency' is prevented from taking economic measures against a third State without Security Council authorisation. For it to be so restricted, the Community would have to fall within the definition of 'regional arrangement or agency' and the economic measures would have to be considered to constitute 'enforcement action' within the terms of the Charter.

i) Enforcement Action

'Enforcement action' is not defined in the Charter, but a comparison of the use of the phrase in other provisions provides some light on its true meaning. The same terminology is used in Articles 2(5), 5 and 45. The first two Articles merely deal with obligations and rights of States against which the UN is taking 'preventative or enforcement action.' Article 45 requires Member States to 'hold immediately available national air-force contingents for combined international enforcement action.' This clearly aimed at Article 42 measures, but it does not exclude non-forcible enforcement action falling under Article 53.

The Charter uses the phrase 'enforcement measures' in Articles 2(7) and 50, and probably bears the same meaning as 'enforcement action.'¹²¹ Article 2(7) provides that the principle of non-interference by the UN in the domestic jurisdiction of any State 'shall not prejudice the application of enforcement measures under Chapter VII.' This again is inconclusive. More illuminating is the drafting of Article 50 which enables States confronted with 'special economic problems' due to carrying out 'prevention or enforcement measures' taken against another State by the Security Council to consult the Council with regard to a solution. A request for such consultation was received from Jordan and from Bulgaria following the adoption of Resolution 661 (1990)¹²² which imposed economic sanctions against Iraq and Kuwait. These were considered before any measures falling under Article 42 were adopted by the Security Council. In this context economic sanctions were treated as 'enforcement measures.'

The terms of the Charter are not totally conclusive, but there is some indication that economic sanctions were intended to fall within the definition of 'enforcement action.' However Security Council practice has not borne this out.

In 1960 the Security Council discussed, at the request of the Soviet Union, whether it should authorise the sanctions imposed by the Organisation of American States against the Dominican Republic.¹²³ The USSR argued that the sanctions constituted 'enforcement action' within in the meaning of Article 53. The Security Council, however, approved a draft resolution proposed by the United States by which it merely 'took note' of the OAS measures. The US, supported by the majority of the Security Council, considered that 'enforcement action' only related to military action.

121 Akehurst "Enforcement Action By Regional Agencies With Special Reference To The Organisation of American States" 42 *British Yearbook of International Law* (1967) pp175-227; pp185.

122. Adopted 6 August 1990.

123. Akehurst, *Enforcement Action*, pp190-192.

In 1962 Cuba asked the Security Council to refer to the International Court of Justice seven questions on the legality of sanctions imposed against it by the OAS. There was a separate vote on the meaning of 'enforcement action' and a number of members of the Council used the Dominican Republic affair as a precedent. The majority again considered that Security Council authorisation is only required for action involving the use of force, and defeated the contrary draft meaning by 7 votes to 4.

The results of these Security Council votes and debates show that it is extremely unlikely that in the future it will regard 'enforcement action' to include economic sanctions. This is due more to the practice of the majority of the then members of the Security Council than to a universally expressed interpretation of the provision. Considerations in the votes were as much, if not more, political as legal, but these incidents are likely now to be established as firm precedents for the assertion that 'enforcement action' only relates to military activities.

ii). Regional Arrangement or Agency

The concept of 'regional arrangement or agency' is partially defined in the Charter. Article 52(1) provides that a regional arrangement or agency i) must be concerned with the maintenance of international peace and security, ii) must be consistent with the purposes and principles of the United Nations and iii) must in some way be regional.¹²⁴

There is little ground for denying that the European Community satisfies the latter two conditions. It is not, however, so clear-cut that it deals with 'such matters relating to the maintenance of international peace and security as are appropriate for regional action.'¹²⁵ The Treaty of Rome makes no reference to such activities in Part One dealing with Principles. Yet it is undeniable that the Member States have used the common commercial policy for reacting to events not directly related to treaty-defined concerns of the Community, such as the Argentinian invasion of the Falkland Islands.

The development of the extra-treaty mechanism of the European Political Cooperation (EPC) has added to the involvement of the Twelve in common foreign policy consultations and actions. But the decisive legal distinction is that the EPC is not a European Community activity. European Political Cooperation was formulated into a conventional framework by the Single European Act 1986 (SEA). Its provisions are set out in a sole article comprising of twelve paragraphs. Article 30(1) of the SEA provides:

124. Akehurst, *Enforcement Action*, pp177.

125. Article 52(1) United Nations Charter.

The High Contracting Parties, being members of the European Community, shall endeavour jointly to formulate and implement a European foreign policy.

The consultations and common positions provided for are those of the Member States not of the European Community. This separation of activities is acknowledged in Article 30(5) by which 'the external policies of the European Community and the policies of the European Political Cooperation must be consistent.' Activities which could rightly be categorised as dealing with international peace and security lie outside the ambit of the EC and belong to the EPC. This is so at least in terms of the constituent treaties. But the correct picture is not seen by stopping at this point in the examination.

The result of consultations by the individual Member States can be the adoption by the European Community of economic measures on a motive of maintaining international peace and security such as those imposed against Yugoslavia in November 1991. The institution of such measures itself by the EC points to it being involved in matters of international peace and security. The terms of the Decision of the Council¹²⁶ to suspend the Cooperation Agreement with Yugoslavia provide evidence of the concern of the EC with such matters. The preambular paragraphs refer both to the EPC statements of 5 and 28 October 1991, which dealt with the situation in Yugoslavia and expressed the principles on which a solution should be sought, and to Security Council Resolution 713 (1991), which *inter alia* determined that the situation in Yugoslavia constituted a threat to international peace and security. The political reason for the measure was the non-observance of the cease-fire concluded on 4 October 1991. It was clearly the aim of the EC to have some impact in this case on the restoration of peace in a conflict which had already been determined to be a threat to international and security.

This increased activity by the Community in non-economic foreign affairs establishes it more as a 'regional arrangement' within the meaning of Article 52. This is particularly true in the case of the former Yugoslav States since its measures are introduced against European nations and so has an even more regional element to its activities. The Community has also developed more of a peace-brokering role in the Yugoslav crisis which has included the convening of the Peace Conference in September 1991. Although undertaken within the framework of the EPC, the Community is undeniably involved, evidenced by the reference to the 'Community and its Member States' in EPC statements. The convening of the Conference, high level of involvement in the in-going crisis and cease-fire monitoring were not agreed under

126. Decision 91/586/ECSC,EEC of 11 November 1991, OJ L315/47 of 15.11.91.

institutionalised Community procedure, but the Member States clearly consider the organisation to be involved in the search for peace.¹²⁷

It must be concluded that by extending its purview into non-Community affairs and by making express reference to the maintenance of international and security when imposing counter-measures that the EC has become a 'regional arrangement or agency' within the meaning of Article 52.

iii) Article 53 and the European Community

The potential for the application of Article 53 resulting from the terms of the Charter is not reflected in the practice of the Security Council and of the EC. The Community regulations make reference to the Security Council resolutions and do tend chronologically to follow such resolutions, but no authorisation is seen as necessary by either body.

The main reason for this is probably the position adopted by most members of the Security Council that 'enforcement action' does not relate to non-military sanctions. Such an interpretation may gain support from the doctrine of subsequent state practice. Despite disagreement over the Dominican Republic sanctions, there has been no dispute aired publicly of the need for authorisation for sanctions against Serbia and Montenegro and Iraq. Indeed the Dominican Republic decision in the Security Council is seen as a precedent for the non-requirement of Council authorisation.

One approach to the problem is that adopted by Dr Akehurst when he stated:

It is commonly supposed by writers that an arrangement which meets the requirements of a regional arrangement, whatever they may be, must automatically be regarded as a regional arrangement governed by the provisions of Chapter VIII of the Charter, whether the parties to the arrangement desire this result or not. There might be some truth in this view if the Charter laid down a precise definition of regional arrangement. But the Charter does not, nor has any United Nations organ ever given us such a definition, so the only way in which one can be *certain* that an arrangement is covered by Chapter VIII of the Charter is to see whether the parties to the arrangement have claimed that it is a regional arrangement and whether this claim has been accepted in practice by the United Nations.¹²⁸

No such claim has been made or accepted as regards the European Community.

127. For elaboration on these activities see Chapter 4.

128. Akehurst, *Enforcement Action*, pp178.

In any case it may be that the Security Council does not consider the European Community to be a regional arrangement or agency. This would have been a valid interpretation in the early days of the Community, but is now open to question as the EC's involvement in peace considerations expands. The entry into force of the Treaty on European Union will require a radical rethinking of this attitude. For its objectives include 'the implementation of a common foreign and security policy including the eventual forming of a common defence policy, which might in time lead to a common defence,'¹²⁹ and it provides for the potential institutionalisation within the EC of foreign policy decisions.

2. Binding Nature of Security Council Resolutions on the European Community

The compulsory nature of Security Council resolutions on Member States has already been discussed. An added complication is the effect of these resolutions on the European Community. If the Council adopts a resolution which is binding on the Member States, is the EC bound by it too?

The operative provision of the Charter is Article 25 by which 'Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.' The European Community is however not a member of the United Nations. The EC possesses its own legal personality distinct from those of its Member States (Art 210 EEC Treaty; Art 6 ECSC Treaty; Art 184 Euratom). The Community is recognised as a distinct entity having been granted observer status at the UN and in some of its specialised organisations. But it is not a member and so accordingly is not bound to comply with Security Council resolutions.

The Member States of the EC are under the obligation to implement the resolutions. Where sanctions are imposed by the Security Council, they must be transposed into national legislation and implemented in full. This obligation overrides all others by virtue of Article 103 of the UN Charter. This includes European Community law which is otherwise the supreme law in matters within EC competences. Since all Community Member States are also members of the UN, it follows that mandatory sanctions imposed by the Security Council must be implemented across the whole territory of the Community. If this is not done the international responsibility of the State which fails to implement it will be engaged. But the members of the EC have transferred their competences in the field of external commercial policy to the Community. Thus the legal entity in whose sole hands the method of implementation lies is seemingly under no legal obligation to apply the sanctions. However all Member States of the EC would be in breach of their

129. Treaty on European Union, Title 1, Article B.

obligations if they did not introduce the measures. They could apply national legislation by virtue of Article 224 of the EEC Treaty,¹³⁰ but with the need to maintain the workings of the single market and to prevent distortions to it, EEC Regulations have been employed in the most recent cases to achieve uniform application.

The use of Community legislation could be seen as a tool of the Member States rather than as a true Community measure. The lack of provision in its constituent treaties for the EC to initiate sanctions in the situation when its interests have not been breached makes for an unusual situation. The Member States have to use Community legislation if the counter-measures they want to take or UN sanctions they have to implement fall within the common commercial policy. The question arises as to whether the measures are genuine Community action or Member States action clothed in Community colours, in other words, whether the Community is merely acting as an 'agent d'exécution' of the Member States. This is not the case for the measures are taken in the exercise of Community exclusive competences. René Milas expounds the correct position:

On ne peut que partager l'avis de C D Ehlermann pour qui la Commission n'est pas l'agent d'exécution des oeuvres des Etats. En effet, ce sont les Etats membres qui sont à la fois les initiateurs de l'action de la Communauté et en même temps, les exécutants, le bras seculier de celui-ci. Elle leur donne sa couverture spirituelle , même si sa volonté est formée par le consensus établi au niveau des représentants des Etats membres et exécutée par le Conseil et/ou la Commission sous forme de législation communautaire.¹³¹

The action taken consists of Community measures. The legal basis is declared to be Article 113 of the EEC Treaty and the measure is taken in compliance with the due procedure (Council decision acting by qualified majority on proposal of the Commission). In form and content they are Community measures.

International law, and more particularly the UN Security Council, only requires the application of the mandatory sanctions in the territory of all UN Member States. The method of implementation is within the discretion of the States subject to their constitutional procedures, and the Security Council is not in the practice of determining the agency through which the trade sanctions are implemented. The Community can be used to apply them, but if they are not applied in full it is the Member States whose international responsibility is engaged. The question posed is

130. For the role of Article 224 see Chapter 3.

131. R. Milas, *Au Nom de l'Europe*, pp238.

whether that of the EC would also be engaged if the sanctions are not applied properly.¹³²

Where the Member States use Community legislation to apply Security Council resolutions an important legal question arises. The problem is best explained by way of illustration. The Security Council determines a threat to or breach of the peace¹³³ without an illegal act committed by State A and it requires all UN Members to introduce comprehensive trade sanctions against that State. The EC Member States are more likely to use EC measures since the substance of the sanctions falls within the exclusive competence of the Community.¹³⁴ If the sanctions entail the breach of a trade treaty between the EC and State A, the EC must show some basis in international law permitting it to violate the terms of the agreement. Such justification appears hard to find since the treaty was not with the Member States (which are permitted, indeed required to breach it by the Security Council resolution), but with the EC itself. There would seem to be no lawful basis for the EC to have violated the trade agreement: no internationally wrongful act and no legitimate authorisation by the UN Security Council. The international responsibility of the EC would seem to be engaged towards State A by the breach of the trade agreement in purporting to apply UN sanctions.

This would create a legal nonsense whereby the sanctions imposed by the Security Council cause an organisation to act illegally when all its Member States are bound to apply them. It would be indefensible for international law to impose sanctions against a State and requiring UN members to 'give the United Nations every assistance in any action it takes in accordance with the . . . Charter,'¹³⁵ and yet place the EC, which possesses the economic means to impose the measures, in the position of itself breaching international obligations by applying the sanctions.

Additionally suppose that the EC was not bound to implement the decision. If the resolution is not binding then neither would it be authoritative. If the EC were not permitted to base its measures on a determination of the Security Council in accordance with Article 39 of the Charter, it would only be able to initiate counter-measures in response to an unlawful act. It would not be able rely on the Security Council resolution itself for that resolution may not be based on an illegality. If the

132. The relationship between the Community and its Member States with regard to competence to introduce counter-measures under EC law is discussed in Chapter 3.

133. The problem would not arise if the determination is of an act of aggression since the EC would be justified in initiating counter-measures for the breach of an obligation erga omnes.

134. Or all twelve States could invoke Article 224 and introduce the same measures: such a scenario is unlikely to occur given the recent practice of adopting an EEC Regulation to implement Security Council sanctions and their more effective implementation by virtue of the uniform application of EC law.

135. Article 2(5) United Nations Charter.

Council makes a determination under Article 39 of an act of aggression, then the Community may initiate counter-measures on the basis of a breach of an obligation *erga omnes*. But the determination of a threat to or breach of the peace is not necessarily a declaration of a violation of international law - it will depend on the facts of each incident. Even if there is an illegal act the Community will only have the right to react if its rights are directly infringed or it is an obligation *erga omnes*. In any case the EC measures would technically be based on the illegality behind the Security Council resolution and not on the resolution itself. If such were the case there would be an inconsistency in the application of the mandatory sanctions. Their obligatory effect on the EC would be dependent on which determination is made by the Security Council under Article 39 of the Charter.

The need for consistency in the international legal order demands that the Community is bound by Security Council resolutions. The ground on which this subordination is founded is expounded after other proposed bases are discussed. Article 234 of the EEC Treaty provides one possible ground. This provision states:

The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this treaty.

The Court of Justice of the European Communities (CJEC) has interpreted this provision to mean 'rights' of third States and 'obligations' of Member States.¹³⁶ This Article is set in terms of the *States'* obligations when it is those of the independent legal person of the European Community that are under discussion. The objection may be raised that in truth it is the Member States who are the Community and that their obligations are the Community's obligations. But this makes no sense when it is accepted that the EC is a distinct legal entity which is provided for by Article 210 EEC.

The CJEC has held that the purpose of Article 234 is to lay down that the application of the EEC Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder, viz the UN Charter.¹³⁷ In the case of *Attorney General v Burgoa*,¹³⁸ the Court considered the consequence of the provision on the Community itself:

136. *Commission v Italy* Case No 10/61 [1962] ECR pp1, pp10.

137. *Ibid* pp10.

138. Case No 812/79 [1980] ECR pp2787.

Although the first paragraph of Article 234 makes mention only of the obligations of the Member States, it would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement. However, that duty of the Community institutions is directed only to permitting the Member State concerned to perform its obligations under the prior agreement and *does not bind the Community* as regards the non-member country in question.¹³⁹

This confirms the view stated above that the Twelve are required to apply UN mandatory sanctions, but the institutions of the Community are not bound by virtue of Article 234 and so may not use it as the legal basis on which to implement them. The argument is not over whether the Member States may use the Community to fulfil its UN obligations, but over the consequences for the Community of being the tool of implementation.

Article 234 relates to 'agreements concluded before the entry into force' of the EEC Treaty. This raises the additional problem that Security Council resolutions passed after 1 January 1958 are not covered in any case by the terms of the Article. Lauwaars favours an analogical application of Article 234 such that the decision is binding on the States.¹⁴⁰ Kuyper argues that Security Council resolutions passed after that date must be regarded as antecedent to the EEC Treaty because they are based on a treaty that predates that Treaty.¹⁴¹

P.J. Kuyper argues that the EC is bound by virtue of Article on Article 48(2) of the UN Charter.¹⁴² This states that mandatory resolutions of the Security Council '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.' He asserts that the Community's duty to implement Security Council sanctions is founded on the classification of the EC as an 'appropriate international agency' within the terms of Article 48(2). But this argument has the same problem in that the provision is directed at the obligations of the States. The duty contained in the Article is for States to apply the resolutions 'through their action' in the appropriate agency. The terms of the provision do not relate to the direct obligations of the international organisation and so does not provide a justification for it to breach its obligations owed to the State which is subject to the sanctions.

139. Case No 812/79 [1980] ECR pp2787, pp2803.

140. Lauwaars, "The Interrelationship Between United Nations Law and the Law of Other International Organisations" 82 *Michigan Law Review* pp1604, pp1610.

141. Kuyper *The Implementation of International Sanctions* pp190.

142. *Ibid.* pp187.

Kuyper puts forward a further, and yet not unproblematic, legal approach based on the decision of the CJEC in *International Fruit Company v Produktschap Voor Groenten En Fruit*.¹⁴³ The case concerned a referral under Article 177 EEC requesting, inter alia, a ruling on whether the institutions of the EC are bound by the terms of the General Agreement on Tariffs and Trade (GATT). The Court stated:

Since the entry into force of the EEC Treaty and more particularly, since the setting up of the common external tariff, the transfer of powers which has occurred in the relations between Member States and the Community has been put into concrete form in different ways within the framework of the General Agreement and has been recognised by the other contracting parties . . . It therefore appears that in so far as under the EEC Treaty the Community has assumed the powers previously exercised by the Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community.¹⁴⁴

The Court also referred in its reasoning to the appearance of the Community as a partner in tariff negotiations and as a party to agreements concluded within the framework of the GATT by virtue of Article 114 EEC. The easy compatibility of the nature and objectives of the EC with the workings and framework of the General Agreement makes the conclusion of the case more difficult to apply to the less direct relations between the functions of the UN Security Council and the EC.

This centres on the concept of the transfer of powers of the Member States to the EC. In the terms of the judgment 'in so far as under the EEC Treaty the Community has assumed then powers previously exercised by the Member States' in the area of UN mandatory sanctions, the term of the resolutions have the effect of binding the Community. This is expressed by Kuyper:

It may be argued, in line with the judgment of the Court of Justice in the Third International Fruit Company Case, that by transferring their powers in the field of commercial policy to the Community, the member States have also transferred their collective obligations in that field. Thus the Community as such is bound by the provisions concerning trade and current payments of the Security Council resolutions ordering sanctions against Rhodesia. In this view, the Community not only could, but

143. *Joined Cases 21-24/72* [1972] ECR pp1221.

144. *Ibid.* pp1227.

should take the necessary measures in the framework of the common commercial policy.¹⁴⁵

The French version of the judgment adds strength to the acceptability of the transfer of obligations when States so desire. The translation reads: 'les Etats membres, en conférant ces compétences à la Communauté, marquaient leur volonté de la lier par obligations contractées en vertu de l'Accord général.'¹⁴⁶ In this way the EC has become the successor to the Member States' rights and obligations in the field of commercial policy.¹⁴⁷

The true ground by which the EC is bound by Security Council resolutions be found in Article 103 of the UN Charter. This provision states:

In 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 obligations under the present Charter shall prevail.

The obligations covered by Article 103 are both those imposed by the Charter itself and binding decisions of the Security Council (which are obligatory by virtue of the Charter).¹⁴⁸ The International Court of Justice ruled that mandatory Security Council resolutions are to be regarded as 'obligations under the . . . Charter' in the *Lockerbie case*.¹⁴⁹ Lauwaars maintains that overriding respect for these obligations is not merely required of States who have ratified the UN Charter:

The obligation [to resolve any conflict in favour of Charter commitments] also applies to *other international organisations*. Not only must the *treaty* establishing the organisation between Member States be accordance with the Charter and the obligations imposed upon the Member States by the Charter, but the *decisions* of the new organisation itself must comply with the Charter.¹⁵⁰

145. Kuyper *Sanctions Against Rhodesia: The EEC and the Implementation of General International Legal Rules* 12 *Community Law Review* pp231; pp238.

146. *Recueil de la Jurisprudence de la Cour* (1972) pp1219, pp1228, para 15.

147. Kapteyn *Introduction to the Law of the European Communities* pp794

148. Lauwaars, *The Interrelationship*, pp1606.

149. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) Provisional Measures Order of 14 April 1992, ICJ Reports 1992 pp114, pp126.

150. Lauwaars, *The Interrelationship*, pp1605.

It is not good enough to say that because the States are bound, the organisations of which they are a part are also bound, however a attractive proposition it may seem. Article 103 is after all, in its own terms, directed at the 'obligations of o the *Members of the United Nations*.¹⁵¹ The Member States have transferred their ability to implement trade sanctions, in the form of the commercial policy, to the European Community which is not a Member.

The conflict to which Article 103 addresses itself in this instance is between the obligation on the Member States to execute the decisions of the EC institutions (under the EEC Treaty) and to implement the Security Council resolution (under the UN Charter). But the direct application of this provision to the obligation of the States does not resolve the problem posed concerning the international responsibility of the Community itself for the treaty breach. Article 103 does not apply directly to the duties of international organisations, and so provides no legal justification for the breach. The answer to the problem is found in its indirect application through the law of treaties.

Article 103 establishes a hierarchy of treaties by qualifying the treaty-making power of the Members of the United Nations. Professor Dowrick expressed the relationship, when discussing how one treaty can affect the ability of a State to conclude a subsequent agreement, in the following way:

If the treaty in question is a "constitutive" treaty purporting to lay down a universal regime (e.g., the Charter of the United Nations), States are disabled from entering into other treaties which derogate from its imperative provisions.¹⁵²

After 1946 the UN Members are prevented from entering agreements which conflict with their obligations in the Charter. These obligations are paramount and Article 103 imposes an implicit subordination of subsequent treaties to these obligations. This applies equally to treaties establishing international organisations. Since an international organisation is no greater than its constituent treaties, they too are subjected to this subordination and so are bound to follow the UN obligations. A State may not transfer to an international body more rights than the State enjoys, and so the disability is transferred to the new body. The organisation becomes subject to the same restriction in both the workings of its institutions and in the treaties which itself concludes. It is incorrect to say that Article 103 is directly addressed to international organisations. It is the conditioned ability of States to conclude treaties which ensures the submission of the EC to the restriction of non-derogation from the Charter's

151. Emphasis added.

152. Dowrick *Overlapping International and European Law* 31
International and Comparative Law Quarterly [1982] pp59, pp67-68.

'imperative provisions', which as stated include mandatory Security Council resolutions.

The full force of Article 103 is maintained by Article 30 of the Vienna Convention on the Law of Treaties 1969 which provides that:

Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

The UN Charter and its obligations (to the extent that they are not rules of customary international law) are naturally only binding on those States which have ratified the Charter. This poses the problem that the Federal Republic of Germany did not join the UN until 1973. This causes problems to the effect of Article 103 on the EEC Treaty since not all the Contracting Parties were members of the UN in 1958. It may not be argued that the FRG was bound to respect the Charter obligations at that time and equally it is wrong to contest that its later membership retrospectively effected such a commitment. But the treaty which it concluded with the five UN members was still subject for the effects of Article 103 for the reasons stated by Lord McNair:

[A]s regards *future* treaties [ie those concluded after 1946] no member can create any valid obligation inconsistent with the Charter; moreover, a co-contracting non-member is aware of that fact, because the Charter must be regarded as what an English lawyer would call a 'notorious' instrument; and a non-member State must be deemed to know whether a State with which it is about to contract is member or not.¹⁵³

The FRG must be taken to have acquiesced in the subordination of the new EEC to the obligations in the Charter since it was cognisant of the limitation of the treaty-making capacity of its contracting parties.¹⁵⁴ The same would be true for any non-member of the UN acceding to the EEC Treaty.

The Community is bound to implement mandatory sanctions imposed by the Security Council by virtue of the conditional ability of the Member States to conclude the EEC Treaty. The resolution is the legal basis for the measures the EC introduces to apply the mandatory sanctions. This means that the position of the EC is exactly the same as for members of the UN in their responsibility to apply the decision. The duty

153. McNair, *Law of Treaties*, pp218.

154. McNair, *Law of Treaties*, pp218.

also provides the EC with legal justification and authority to breach any trade treaty to implement the sanctions.

It is important to consider the nature of this obligation on the European Community to honour the decisions of the Security Council. It consists of the duty to restrain from acts preventing the Member States complying with their UN obligations¹⁵⁵ and 'where the Community's competence is exclusive, as in the field of the common commercial policy, it is the Community that has to implement the obligations under the Charter.'¹⁵⁶

II. European Community Counter-Measures

The European Community has to rely on general international law for its right to implement economic measures against a third State. This means that it may take acts of retorsion, reciprocity and counter-measures within the limits set by international law. It is in the same position as a sovereign State, but there are extra factors to be considered. These are examined in relation firstly to prejudice caused to Community interest and, secondly, to Member States' interests.

I. European Community Interests

The EC enjoys independent legal personality and, due to the transfer of certain aspects of state sovereignty to it, has a large number of economic interests to protect. International law recognises such transfers and so it would be illogical if it did not also provide, in accordance with its self-policing approach, for a method for their protection. An international organisation may legitimately introduce counter-measures in response to the infringement of its own rights. In the case of the EC the measures would also act to protect the interests of the Member States which are closely associated with those of the Community.

It follows from the nature of the counter-measures themselves that the response does not have to be of the same subject-matter as the violation. Thus if the breach committed by the third State is in an area of competence of the Community, eg fisheries, then the EC may respond by breaching an obligation owed to that State in another field of its competence, eg commercial policy. However this could not occur between the interests of the three European Communities. If a third State breaches a coal agreement signed with the European Coal and Steel Community, counter-measures may only be taken by that Community within the field of its competences. It

155. Attorney General Case No. 812/79 precited.

156. Lauwaars, *The Interrelationship* pp1610-11.

is not open to the European Economic Community to initiate counter-measures by violating a commercial agreement that it has with that State because the rights of the EEC have not been breached.

2. Member States' Interests

If the right which has been breached is of a Member State, and not of the EC, a more complicated question arises. That State is no longer in control of all measures traditionally available to it with which to respond. A plurality of means of response have been transferred to the EC in the form of the common commercial policy. The State is less able to coerce compliance with the breached obligation. Since the EC is placed to fill that lacuna, can it take counter-measures in response to a breach of the rights of its Member States?

Where international law permits third-party counter-measures such as when the norm which has been violated constitutes an obligation *erga omnes*, the European Community may introduce them in the same way as States. But it may not be concluded from current practice that the EC is entitled to take counter-measures on behalf of one or more of its Member States.

The assignment to a central organisation of the economic powers which a State is entitled to use to coerce another to perform its legal obligations or to desist from wrongful acts does not imply the right for that organisation to use these powers to protect the individual rights of the transferring State. The EC must be regarded as not entitled to use its competences to impose counter-measures against a State which infringes the rights of an individual Member State in the same way that the latter could previously have done. This conclusion denies the Member States of a major part of their resources to enforce compliance with an obligation owed to them.

A powerful trading organisation entitled to use its economic strength to ensure fulfilment of obligations owed to its Member States, in addition to those owed to itself, would raise and accentuate the expressed concern of the inequality of ability of States to coerce compliance. The answer to such a problem would lie in the strict application of the principle of proportionality. Dr Ehlermann correctly states that any counter-measures introduced by the EC on behalf of a Member State would have to ensure close observance of the requirements of the principle.¹⁵⁷ The effects of the measure would have to be proportional to those of the offence of the State against which it is introduced.

157. Ehlermann "Communautés Européennes et Sanctions Internationales - Une Réponse à J. Verhoeven" 18 *Revue Belge De Droit International* (1984-85) pp96-112; pp107-108.

L'organisation internationale doit dès lors moduler sa réaction en fonction de la gravité de la violation et du potentiel de représailles que comporte une mesure applicable à l'ensemble de son territoire.¹⁵⁸

The collective strength of the EC would be far greater than that of a single Member State and so particularly close attention would have to be paid to the proportionality of the counter-measure. But it is far from established that the EC is entitled to introduce counter-measures on behalf of its Member States when its own rights have not been infringed.

158. *Ibid.* pp108

CHAPTER 3

COMMUNITY LAW AND THE APPLICATION OF COUNTER-MEASURES AND SANCTIONS BY THE EUROPEAN COMMUNITY

I. Legal Basis in Community Law

The legal basis in Community law of counter-measures introduced by the EC has been the subject of development and debate. These have centred on the relationship between Articles 113 and 224 of the EEC Treaty. The constituent treaty provides no express power for the EC to apply counter-measures. Article 113, as the foundation provision of the common commercial policy, has been used as authority when the Community has acted.

The increased employment of counter-measures by the EC in recent years has led to a more uniform approach between the Commission and Council, but initially the debate involved a difference of opinion between the two institutions. The consequence of the choice of the legal basis is the determination of whether the Community or the Member States are competent to act. The difference stems from the application of Security Council imposed sanctions against Rhodesia in 1966. Although on that occasion both recognised that the Member States had the legal power to take action, their approaches to Community competence under other circumstances differed.

The Council adopted what has been termed 'la doctrine rhodésienne.'¹⁵⁹ In response to a written question from a member of the European Parliament¹⁶⁰ in 1976, the Council stated that the measures decided on by the UN Security Council 'were taken for the purpose of maintaining peace and international security and therefore do not fall within the scope of Article 113.' The doctrine has been abandoned over the years and the potential breach of international peace and security appeared as one of the visas in Regulation 1432/92¹⁶¹ which imposed counter-measures against Serbia and Montenegro.

In contrast to this the Commission has advocated an 'instrumental approach.'¹⁶² This concentrates on the legal instrument to be used rather than on categorising the

1. J. Willaert "Les Sanctions Contre La Rhodésie" 18 *Revue Belge De Droit International* 1984/85 pp216, pp235; J-L Dewost "La Communauté, Les Dix, et Les Sanctions Economiques: De La Crise Iranienne à La Crise des Malouines" *Annuaire Français De Droit International* 1982 pp215, pp217.

160. Patjin Written Question No 526/75, OJ C89/7, 16th April 1976.

161. OJ L151/4, 1st June 1992.

162. P.J. Kuyper "Community Sanctions Against Argentina: Lawfulness under Community and International Law" in *Essays in European Law*

counter-measures as having a commercial or political objective. This has emerged as the prominent approach in recent EC practice. As P.J. Kuyper has stated the Community is able to impose trade measures against a State for they constitute 'one instrument from a whole arsenal which could be employed to conduct a common commercial policy.'¹⁶³ This approach means that even if the measures are taken for political ends the EC is competent to act if the instrument employed falls within the range of methods used to pursue the common commercial policy. The immediate ramification of the Rhodesian doctrine was that the Community was only able to act under Article 113 if the measures were motivated by commercial or trade considerations. Recent practice in respect of Iraq, Libya and Serbia and Montenegro proves that this distinction is no longer valid. The assertion¹⁶⁴ that this is still the governing basis for determining Community competence is unacceptable and takes no account of these developments. The common commercial policy competence of the EC has advanced and expanded to allow for it to be used to apply measures concerned with international peace and security.

There are, however, contrasting opinions on the precise relationship between Articles 113 and 224. The latter provision states:

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 or serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining international peace and security.

The relationship is capable of three interpretations which have been expounded by writers on the subject.

The first puts greatest emphasis on the exclusive competence of the Community in the commercial sector. As enunciated by Professor Verhoeven¹⁶⁵, Article 224 permits a temporary derogation by Member States faced with the conditions mentioned in that Article. It could for example impose an embargo against a

and Integration ed D. O'Keefe and H. Schermers 1982 pp141, pp144.

163. *Ibid.* pp144

164. Redleaf, "The Division of Foreign Policy Authority Between the European Community and the Member States: A Survey of Economic Sanctions Against South Africa 12 *Boston College of Third World Law Journal* (1992) 1 97-119. pp115.

165. J. Verhoeven "Communautés Européennes et Sanctions Internationales" 18 *Revue Belge De Droit International* 1984/85 p80; 93.

third State. But once the Community acts in that regard, the exercise of its competences supersedes any measures implemented by the Member State. The State is then required to adhere to the Community measures. There is nothing in the EEC Treaty to support this argument. The power of derogation under Article 224 is not qualified by a requirement of inaction on the part of the EC institutions. The Member State retains an absolute right of dispensation from EC measures when the circumstances stated in Article 224 are present.

A more satisfactory interpretation is that Article 224 maintains for the Member States a reserve of sovereignty.¹⁶⁶ The provision constitutes a general derogation from the exclusive competence of Article 113.¹⁶⁷

[L]'article 113 CEE ne fonde pas une compétence exclusive lorsque les conditions de l'article 224 sont réunies. De même aucun Etat membre ne peut être contraint d'appliquer une mesure décidée en vertu de l'article 113 CEE, s'il peut se prévaloir des conditions de l'article 224 CEE.¹⁶⁸

If faced with such conditions, the Member State is still under the obligation to consult its partners in the framework of the European Political Cooperation. Such an interpretation is closest to the terms of the EC Treaty. It is one of the provisions which permit Member States to abstain from applying EC law without the need for prior authorisation of the Commission. As with most exceptions, Article 224 is likely to be interpreted in a restrictive manner since its application disrupts the workings of the single market.

The third interpretation, which is favoured by P.J. Kuyper, is stated by him as follows:

It seems that, if trade sanctions are imposed for political ends, Article 224 does not constitute the exception to Article 113, but Article 113 finds itself, as it were inside Article 224, as one of the possible options for the implementation of those sanctions.¹⁶⁹

In this way Article 113 becomes one of the methods of application of counter-measures decided by the Member States in the European Political Cooperation (EPC). This corresponds to the realities of the EEC Treaty and Single European Act. Kuyper

166. C-D Ehlermann "Communautés Européennes et Sanctions Internationales - Une Réponse à J. Verhoeven" 18 *Revue Belge De Droit International* (1984/85) pp96, pp109.

167. Willaert, *Les Sanctions* pp236

168. Ehlermann, *Communautés Européennes* pp109

169. Kuyper, *Community Sanctions* pp148

goes on to say that Article 113 may only be used to implement counter-measures after a decision has been reached under the EPC or consultations have taken place under Article 224.¹⁷⁰

The best approach is to interpret the relationship in the manner put forward by Kuyper coupled with the rider that Article 224 may act as an exception to Article 113. The implementation of counter-measures is an element of foreign policy and as such falls under the EPC provisions of the Single European Act. This requires consultation between the Member States and coordination of the external policies of the EC and those of the EPC. Thus the decision to apply counter-measures under Article 113 must be preceded by these consultations.

Where the circumstances of a situation constitute one of the alternatives set out in Article 224, the Member States are able to decide to take Community action under Article 113 or to derogate from the EC exclusive competence to implement the counter-measures by way of adoption of a national measure. On this basis it is quite true that Article 113 is one means of action available alongside others. But this presupposes that the Member States are sufficiently in agreement on the appropriate action to be taken. Exercise of the common commercial policy under Article 113 requires qualified majority voting. Those Member States wanting Community implementation of counter-measures must be sure from EPC or Article 224 consultations that the required 54 votes can be marshalled to ensure their adoption. If, however, there is insufficient support for the proposition, then the relationship between Articles 113 and 224 changes to one of exception. For provided the conditions in Article 224 are satisfied, a Member State determined to apply counter-measures may not be prevented from doing so by reason of the non-support of the other Member States.

An example best illustrates the situation. The EC signs a trade agreement with State A in exercise of its competences under Article 113. If a situation were to develop in which State A invaded State B in breach of the obligation *erga omnes* to refrain from acts of aggression, the Member States and the EC would be entitled under international law to apply counter-measures. The conditions set out in Article 224 are thereby fulfilled. They consult under the auspices of the EPC (which would also satisfy the Article 224 consultation requirement). If a sufficient number of Member States are in favour of suspending the trade agreement with Turkey, then Article 113 may be used as a means of action under Article 224. But if there is not adequate support, a Member State would be entitled unilaterally to suspend application of the agreement. In this way Article 224 is a veritable exception to Article 113.

170. *Ibid.* pp148 .

Provided that Article 224 conditions are satisfied a Member State may as a last resort always rely on the reserve of sovereignty to derogate from any common commercial policy measures of the EC. There is nothing in the terms of Article 30 of the Single European Act (SEA) to require compliance with the majority view of the EPC partners. It demands close cooperation, but Article 224 enables ultimate non-compliance with Article 113 decisions or agreements.

The EEC Treaty and SEA attempt to a large degree to restrain the exercise of this power. Fundamentally this is to prevent disruption to the workings of the single market. The use of Article 113 for common counter-measures is based on this reasoning. However in the past uniform application has not always been achieved even when Article 113 has been invoked. When Regulation 887/82¹⁷¹ imposing counter-measures against Argentina was extended by Regulations 1176/82¹⁷² and 1254/82,¹⁷³ Ireland and Italy invoked Article 224 and no longer suspended imports from Argentina. This invocation of Article 224 was a derogation from Regulations imposing counter-measures. Its effect was to enable the two States to continue normal trade with Argentina. This can barely be interpreted as measures which a Member State 'may be called upon to take in the event of . . . war or serious international tension constituting a threat of war.' In other words Article 224 was used as a means of maintaining the economic status quo, instead of being the basis for taking exceptional action in response to a serious situation which is how it is designed and termed to be used. Kuyper seeks to explain this invocation by Italy and Ireland by applying his interpretation of Article 224. He states that according to this approach it could be argued that Member States 'are free to take the measures they feel 'called upon' to take (in the case of Italy and Ireland , only a weapons embargo) under Article 224, but may not wish or may not be able to block the decision-making procedure, which leads to the adoption of a Regulation based on Article 113. Their application of their measures short of the Article 113 measures would then not be contrary to their obligations under the EEC Treaty.'¹⁷⁴ With respect, this is a somewhat forced interpretation to attempt to make the law fit the facts. It must surely be admitted that Italy and Ireland were in breach of their obligations under Community law. There is no provision for authorised derogation from such obligations after the end of the transition period.

II. The Scope of Action Available to The Community

171. OJ L102/1, 16th April 1982

172. OJ L136/1 18th May 1982.

173. OJ L146/1 25th May 1982.

174. Kuyper, *Community Sanctions* pp149.

The European Community is only permitted to introduce counter-measures where their subject-matter falls within a field of its competence. This will usually be the common commercial policy. However the EC has external competences in other fields, and agreements made on the basis of such powers may also be breached as counter-measures.

The conduct of foreign trade relations with third States is largely, but not solely in the hands of the European Community. The areas in which it has competence to conclude international agreements has been enhanced by a series of decisions of the Court of Justice of the European Communities. The present study does not permit a detailed examination of the jurisprudence,¹⁷⁵ but the conclusions which it provides are most pertinent. It is important to determine the differentiation of economic competences between the Community and its Member States in order to appreciate the measures which lay within the ambit of each, which may be employed as counter-measures.

In addition to the external competences explicitly provided for by the EEC Treaty, the CJEC has developed the concept of implied external powers.¹⁷⁶ Express or implied external powers are not necessarily exclusive. The exclusivity of express powers depends on the terms of the Treaty. However for implied competences, this is naturally more difficult to determine. The Community gains exclusive external power if competence has been ceded to it in the internal sphere. Two possibilities have been put forward for deciding when this has occurred.¹⁷⁷

Treaty provisions may confer an exclusive character on internal competence with effect from a particular time and thereby also form the hallmark of exclusivity for external powers derived from them.¹⁷⁸ The exercise of internal competences may also lead to the exclusivity of the derived external competence linked to it, viz if and in so far as the internal measures taken contain a cession of competence to the Community in the matter concerned.¹⁷⁹

The development of the concept of implied powers gives the Community an even wider scope for potential counter-measures

175. Simmonds "The European Economic Community and the New Law of the Sea" *Hague Recueil* VI 1989, pp15-166, pp19-40.

176. Cases 22/70 [1971] ECR pp263; Cases 3, 4, and 6/76 [1976] ECR pp1279; opinion 1/75 [1975] ECR pp1362; opinion 1/78 [1979] ECR 2871.

177. P.J.G. Kapteyn and P. Verloren van Themaat *Introduction To The Law of the European Communities* pp773-4.

178. Kramer et al Cases 3, 4, and 6/76 [1976] ECR pp1279.

179. *Commission v Council* Case 22/70 [1971] ECR pp263, pp275.

The EEC Treaty also empowers the Community to conclude association agreements with other States (Art 238). Such treaties are susceptible to breach as legitimate counter-measures.

1. The Common Commercial Policy

No definition of 'commercial policy' is contained in the EEC Treaty. This has enabled the concept to be kept fluid rather than set with a definition which may be incapable of adapting to the changing face of international trade. Article 113 enumerates a non-exhaustive¹⁸⁰ list of 'uniform principles' on which the commercial policy is based: changes to tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.

The external and internal exclusive competence of the EC in commercial policy is beyond doubt.¹⁸¹ But the substance of that policy is not so clear. The CJEC has stressed the wide scope of application of Article 113 in that 'commercial policy' has 'the same content whether it is applied in the context of the international action of a State or to that of the Community.'¹⁸²

The common commercial policy . . . embraces all measures (autonomous or conventional) which serve to regulate economic relations with third countries and concern free movement of goods and related traffic in services and payments.¹⁸³

The commercial policy relates to all nature of goods except for those dealt with specifically by the EEC Treaty (eg fisheries). This gives great potential to the Community for more effective counter-measures since it is not restricted to particular types of goods. The external and implied powers permit the Community to effect counter-measures in one of two ways when acting on the basis of Article 113. It is able to adopt measures concerning autonomous commercial policy or conventional commercial policy.¹⁸⁴

The autonomous commercial policy is the direction of economic relations by unilateral measures concerning imports and exports. Thus embargos and boycotts are

180. Opinion 1/78 [1979] ECR 2871 at 2913; Kapteyn pp778.

181. Case 41/76 Criel, née Donckerwolcke et al v Procureur de la République au Tribunal de Grande Instance, Lille et al [1976] ECR 1921 at 1937.

182. Opinion 1/75 [1975] ECR pp1362.

183. Kapteyn *Introduction To The Law of the European Communities*, pp790.

184. Kapteyn *Introduction To The Law of the European Communities*, pp788.

within the hands of the Community. The EC has laid down the principles on which the policy in relation to importation and exportation in a series of Regulations with two bedrock pieces of legislation. Regulation 288/82¹⁸⁵ sets out common rules for imports and Regulation 2603/69¹⁸⁶ prescribes those for exports.

The basis of Regulation 288/82 is that importation into the Community of the products covered by the legislation shall be 'free and therefore not subject to any quantitative restriction.' The Regulation is of general application with the exception of textile products, imports from China and Cuba, imports from State-trading countries, and products specified in the Annex. It also provides for protective measures to be taken where substantial injury is likely to be caused to Community producers or where immediate intervention is required to safeguard the interests of the Community. Article 21(a) of the Regulation permits Member States to adopt 'prohibitions, quantitative restrictions or measures of surveillance' on the ground, *inter alia*, of public security. This exception could be employed as the legal basis for counter-measures to prevent imports from an offending State if the ground can be made out.

The fundamental provision of Regulation 2603/69 is that exports from the Community are equally free and so unimpaired by quantitative restrictions. Products specified in the Annex to the Regulation are excepted from this freedom. Exceptions are also made for protective measures and for the adoption of measures required to protect certain interests including public health and public security.

It has been argued that once the Council has adopted a Regulation establishing general rules that they cannot be waived in individual circumstances.¹⁸⁷ The case of *NTW Toyo Bearing Co v Council*¹⁸⁸ is quoted in support in which the CJEC stated: 'The Council, having adopted a general regulation with a view to implementing one of the objectives laid down in Article 113 of the Treaty, cannot derogate from the rules laid down in applying these rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom that law applies.'¹⁸⁹ The argument runs that counter-measures implemented by way of derogation from the Regulations providing for freedom of importation and exportation are illegal under Community law.

This argument cannot be accepted as correct. Dewost provides the proper explanation when discussing Regulation 877/82 which suspended imports from Argentina.

185. OJ 1982 L35/1 (as amended).

186. OJ English Special Edition 1969 (II) p590 (as amended).

187. Dewost, *La Communauté, Les Dix, et Les Sanctions Economiques* p229.

188. Case 113/77 [1979] ECR pp1185.

189. *Ibid.* pp1209.

[L]e règlement 877/82 ne constitue pas une 'application à un cas particulier' de règles différentes de celles posées par le règlement général 926/79 relatif au régime commun applicable aux importations mais bien une dérogation à l'ensemble du système de libération des importations . . . Le règlement . . . étant fondée sur l'article 113 comme le règlement 926/79 dont il écarte l'application, il s'agit simplement de la mise en oeuvre de l'adage 'lex specialis derogat . . .'¹⁹⁰

The existence of the general measure does not render illegal its non-application in the form of a legitimate counter-measure.

The prohibition on imports and/or exports as a method of imposing counter-measures has the obvious effect of disrupting private law transactions. Such measures have effects on a huge amount of trade, and so are more likely to prove effective than an institutional Community measure, eg cancellation of a food aid programme. Because of this the autonomous commercial policy approach has been widely employed in the instances of use of counter-measures by the EC. In 1982, all imports originating in Argentina were suspended for a month, and then extended on two further occasions. The EC prohibited the introduction into the Community of all commodities or products originating in or coming from Iraq and Kuwait (in 1990)¹⁹¹ and from Serbia and Montenegro (in 1992).¹⁹² The export to the same countries of such products from the Communities was equally forbidden. These restrictions were subject to medicinal and humanitarian exceptions.

The common commercial policy also covers 'services'. The provision of such services to the government or nationals of a third State or to companies incorporated under the law of that State may also be prohibited as a form of counter-measure. It is probable that the definition of 'services' in this area is the same as that defined in Article 60 EEC on the freedom to provide services provisions of the EEC Treaty (Arts 59-66).¹⁹³ Activities falling within this definition are at least susceptible to be prohibited to be provided to natural and legal persons of a State by reason of EC counter-measures.

The conventional commercial policy is the exercise of the power to conclude agreements with third States which is granted by Articles 113(3) and 114. These have

190. Dewost, *La Communauté, Les Dix, et Les Sanctions Economiques* pp229.

191. OJ L213/1, Reg No 2340/90, 9th August 1990.

192. OJ L151/4, Reg No 1432/92, 1st June 1992.

193. Article 60 EEC states:

- 'Services' shall in particular include
- (a) activities of an industrial character
 - (b) activities of a commercial character
 - (c) activities of craftsmen
 - (d) activities of the professions

taken the form of trade agreements and increasingly cooperation agreements which cover areas beyond trade in the strict sense of the word, but provide for consultation and cooperation in such fields as science and technology. The breach of such agreements involves merely (inter-) governmental action and does not prevent trade between private parties. It would have effects on their transactions if the provisions of the agreement provided for a favourable tariff rate. This would thus increase the price of the import, but leaves the transaction and the possibility of further transactions intact.

The conventional commercial policy was the basis for the first batch of measures imposed by the Community against Yugoslavia on 8 November 1991. They included the 'immediate suspension of the application of the trade and cooperation agreement with Yugoslavia and a decision to terminate the agreement.'¹⁹⁴ The consequences of these measures were the cessation of cooperation in the fields of industry, science, technology, agriculture, transport, tourism, living conditions, fisheries and finance. The agreement also provided for the elimination of import duties on specified goods and for the reduction of those on others. This suspension was followed by the denunciation of the agreement in accordance with its provisions and so did not breach the treaty. Article 60 states that either party may denounce the agreement by giving notice to the other side, denunciation taking effect six months after such notification. The denunciation legally puts an end to the treaty's existence. The range of benefits to third States and of activities included in such agreements, of which the EC-Yugoslavia cooperation agreement is typical, places the EC in a powerful position to implement a wide scope of counter-measures.

The prohibition on importation and exportation of products in and out of the Community is technically only a counter-measure when it is pronounced in violation of a treaty with the third States whose goods are affected. Otherwise it is an act of retorsion since free trade is not a legal requirement. The existence of GATT means that in most cases the prohibition of trade is in breach of treaty obligations. Such was the case with the banning of imports from Argentina, which were justified under Article XXI of the Agreement.

2. Other Community Competences

The principal instrument for effecting counter-measures is the common commercial policy, but the Community's other fields of competence lend themselves as such tools. The EC could use its external competences (exclusive or mixed) in a manner similar to the conventional commercial policy. Thus its ability to utilise these areas in the

194. EC Bulletin 11-91 p91

application of counter-measures is dependent on the pre-existence of a treaty with the offending State.

External Community competences exist in varying degrees in the following fields: transport, fisheries, competition, free movement of capital, environment, research and development, freedom to provide services and freedom of establishment, and free movement of workers.¹⁹⁵ Agreements are likely to take the form of the granting and acceptance of reciprocal rights and obligations. There is neither space nor need for a detailed survey of existing or potential agreements. By way of illustration the EC signed an agreement on the basis of Article 130 q (2) of the EEC Treaty on a 'programme plan to stimulate the international cooperation and interchange by European research scientists' with Sweden, Finland, Austria, Switzerland and Norway. The agreements were to last the length of the programme (1988-92) and provided for bursaries, grants, twinning of laboratories and mobility of researchers. One could imagine the suspension of the programme as a counter-measure, designed as a nominal gesture of disapproval, at least, even if the practical effect in securing compliance with an international norm might be limited.

Article 238 provides the Community with the power to conclude 'agreements establishing an association involving reciprocal rights and obligations, common action and special procedures' with other States, union of States or international organisations. The Lome Conventions have been concluded by virtue of this provision. The Fourth Lome Convention,¹⁹⁶ signed with the ACP States, enables, inter alia, products from those States to enter the Community free of customs duties and establishes a system to guarantee the stabilisation of export earnings derived from ACP States exports to the Community and other specified destinations. Such agreements are potential material for counter-measures, and can indeed be effective given the economic superiority of the EC over its developing contracting partners. Their use would exacerbate the differentiation in economic strength between developed and developing States and would set back the search for practical equality in the field of enforcement of international law. Employment of such agreements as counter-measures is less conceivable given the public and political reaction that it is likely to arouse.

III. The Scope of Action Available To Member States

Member States are competent under European Community law to introduce counter-measures in three situations, namely when:

195. Kapteyn *Introduction To The Law of the European Communities*, pp780-787

196. ILM' 1990 pp783.

- i) the circumstances stated in Article 224 are satisfied
- ii) the subject-matter of the proposed counter-measures does not fall within a field of competence of the EC
- iii) the treaty to be breached as a counter-measure was concluded between the Member State and the offending State before the former joined the EC.

Whenever a Member State may pursue counter-measures it is under an obligation of close consultation and cooperation established in Article 30 of the Single European Act.

1. Article 224

The significance of Article 224 is explained above. The use of the provision has declined significantly since its first emphatic invocation by the Member States in the matter of the UN sanctions against Rhodesia in 1966. No mention of Article 224 is made in either of the main Regulations implementing the UN sanctions against Iraq¹⁹⁷ or Serbia and Montenegro.¹⁹⁸ Community action is replacing individual government measures so that the EC presents a united economic and political approach. The decline in the use of Article 224 is welcome on the basis that it prevents distortion to the single market, but its availability ensures that Member States retain the ultimate right to protect their interests when the relevant conditions in the Article are satisfied.

2. Extra-Community Competences

This gives the Member States the widest scope of action. The Community is naturally limited to the powers conferred on it by the Member States in its constituent treaties. Whatever falls outside EC competences is in the hands of the individual Member States. But their freedom of action in the field of international relations is subject to the obligation to 'inform and consult each other on any foreign policy matters of general interest'¹⁹⁹ before deciding on their final position,²⁰⁰ and 'to take full account of the positions of the other partners and . . . give due consideration to the desirability of adopting and implementing common European positions.'²⁰¹

197. OJ L213/1, Reg No 2340/90, 9th August 1990.

198. OJ L151/4, Reg No 1432/92, 1st June 1992.

199. Article 30 (2) (a) Single European Act 1986 (SEA).

200. Article 30 (2) (b) SEA.

201. Article 30 (2) (c) SEA.

The EC is not competent to impose counter-measures in several important areas including diplomatic relations, culture and sport. The two fields which can be highlighted for special treatment are arms exports and financial matters.

i) Arms Exports

Article 223(b) excludes arms and war materials from the scope of the EEC Treaty.

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 intended for specifically military purposes.

The Member States drew up a list of products within the first year of operation of the EEC Treaty to which this provision relates. Article 223 must be interpreted in a restrictive manner.²⁰² This does not detract from the fact that the products mentioned in this list are subject to Member States' competence. This enables the Member States to regulate arms exports by means of export licences, and counter-measures can be applied by the simple refusal of a licence by the exercise of governmental discretion. For example, the Member States of the EC effected an arms embargo against Argentina. The Member States issued a joint declaration²⁰³ under the auspices of the EPC announcing an embargo of the exportation of arms and military equipment to Argentina. This was unsupported by a mandatory Security Council resolution, but was justified by the unlawful use of force by Argentina breaching an obligation erga omnes or on the ground of collective self-defence. The Member States operated their own embargo. This was achieved in the United Kingdom by an amendment dated 16 April 1982 to the Open General Transhipment Licence of 19 March 1979 to control the export of arms and strategic goods to Argentina.²⁰⁴

One area which gives rise to practical difficulties is that of 'dual-use goods' - goods which could be used for either military or non-military purposes. The Council of Ministers has adopted a draft regulation on strategic exports.²⁰⁵ The purpose is to ensure that Member States apply the necessary control measures in accordance with common standards. Export licences will be required for goods named in a list published

202. (1986) ECR 1651; *Kuyper Trade Sanctions, Security and Human Rights Policy in the European Communities* pp10.

203. 10th April 1982, EC Bulletin 4-1982 pp7 note 1.1.3.

204. *British Yearbook of International Law* 1982 pp514.

205. [1992] 3 CMLR 221.

in a complementary regulation. The draft regulation will not apply to goods covered by Article 223 (ie those goods named in the 1958 list). This centralisation of the regulation of the exportation of goods which are often the prime subject-matter of counter-measures will provide for even closer coordination of such measures when they are introduced.

ii) Financial Assets

The Member States retain potent powers in the field of the regulation of financial assets located within their jurisdiction. Where the aim of counter-measures is to prevent legal persons having access to financial assets in a Member State national measures are required since the EC is not competent in this area.

Typically the legislation prevents the Government and nationals of the offending State and bodies incorporated under its laws or bodies controlled by legal persons in that State from having access to its financial assets. It usually prohibits any dealing in gold with or transfer of economic resources to such persons.

The measures taken in relation to the crisis in the former Yugoslavia are studied in the final chapter, but their aim is to prevent the withdrawal of assets from the jurisdiction. Iraqi²⁰⁶ and Kuwaiti²⁰⁷ assets were also frozen by the UK in compliance with the UN Security Council Resolution 661. The mechanism of freezing assets has most recently been used in response to such resolutions, but it is also available for application as a standard counter-measure outside of the UN system.

The competence of Member States in relation to arms embargos and asset freezing means that there is potential for non-uniform application of measures and gives rise to the potential of less effective counter-measures than are possible to achieve. Consultation through the EPC does provide for some coordination of Member State action. Closer cooperation in the application of counter-measures is to be welcomed by reason of the beneficial results on the effectiveness of the measures and on the lessening of distortion to the single market.

iii) Treaties Existing Prior To Membership of the EC

The situation under consideration is where a Member State has an agreement with a third State which was concluded prior to that State's membership of the European

206. The Control of Gold, Securities, Payments and Credits (Republic of Iraq) Directions 4th August 1990, SI 1990 No 1616.

207. The Control of Gold, Securities, Payments and Credits (Kuwait) Directions 2nd August 1990, SI 1990 No 1591.

Community. It falls to be considered whether that Member State could use that treaty as an instrument for applying counter-measures independently of any Community measures.

Article 234(1) provides:

The rights and obligations arising from agreements concluded before the entry into force of this treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

The same Article states that Member States shall 'take all appropriate steps' to eliminate any incompatibilities between the agreement and the EC Treaty. It also stipulates that when applying the agreement the Member States must be mindful that the advantages conferred by the EC Treaty 'form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.'

Subject to these duties of reconciliation of obligations, the application of pre-existing treaties is permitted under Community law. It follows that the Member States are entitled to bring them to an end, suspend or denounce them in accordance with international law. Those treaties which would most readily serve as counter-measures, eg trade agreements, have been subsumed by treaties concluded between the EC and the third State.

A problem is unlikely to arise given that most agreements between Member States and third States which are still in force will have no bearing on European Community matters. The use of treaties as counter-measures which have no relation to the EC are unaffected by Community law. A problem may arise where the EC refuses to introduce counter-measures against a third State but a particular Member State wishes to do so and it has a pre-existing treaty with the third State. If the agreement has some effect on Community matters, Article 234(1) would appear to enable the Member State to proceed with such action. One hypothetical example would be a fisheries agreement between UK and Norway concluded before 1973 (the year of the UK's accession to the EC) providing for Norwegian fishing rights in UK waters. Fisheries falls within the EC's competence, but Article 234(1) ensures the continuing validity of the agreement and so the potential for unilateral counter-measures by the UK against Norway by the non-application of the agreement, so preventing Norwegian vessels from fishing in its waters.

IV. Member States and EC Agreements

A Member State is *prima facie* not party to an agreement concluded by the European Community in the exercise of its exclusive competences. However by virtue of Article 228(2) EEC agreements concluded in accordance with the terms and procedure set out in paragraph 1 of that Article are binding on the institutions of the Community and on the Member States. As a matter of Community law and treaty law, the Member States are bound by its terms.

If the other contracting State(s) to the agreement were to breach that treaty or another international obligation owed to a particular Member State, international law permits the latter to take counter-measures. In compliance with the conditions examined in Chapter One, the Member State may temporarily release itself from obligations owed to that State. The Member State may then temporarily refrain from observing the terms of the Community-third State treaty. This is the position in international law.

However if the Member State ceased to observe the treaty, it would be in breach of its Community obligations. If, say, the treaty concerned the importation into the Community of sugar beet from a third State and the UK acted to prevent such importation into British territory as a form of legitimate counter-measure, it would be in violation of its obligations in relation to the single market by distorting the free movement of goods within the Community. The action would be sanctionable by the CJEC under Article 169 and 170 proceedings.

This is more complicated than the issue of failure of Member States to fulfil obligations between each other which was faced by the Court of Justice of the European Communities (CJEC) in the cases of *Commission v Luxembourg* and *Commission v Belgium*.²⁰⁸ But the Court's judgment does provide useful dicta on the present situation.

In fact the [EEC] Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it. Therefore, except where otherwise expressly provided, the basic concept of the treaty requires that the Member States *shall not take the law into their own hands*.²⁰⁹

The crux of the problem is in deciding whether the rights of the Member State in international law or its obligations under Community law are to take priority. The

208. Cases 90 and 91/63 [1964] ECR pp625.

209. *Ibid.* 631 (emphasis added).

objective of the single market requires Community obligations to be observed, but the scenario is not concerned merely with intra-Community factors. In international law the Member State may take counter-measures, but in doing so it would be in breach of its obligation to 'abstain from any measure which could jeopardise the attainment of the objectives' of the EC Treaty (Art 5).

The answer to the problem lies in the very notion on which the Community is founded by which the 'Member States have limited their sovereign rights.'²¹⁰ Within the scope of Article 113 they have transferred the legal power to take acts which fall within the terms of the common commercial policy.

As full responsibility in the matter of commercial policy was transferred to the Community by means of Article 113(1) measures of commercial policy of a national character are only permissible . . . by virtue of specific authorisation by the Community.²¹¹

International law recognises that the Member States are no longer in a legal position to apply measures which breach the common commercial policy without authorisation (subject to Article 224), they having ceded that competence to the European Community. If a Member State purported to exercise such competence, a corporation whose contract was affected by the measures would be able to rely on the direct effect either of the EC-Third State agreement or of any Council Regulation adopted to implement the treaty.

V. Judicial Control of Community and Member State Action

The attribution of competence between the EC and its Member States is not always easy to determine. In the case of dispute, the CJEC is placed to review both Community and national counter-measures where the latter fall within a field of competence of the EC

It is unlikely that the Court would be petitioned on such a political decision as the imposition of counter-measures. However Articles 169 and 170 could conceivably be used by the Commission or a Member State to challenge the legality or scope of a regulation which imposed counter-measures against a third State. Such proceedings could also be used to sanction Member States which fail properly to implement decisions reached at Community level. This could prove important to ensure that the

210. *Costa v ENEL* [1964] ECR pp585, pp593.

211. *Case 41/76 Criel, née Donckerwolke et al v Procureur de la République au Tribunal de Grande Instance, Lille et al* [1976] ECR pp1937.

measures are applied uniformly and that no loopholes appear in Member State implementation.

Where Member State(s) take national counter-measures in exercise of retained sovereignty the CJEC is still competent. For if the Member State acts under either Article 223 or 224, then Article 225 provides:

By way of derogation from the procedure laid down in Articles 169 and 170 the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 223 and 224.

Where the Member State acts by way of application of the exception to Regulation 288/82 (Art 21(a)), the Court is competent to judge the validity and scope of its use.

Although judicial competence is thus provided for by the EEC Treaty, control of Member State action is more likely to be of a political nature exercised by the other Member States, since they might not be keen to expose political and security matters to judicial scrutiny.

CHAPTER 4

INTERNATIONAL ECONOMIC SANCTIONS IN THE CONTEXT OF THE CRISIS IN THE FORMER YUGOSLAVIA

The use of sanctions²¹² by the United Nations and the European Community in the crisis in the former Yugoslavia has to be seen in the context of its other activities and objectives and overall aim of achieving peace.²¹³ This was emphasised by the Community in the European Political Cooperation (EPC) statement issued on 1 June 1992 welcoming the UN Security Council Resolution 757 (1992) and pledging to enforce the sanctions imposed under it against Serbia and Montenegro:

The European Community and its Member States express the view that those measures should be considered in the light of their untiring efforts to achieve a lasting and peaceful solution for the problems of the former Socialist Federal Republic of Yugoslavia, namely through the Conference on Yugoslavia and through the talks of the three communities of Bosnia-Herzegovina on constitutional arrangements.²¹⁴

The Socialist Federal Republic of Yugoslavia consisted of six republics - Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia - and of two autonomous regions - Kosovo and Vojvodina. The constitutional crisis came to a head in May 1991 when Serbia blocked the annual rotation of the chairmanship of the Federal Presidency of Yugoslavia among the republics and autonomous provinces.²¹⁵ Negotiations during the spring of 1991 on the terms of a newly structured federation failed and the parliaments of the republics of Croatia and Slovenia declared their independence from the Yugoslav federation on 25 June. The declarations were declared 'null and void' and 'illegal' by the federal government.²¹⁶ The US and EC had

212. 'Sanctions' rather than 'counter-measures' because for the most part the restrictions were introduced pursuant to Security Council mandatory resolutions.

213. This account of the crisis in the republics of the former Yugoslavia does not attempt to relate the facts of the civil war, nor details of the peace efforts, nor the full role of other international organisations due to pressure of space. It is taken up to the adoption of Resolution 820 (1993).

214. EC Bulletin 6-1992 pp107 at 1.5.2.

215. The Federal Presidency consisted of one representative from each of the six republics - Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Slovenia and Serbia - and from both the autonomous provinces - Kosovo and Vojvodina.

216. *The Times*, 27 June 1991, pp1.

previously warned the republics that they would not recognise their independence. This reflected the EC's initial policy of maintaining the federation.²¹⁷

Federal troops and tanks moved out of barracks in Slovenia to assert the control of the federal government on 27 July.²¹⁸ The EC decided the following day²¹⁹ to send a troika consisting of the foreign ministers of the current President of the Council of Ministers, the previous occupant and next in line to the position to chair peace talks.²²⁰ The troika proposed a peace plan consisting of the implementation of a ceasefire and return of forces to barracks; suspension of the declarations of independence for three months; and restoration of constitutional order including the appointment of a federal president. But Slovenia rejected the federal conditions for a ceasefire. A meeting was then held between the federal prime minister and the President of Slovenia and an agreement was reached on 31 June and tanks began to withdraw from the republic, but remained in Croatia.²²¹

The conclusions of a meeting of the Committee of Senior Officials of the Conference on Security and Cooperation in Europe (CSCE) were discussed by EC foreign ministers on 5 July²²² in The Hague.²²³ It was agreed to send another troika to make practical arrangements for a mission to be sent to monitor the implementation of the previously agreed ceasefire. It simultaneously declared an embargo on armaments and military equipment on all of Yugoslavia. The EC also suspended the second and third financial protocols with the federation thereby freezing £600 million of aid due to go to Yugoslavia, but expressed the hope that the normalisation of the situation would soon permit their restoration.²²⁴

The Community constantly condemned the use of force. In the EPC declaration of 5 July 1991, it stated that a dialogue between the parties should be based on

... the principles enshrined in the Helsinki Final Act and the Charter of Paris for a New Europe, in particular respect for human rights, including the rights of minorities and rights of peoples to self-determination in conformity with the Charter of the United

217. *The Times*, 24 June 1991, pp1.

218. *The Times*, 28 June 1991, pp1.

219. *The Times*, 29 June 1991, pp1.

220. The initial troika consisted of the foreign ministers of Italy, Luxembourg and The Netherlands. The presidency of the Council of Ministers rotated on 1 July and subsequent troikas were composed of officials from Luxembourg, The Netherlands and Portugal.

221. *The Times*, 1 July 1991, pp1.

222. *The Times*, 5 July 1991, pp14.

223. The Committee of Senior Officials met in Prague on 3 July having only been established by the Conference a few weeks before.

224. EC Bulletin 7/8-1991 pp108 at 1.4.3.

Nations and with the relevant norms of international law, including those relating to territorial integrity of States (Charter of Paris).²²⁵

The troika brokered a truce on 7 July after talks on the Adriatic island of Brioni between the EC delegation, the federal government and the presidents of the republics. The agreement included a three month moratorium on further moves by Slovenia and Croatia to implement their independence declarations so that round-table talks could begin on 1 August and a CSCE mission would monitor certain areas in Slovenia.²²⁶

The federal presidency voted on 18 July to withdraw the JNA from Slovenia within three months.²²⁷ But a second round of talks subsequent to those at Brioni broke down. EC foreign ministers agreed on the dispatch of a third troika to Yugoslavia to try to reach a ceasefire in Croatia, and to extend the monitoring mission's work to that republic. The EC troika failed in its effort to secure peace and blamed Serbia for the failure to agree to an extension of the EC monitoring mission's work to Croatia.²²⁸ EC foreign ministers requested the Commission to examine the possible use of sanctions.²²⁹

On 29 August the EC issued a deadline of 1 September to accept a monitored ceasefire and a peace conference.²³⁰ Following the signing of a ceasefire on 1 September and a Memorandum of Understanding on the extension of the EC monitoring mission, and agreement of all the parties to its goals and instruments, the Conference on Yugoslavia was convened on 7 September in the Peace Palace in The Hague under the chairmanship of Lord Carrington.

The aim of the Conference was to 'adopt arrangements to ensure peaceful accommodation of the conflicting aspirations of the Yugoslav peoples on the basis of the following principles: no unilateral change of borders by force, protection of the rights of all in Yugoslavia and full account to be taken of all legitimate concerns and legitimate expectations.'²³¹ A joint declaration was adopted on the opening day, specifying the aims of the Conference and stating in particular that no recognition would be given to changes in frontiers other than those achieved by peaceful means and with the agreement of the parties concerned.²³² The Conference provided the framework for on-going talks, including plenary discussions between the parties.

The UK, France and Belgium presented a draft text to the UN Security Council. On 25 September, acting under Chapter VII of the Charter, the Council

225. EC Bulletin 7/8-1991 pp107 at 1.4.3.

226. *The Times*, 8 July 1991.

227. *The Times*, 19 July 1991.

228. *The Times*, 5 August 1991, pp1.

229. *The Times*, 7 August 1991, pp7.

230. EC Bulletin 7/8-1991 pp116 at 1.4.25.

231. EC Bulletin 9-1991 pp63 at 1.4.2.

232. ILM' XXXI No 6 November 1992 pp1431.

adopted Resolution 713 (1991), which determined a threat to international peace and security and imposed 'a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia.'²³³ It requested the Secretary-General to offer his assistance and to report as soon as possible to the Security Council. It supported the ceasefire arrangements of 17 and 22 September, and urged the resolution of disputes through the Conference on Yugoslavia. The Resolution was backed by the Yugoslav federal government in a letter to the UN, thus removing any objection by Council members on the basis of interference in the internal affairs of a Member State.

The EC foreign ministers issued an important EPC statement after their meeting at Haarzuilens on 6 October. It threatened that if an agreement of 4 October, which included a ceasefire and military arrangements, was not respected by midnight it would impose:

restrictive measures against those parties continuing to flout the desire of the other Yugoslav parties as well as the international community for a successful outcome of the Conference on Yugoslavia. [The EC] will then terminate the Cooperation and Trade Agreement with Yugoslavia and only renew it with those parties which are contributing to the peace process. Ministers have asked the Political Committee and the Commission to identify immediately further measures, including in the economic field.²³⁴

It also stated that a solution to the issue of recognition for those republics wishing it should be sought 'at the end of a negotiating process conducted in good faith and involving all parties.' Despite this declared approach, Croatia and Slovenia declared their independence from the Yugoslav federation on 8 October.²³⁵ This took place on the expiry of the three month EC-imposed moratorium on declarations of independence agreed at the Brioni talks.

The EC issued a warning to Serbia on 28 October that unless it lifted by 5 November its reservations to the peace plan²³⁶ unveiled by Lord Carrington ten days earlier linking the six republics in a looser association of 'sovereign and independent republics,'

233. UN Doc S/RES/713 (1991).

234. EC Bulletin 10-1991 pp86 at 1.4.7.

235. *The Times*, 9 October 1991, pp1.

236. Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" 86 *American Journal of International Law* pp569, pp582-583.

the Conference [on Yugoslavia] will proceed with the cooperative republics to obtain a political solution, in the perspective of recognition of the independence of those republics wishing it, at the end of a negotiating process conducted in good faith, as set out in Haarzuilens on 6 October. Non-cooperative parties can then expect restrictive measures to be taken against them by the European Community and its Member States.²³⁷

EC foreign ministers met on 4 November in Brussels and agreed a contingency plan on imposing sanctions against republics which opposed the EC peace plan put forward by Lord Carrington. The EC extended the 5 November deadline until Serbian views had been heard on the ultimatum for political negotiations. Serbia did not want Serb-populated enclaves in Croatia to remain in that republic, and was unwilling to give up its demand that a solution be found on a federal basis.²³⁸ This approach led to the announcement on 8 November, following a meeting of EC foreign ministers in Rome, that 'the basic elements of the proposals on behalf of the Twelve put forward by Lord Carrington, aimed at a comprehensive political solution, have not been put forward by all the parties' and as a consequence the negotiating process had been put in jeopardy and so the EC had decided to take the following measures:

- i) the immediate suspension of the trade and cooperation agreement with Yugoslavia and a decision to terminate the agreement
- ii) the restoration of the quantitative limits for textiles
- iii) the removal of Yugoslavia from the list of beneficiaries of the Generalized System of Preferences
- iv) the formal suspension of benefits under the Phare programme.²³⁹

The Community promised to enact 'positive compensatory measures' to those republics which co-operated in the peace process to find a solution. But the Peace Conference was effectively suspended by the announcement of sanctions. The EPC statement notified that Yugoslavia had not been invited to the G-24 ministerial meeting on 11 November. The EC also called for the implementation of a UN oil embargo and for the arms embargo to be strengthened, but the search for agreement among members of the Security Council on an oil embargo was abandoned in the face of objections of non-aligned States.²⁴⁰

237. EC Bulletin 10-1991 p89 at 1.4.15.

238. *The Times*, 5 November 1991, pp11.

239. EC Bulletin 11-1991 pp91 at 1.4.3.

240. EC Bulletin 11-1991 pp92 at 1.4.3.

On 2 December the EC Council of Ministers re-established as from 15 November the trade concessions provided for by the Cooperation Agreement between the Community and Yugoslavia for Bosnia-Herzegovina, Croatia, Slovenia and Macedonia.²⁴¹ It also called on the Commission to restore the Phare programme to cover these republics. These measures fitted into the framework of providing incentives to parties contributing to the peaceful search for a solution. They also signalled that the Community now considered that these republics had lost their ties with Belgrade, and so led the way to possible recognition.²⁴²

Acting under Chapter VII of the Charter the Security Council established a Committee of the Security Council ('the Committee') to monitor the implementation of the arms embargo as part of Resolution 724 (1991).

The EC agreed on 16 December to recognise the independence of all the Yugoslav republics which fulfilled specified conditions, and said that the implementation of the decision would take place on 15 January 1992. It invited all the republics to state by 23 December whether:

- i) they wished to be recognised as independent States;
- ii) they accepted the commitments contained in the EC Guidelines on the recognition of new States in Eastern Europe and Soviet Union;²⁴³
- iii) they accepted the provisions laid down in the draft Convention - especially those in Chapter II on human rights and rights of national or ethnic groups - under consideration by the Conference on Yugoslavia;
- iv) they continued to support

241. Regulation (EEC) No 3567/91 of 2 December 1991, OJ No L142/1 of 12.12.91.

242. *The Times*, 3 December 1991, pp11.

243. The Guidelines were issued on 17 December and contained the following commitments

- 'i) respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- ii) guarantees for the rights of ethnic and national groups and minorities in accordance with commitments subscribed to in the framework of the CSCE;
- iii) respect for the inviolability of all frontiers which can only change by peaceful means and by common agreement;
- iv) acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- v) commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.'

- a) the efforts of the Secretary-General and Security Council of the United Nations
- b) the continuation of the Conference on Yugoslavia.²⁴⁴

The EC also required any republic prior to recognition 'to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community state and that it will conduct no hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims.' This later point had clear connotations for the Macedonian problem. Lord Carrington warned the Member States that recognition of Croatia and Slovenia might lead to demands for the recognition of Bosnia-Herzegovina and to the outbreak of hostilities in that republic. The US also warned that recognition could damage the prospects for peace.²⁴⁵

In response to the contribution of Montenegro to 'creating the necessary conditions for the continuation of the [peace] Conference' the EC suspended, on 10 January, the application of certain quantitative restrictions which had been applied against that republic and Serbia.²⁴⁶ This then put Montenegro in line with measures adopted for Bosnia-Herzegovina, Croatia, Macedonia and Slovenia.²⁴⁷

On 15 January the Member States of the EC²⁴⁸ formally recognised Croatia and Slovenia.²⁴⁹ This followed fulfilment of the conditions of the declaration of 16 December 1991 and the advice of the Arbitration Commission. The EC had received applications for recognition from Croatia, Slovenia, Bosnia-Herzegovina, Macedonia (which voted in a referendum for independence on 8 September), and from the self-proclaimed 'Republic of Krajina' (composed of Serb-held areas of Croatia), and from the Albanian population of the 'Republic of Kosovo.' But Serbia announced that it would not seek recognition because Serbia had been an internationally recognised State before the founding of Yugoslavia. The statement issued by the EC declared that for other republics which desired recognition 'there are still important matters to be addressed before a similar step by the Community and its Member States can be taken.'²⁵⁰ EC recognition was followed by other States the following day. Germany had proceeded with recognition in December 1991 but had delayed its implementation until the Community recognised the republics. Recognition by the EC Member States was in

244. EC Bulletin 12-1991 pp119 at 1.4.6.

245. *The Times*, 17 December 1991, pp11.

246. EC Bulletin 1/2-1992 pp107 at 1.5.8.

247. *Ibid* pp108 at 1.5.8.

248. Germany had recognised the Republics in December 1991, and that decision became effective on 15 January 1992.

249. EC Bulletin 1/2-1991 pp108 at 1.5.20.

250. *Ibid* pp108 at 1.5.20.

accordance with the boundaries of the republics finalised by Marshal Tito in 1945, but the de facto situation was that one third of Croatia was under Serbian control.²⁵¹

On 3 February the EC Council of Ministers adopted Regulation (EEC) No 545/92²⁵² fully restoring to Bosnia-Herzegovina, Croatia, Macedonia and Slovenia all the trade concessions granted to Yugoslavia which were not covered by Regulation 3567/91 of 2 December 1991, namely certain industrial products subject to tariff ceilings, agricultural products or ECSE products. In accordance with the conclusions reached on 10 January at the EPC, Montenegro was added to the list of qualifying republics. The same day the Council adopted the Commission proposal to restore the benefit of generalised preferences for agricultural products for the same republics, which were deemed to be cooperating in the peace process.²⁵³

The EC Member States formally recognised the Republic of Bosnia-Herzegovina on 7 April following popular approval of independence in a referendum held on 29 February and 1 March.²⁵⁴ The United States announced the following day its recognition of Croatia, Slovenia and Bosnia-Herzegovina. This followed the issuing of a joint statement on recognition of Yugoslav republics by the EC and US on 10 March in which a 'dual track approach' was agreed, and the US promised to give 'rapid and positive consideration' to recognition of Croatia and Slovenia.²⁵⁵

The authorisation by the Security Council of the deployment of a UN Protection Force was followed on 27 April by a joint session of the rump Parliamentary Assembly of the former Socialist Federal Republic of Yugoslavia, the National Assembly of the republic of Serbia and the Assembly of the Republic of Montenegro which adopted a declaration proclaiming the Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia'.²⁵⁶

The EC offered on 7 April to extend to Serbia the benefit of similar positive measures to those granted to the other republics on 2 December 1991 and 10 January 1992.²⁵⁷ This appeared to be on condition that Serbia implemented its promise to continue giving 'a positive response to EC sponsored peace efforts'.²⁵⁸ But in a European Political Cooperation statement, the EC and Member States condemned the violence in Bosnia 'at the hands of various armed elements with the support of regular forces, and in particular of the JNA.' It called upon all parties to abide by the agreed

251. *The Times*, 16 January 1992, pp1.

252. OJ No L63/1 of 7.3.92.

253. Regulation 548/92 of 3 February 1992, OJ 1992.L63/49.

254. EC Bulletin 4-1992 pp81 at 1.5.4.

255. EC Bulletin 3-1992 pp101 at 1.4.5.

256. Weller pp595.

257. EC Bulletin 4-1992 pp81 at 1.5.4.

258. *Ibid* pp597, referring to 'The Week in Europe' 9 April 1992.

ceasefire of 12 April and stated that they had brought the situation in Bosnia-Herzegovina to the attention of the Conference on Security and Cooperation in Europe (CSCE).²⁵⁹

On 11 May an EPC statement was issued placing the 'greatest share of the blame . . . on the JNA and the authorities in Belgrade which are in control of the army both directly and indirectly by supporting Serbian irregulars.'²⁶⁰ It demanded the complete withdrawal of the JNA and its armaments from Bosnia-Herzegovina or its disbanding and placing of armaments under effective international monitoring, and the reopening of Sarajevo airport for the distribution of humanitarian aid. The EC and its Member States requested the Belgrade authorities to commit themselves to respect the integrity of all the borders of the republics, to respect the rights of minorities, to promote the conclusion of an agreement on the status of Krajina ensuring the respect of the territorial integrity of Croatia, and to cooperate fully with all parties at the Peace Conference. In the same statement the Community and Member States also stated their decision to:

- i) recall their Ambassadors in Belgrade for consultations
- ii) demand the suspension of the delegation of Yugoslavia at the CSCE from taking part in the proceedings for the present; the situation would be reviewed on 29 June
- iii) further pursue, should the situation remain unchanged, the increasing isolation of the Yugoslav delegation in international forums, bearing in mind in particular, the impending OECD ministerial meeting
- iv) ask the Commission to study the modalities of possible economic sanctions.

Slovenia, Croatia and Bosnia-Herzegovina were formally admitted to the United Nations²⁶¹ on 22 May.²⁶² The UN had previously considered the three republics as part of Yugoslavia, which precluded the application of sanctions against Serbia and Montenegro alone. The formal recognition of the Republic of Bosnia-Herzegovina and its admission to the United Nations were important developments leading to the imposition of sanctions against the Serbia and Montenegro. The EC no longer had to cling to the legal contradiction of having normal trade relations with one part of a State (Bosnia-Herzegovina) and restricted relations with another part (Serbia). The

259. EC Bulletin 4-1992 pp84 at 1.5.14.

260. EC Bulletin 5-92 pp104 at 1.3.5.

261. UNSC Docs A/46/912 - S/23884, A/46/913 - S/23885, A/46/921 - S/23971 of 21 May 1992; UNGA Resolutions 46/236, 46/237 and 46/238 of 22 May 1992.

262. On the same day the United States closed two of the three Yugoslav consulates in the US and suspended landing rights of Yugoslav Airlines.

reception of the new States into the international community paved the way for sanctions to be imposed without making Bosnia a direct victim of the measures.

Deliberations took place within the UN and EC over the introduction of oil and trade sanctions against Serbia and Montenegro. A mortar attack on people queuing for bread which killed sixteen hardened the resolve of the UK and its Western allies. The US, UK, France and Belgium requested the Security Council to adopt oil and trade sanctions in one go rather than in two stages as had been tentatively agreed before the attack.²⁶³

The Security Council adopted Resolution 757 (1992)²⁶⁴ on 30 May acting under Chapter VII of the UN Charter. The measures adopted were to remain in place until the Council decided that the Federal Republic, including the JNA, fulfilled the requirements of Resolution 752 (1992), which demanded the withdrawal of Yugoslav federal troops and Croatian army units from Bosnia-Herzegovina and the disbanding of all irregular forces.

The Resolution required States to impose a prohibition on the introduction to their territories of all products originating in Serbia and Montenegro and the exportation of any goods to those Republics; on any dealings in any goods originating there which were exported from the Republics after the date of the resolution; on the sale and supply of any products, except for those required for strictly medical purposes notified to the Committee, to any person or body in Serbia and Montenegro or for any business carried on in or operated from the Republics. States were to prevent the provision of financial and economic resources to the authorities of the Republics or to businesses there and the removal from their territory of any funds, except payments exclusively for strictly medical or humanitarian purposes and foodstuffs. The transshipment through Serbia and Montenegro of goods originating outside of them in accordance with guidelines established by the Committee was permitted. Permission to any aircraft to take off from, land in or fly over their territory if it was destined to land in or had taken off from the territory of the Republics was to be denied unless the Committee had approved the particular flight for humanitarian or other purposes consistent with the relevant Security Council resolutions. The provision of engineering and maintenance services to aircraft registered in the Federal Republic or operated by or on behalf of entities in Serbia and Montenegro, or the provision of components, airworthiness certificates, payment of new claims against existing insurance contracts or new direct insurance for such aircraft were prohibited. All States had to reduce the level of their diplomatic representation in the Republics, prevent the participation in sporting events on their territories of groups or persons representing Serbia and

263. *The Times*, 29 May 1992, pp10.

264. UN Doc S/RES/757 (1992).

Montenegro and suspend scientific and technical cooperation and cultural exchanges with the Republics. All States, including Serbia and Montenegro, were required to ensure that no claim lay at the instance of those authorities or of any person or body in the Republics in connection with any contract or other transaction where its performance was affected by reason of the measures imposed by this and related resolutions. None of these measures applied to activities related to UNPROFOR, to the Conference on Yugoslavia and the European Community Monitor Mission. The Security Council decided to keep the measures under continuous review with a view to considering their suspension or termination following compliance with the demands of Resolution 752.

The European Community adopted Regulation (EEC) No 1432/92 on 1 June to implement the UN measures falling within EC competences.²⁶⁵ It also withdrew the trade concessions from Montenegro which had been granted on 10 January and 3 February 1992.²⁶⁶

On 18 June, the Security Council²⁶⁷ acting under Chapter VII voted that commodities and products essential for humanitarian need would no longer be subject to the prohibition on sale or supply to Serbia and Montenegro or that on financial transactions related thereto subject to the consent of the Committee of the Security Council.²⁶⁸

The communique issued on 27 June at the end of the Lisbon European Council stated:

The European Community and its Member States will not recognise the new federal entity comprising Serbia and Montenegro as the successor state to the former Yugoslavia until the moment that decision has been taken by the qualified international institutions. They have decided to demand the suspension of the delegation of Yugoslavia in the proceedings at the CSCE and other international forums and organisations.²⁶⁹

The European Council also expressed its willingness to recognise Macedonia 'within its existing borders according to [the] Declaration of 16 December 1991 under a name

265. The provisions of the Regulation are examined in Chapter 5.

266. Regulation (EEC) No 1433/92 and Decision 92/286/ECSC, OJ L151 of 3.6.92.

267. Security Council Resolution 760 (1992) of 18 June 1992.

268. The EC Council of Ministers adopted Regulation (EEC) No 2015/92 and Decision 92/338/ECSC on 20 July which respectively amended Regulation (EEC) No 1432/92 and Decision 92/285/ECSC to implement the terms of Security Council Resolution 760 (1992).

269. EC Bulletin 6-1992 pp22.

which does not include the term Macedonia.' It considered its borders inviolable and guaranteed by the principles of the UN Charter and the Charter of Paris.

The Western European Union (WEU) and NATO launched joint naval operations to monitor the implementation of sanctions in the Adriatic on 10 July.

On 20 July the EC issued an EPC statement announcing that the EC States would actively seek the exclusion of Yugoslavia from international bodies because it did not recognise the new Yugoslav state comprising Serbia and Montenegro as the sole successor to the former Socialist Federal Republic of Yugoslavia.²⁷⁰

The peace efforts of the EC and UN were brought into one framework in the form of the International Conference on the Former Yugoslavia which opened in London on 22 August. The Conference established a Steering Committee consisting of a representative of the Secretary-General of the UN (Cyrus Vance) and a representative of the presidency of the EC (Lord Owen replacing Lord Carrington), who were to act as co-chairmen, representatives of the EC troika and of a CSCE troika, one representative of the Organisation of the Islamic Conference, and two representatives of neighbouring States. Six working groups were established to operate in continuous session in Geneva under the direction of the co-chairmen of the Steering Committee. These consisted of the working groups on Bosnia-Herzegovina (to promote a cessation of hostilities and a constitutional settlement in the republic); on Humanitarian Issues (to promote humanitarian relief including refugees); on Ethnic and National Communities and Minorities (to recommend initiatives for resolving ethnic questions); on Succession Issues (to resolve succession issues arising from the emergence of new States); on Economic Issues; and on Confidence and Security-Building and Verification Measures (to develop confidence-building measures covering military movements, arms control, and arms transfers and limitations, and measures for their monitoring and verification).

On 8 September the EC Council of Ministers decided²⁷¹ to subject exports destined for the States of Bosnia-Herzegovina, Croatia, and the former Yugoslav republic of Macedonia to prior authorisation by the relevant Member State authorities. This would in turn be dependent on the prior issue of import licences by the authorities of the republics in question and on a commitment by them to acknowledge the safe receipt of exports. This three-tiered control mechanism was designed to ensure the exports to former Yugoslav republics or territories bordering on Serbia and Montenegro were not diverted. Slovenia was excluded because it does not border Serbia or Montenegro.²⁷² These licences do not apply to exports comprising foodstuffs

270. EC Bulletin 7/8-1992 pp108 at 1.5.5.

271. Regulation (EEC) No 2656/92 of 8 September 1992, OJ No L 226/27 of 12.9.92, and Decision 92/470/ECSC, OJ No L 266/29 of 12.9.92.

272. DTI Press Notice P/92/584 of 15 September 1992.

or products intended strictly for medical purposes, for essential humanitarian need or for activities related to UNPROFOR, the Conference on Yugoslavia or the EC Monitor Mission, and those consignments worth less than ECU 1000. Between 19 September and 1 November 1992 exports pursuant to contracts concluded before 19 September 1992 were also exempt provided execution of the contract began before that date.

On the same day the Council adopted a Regulation²⁷³ to prevent goods being diverted to Serbia and Montenegro by confining use of the TIR carnet to consignments sent via these territories either under the Community transit procedure for intra-Community trade or the common transit procedure for trade between the Community and EFTA. Community or common transit procedures were more sophisticated and watertight than TIR procedures so that the simultaneous use of transit and TIR carnet procedures would ensure that the embargo was more effective.

On 23 September, following a recommendation by the Security Council, the General Assembly voted by 127-6 to prevent the delegation of the Socialist Federal Republic of Yugoslavia from taking up its seat in the Assembly until it reapplied for membership.²⁷⁴ On 24 August Yugoslavia was also barred from the International Atomic Energy Agency.

Lord Owen and Mr Vance presented their proposals for the shape of the future of Bosnia on 27 October.²⁷⁵ The Vance-Owen plan consisted of constitutional proposals, military arrangements and a map dividing Bosnia-Herzegovina into ten ethnic regions. The Republic would retain a central government but give considerable autonomy to up to ten regional authorities. The central government would consist of a ceremonial president and a prime minister whose cabinet would be ethnically balanced. A constitutional court and a human rights court composed of five foreign judges would be established; and ombudsmen from all groups would deal with the reversal of ethnic cleansing.

On 16 November the UN Security Council passed Resolution 787 (1992).²⁷⁶ It prohibited the transshipment of crude oil, petroleum products, coal, energy-related equipment, iron, steel, other metals, chemicals, rubber, tyres, vehicles, aircraft and motors of all types unless specifically authorised by the Committee. All States were called on to take all steps necessary to ensure that none of their exports are diverted to Serbia and Montenegro. All States were required to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security

273. Regulation (EEC) No 2655/92 of 8 September 1992, OJ No L 266/26 of 12.9.92.

274. *The Times*, 24 September 1992, pp10.

275. *The Times*, 28 October 1992, pp12.

276. UN Doc S/RES/787 (1992).

Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions of resolutions 713 and 757. The Security Council reaffirmed the responsibility of riparian States to measures necessary to ensure that shipping on the Danube is in accordance with resolutions 713 and 757, including the halting of such shipping in order to inspect and verify their cargoes and destinations.²⁷⁷

NATO and the WEU agreed on 20 November to enforce the trade embargo and so gave its vessels in the Adriatic and on the Danube the power to stop and search merchant ships suspected of violating the arms and trade sanctions.

The EC discontinued the double control procedure, introduced on 8 September 1992, in relation to trade with Croatia and the former Yugoslav Republic of Macedonia.²⁷⁸ It was made redundant in these territories by the establishment of Sanctions Assistance Missions (SAMS) by the CSCE which enabled the competent authorities to control effectively the exports from or through its territory to Serbia and Montenegro. The original procedure was maintained for Bosnia-Herzegovina because the conflict made it difficult to set up a Sanctions Assistance Mission in the Republic. Additional SAMS were established in Romania, Bulgaria, Hungary and the Ukraine to provide assistance to local customs officers and other personnel both with advice and manpower.²⁷⁹

It was announced on 14 January 1993 that the EC would make its first deliveries of aid to the former Yugoslav republic of Macedonia in February to compensate it for the adverse effects of sanctions. Twenty million ECUs worth of aid (out of the 100 ECU package decided in Edinburgh) would be sent and a second tranche prepared.²⁸⁰

The persistent refusal of the Bosnian Serbs to sign the Vance-Owen peace plan and their prolonged siege of eastern Bosnian towns preventing aid reaching those towns led to the adoption of Resolution 820 (1993)²⁸¹ by the UN Security Council on 17 April. The measures adopted under the resolution were set to come into force nine days after its adoption 'unless the Secretary-General has reported to the Council that the Bosnian Serb party has joined the other parties in signing the peace plan and in implementing it and that the Bosnian Serbs have ceased their military attacks.' This

277. The Resolution was implemented by the EC in Regulation (EEC) No 3534/92 of 7 December 1992 OJ No L358/16 of 8.12.92.

278. Regulation (EEC) No 40/93 of 8 January 1993, OJ No L7/1 of 13.1.93.

279. Douglas Hogg, Minister of State of the Foreign and Commonwealth Office, Foreign Affairs Committee, *The Expanding Role of the United Nations and its Implication for UK Policy.*, Minutes of Evidence, 2 December 1992 pp93 at para 152.

280. EC Bulletin 1/2-1993.

281. UN Doc S/RES/820 (1993).

demand was not met within the stated deadline, and so they came into force on 26 April 1993. But the resolution had provided that if the Secretary-General reported that such attacks resumed or that the Serbs failed to comply with the peace plan, then the measures would immediately have come into force.

The import to, export from and transshipment through the United Nations Protected Areas in Croatia and those areas of Bosnia-Herzegovina under the control of Serb forces, with the exception of essential humanitarian supplies including medical supplies and foodstuffs distributed by international humanitarian agencies, were prohibited unless proper authorisation was obtained from the Government of Croatia or of Bosnia-Herzegovina respectively. States were to prevent the diversion to Serbia and Montenegro of products said to be destined for other places, particularly the UNPAs and areas of Bosnia controlled by Serb forces. The transshipment of goods through the Federal Republic on the Danube was permitted only on the specific authorisation of the Committee. It confirmed that no vessels connected with Serbia or Montenegro or suspected of having violated or being in violation of Security Council sanctions were to be permitted to pass through waterways in the territories of members. States in which funds of the authorities in Serbia and Montenegro, of businesses in the Republics, or those controlled directly or indirectly by such authorities or by Serbian or Montenegrin businesses were compelled to require all persons and entities holding such funds to freeze them to ensure that were not made available, directly or indirectly, to the authorities in the Federal Republic or to businesses in Serbia and Montenegro. The transport of goods across the land borders or to or from the ports of the Republics was prohibited subject to certain exceptions. States neighbouring Serbia and Montenegro were required to prevent the passage of all freight vehicles and rolling stock into or out of the Republics, except at certain crossings. All States were to impound all Serbian or Montenegrin vessels, freight vehicles, rolling stock, and aircraft found in their territories and such carriers could be forfeited if they violated the UN sanctions. These and cargoes had to be detained, pending investigation and, where appropriate the cargo forfeited to the detaining State. The provision of financial and non-financial services to any person or business in Serbia and Montenegro was prohibited, with the exception of telecommunications, postal services and legal services, those services approved by the Committee, and services whose supply may have been necessary for humanitarian or other exceptional purposes. All commercial maritime traffic was prohibited from entering the territorial sea of the Federal Republic, except when authorised by the Committee or in case of *force majeure*. None of the above measures applied to the activities related to UNPROFOR, the International Conference on the Former Yugoslavia or the European Community Monitor Mission.

The Resolution stated that the Security Council was ready 'after all three Bosnian parties have accepted the peace plan and on the basis of verified evidence, provided by the Secretary-General, that the Bosnian Serb party is cooperating in good faith in effective implementation of the plan, to review all the measures in the present resolution and its other relevant resolutions with a view to gradually lifting them.'

The complete economic isolation of Serbia and Montenegro was set in place. But the application of the measures required State legislation and commitment to effective implementation and monitoring.

CHAPTER 5
THE INTERNATIONAL SANCTIONS IMPOSED AGAINST SERBIA AND
MONTENEGRO

I. The European Community Measures of November 1991

The first economic measures²⁸² taken by the European Community in response to the situation in Yugoslavia were those taken in November 1991. These consisted of:

- the immediate suspension of the trade and cooperation agreement with Yugoslavia and a decision to terminate the agreement.
- the restoration of the quantitative limits for textiles
- the removal of Yugoslavia from the list of beneficiaries of the Generalized System of Preferences
- the formal suspension of benefits under the Phare programme

The final three listed are acts of retorsion for they do not breach contractual obligations owed to Yugoslavia. But the suspension and denunciation of the Cooperation and Trade Agreements (the Agreements) are difficult to classify. Their purpose was clearly to show disapproval at the situation then prevailing in Yugoslavia and particularly at the non-observance of the cease-fire agreement of 4 October 1991. They are not counter-measures for no internationally wrongful act was committed or alleged to have been committed. Neither are they strictly acts of retorsion since the grounds invoked are concerned with justification in treaty law rather than as merely unfriendly acts.

1. Denunciation and Suspension of the Cooperation and Trade Agreements

The denunciation of the two Cooperation and Trade Agreements was effected in accordance with their terms. Article 60 of the EEC-Yugoslavia Agreement provided that the treaty could be denounced by either side by giving six months notice to the other contracting party.²⁸³ The effect of this provision is that no reasons need be given or procedure observed other than notification. The Council of Ministers denounced the Agreements on 25 November 1991. The Regulation²⁸⁴ effecting denunciation was based on Article 238 EEC since this was the provision which gave the European Community competence to conclude the EEC-Yugoslavia Agreement. The result was

282. In the summer of 1991 the EC did not approve the third Financial Protocol or the Transport Agreement with Yugoslavia,

283. Article 15 of the ECSC-Yugoslavia Agreement was worded to have similar effect.

284. Decision 91/602/EEC of 25 January 1991, OJ 1991 L325/23.

that the approval of the European Parliament was required, and this was achieved by use of the parliamentary emergency procedure.

Denunciation would have had no effect on the application of the Agreements until the expiry of the six month period. So the European Community had to suspend their operation to achieve instant implementation of the measure. This eventuality was not provided for by the terms of the Agreements and so the European Community had to find justification in the law of treaties. The Community suspended both the Agreements and the trade concessions granted under them on 11 November 1991.²⁸⁵ The grounds stated in the preamble to the Decision suspending the treaties were:²⁸⁶

Whereas the pursuit of hostilities and their consequences on economic and trade relations, both between the Republics of Yugoslavia and with the Community, constitute a radical change in the conditions under which the Cooperation Agreement . . . and its Protocols, as well as the Agreement on ECSC products, were concluded; whereas they call into question the application of such Agreements and Protocols.

The grounds invoked to justify the suspension were, seemingly, the *clausula rebus sic stantibus* and supervening impossibility of performance.²⁸⁷ The use of such claims for the legal justification for such an overtly political act must be examined carefully since they are not founded on the wrongdoing of the other party. As with national law, strict conditions are imposed on the invocation of such grounds.

The Vienna Convention on the Law of Treaties defines the circumstances in which these grounds may be used to excuse States from their international obligations. The first problem faced when referring to the Convention is that the European Community is not party to it. However its relevant terms are binding on it since they are rules of customary international law.²⁸⁸ The procedural requirements are merely conventional and so are not binding on the European Community.

Article 61(1) of the Vienna Convention states:

A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent

285. Decision of the Council 91/586/ECSC, EEC of 25 November 1991, OJ 1991 L325/23, and Regulation (EEC) No 3300/91 of 11 November 1991. This latter legislation was based on Article 113 EEC, see *Kuyper Trade Sanctions, Security and Human Rights Policy in the European Communities* p24, footnote 74.

286. Decision 91/586/ECSC, EEC of 25 November 1991, OJ 1991 L325/23.

287. *Kuyper Trade Sanctions, Security and Human Rights Policy in the European Communities* p25.

288. *Icelandic Fisheries Jurisdiction Case (UK v Iceland)* ICJ Reports '1973, pp18 (*rebus sic stantibus*).

disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

The restriction of the application of this Article to the disappearance or destruction of 'an object indispensable for the execution of the treaty' has been judged by some to be too narrow.²⁸⁹ Reuter maintained that beyond the scope of material impossibility a State could rely on the doctrine of *force majeure*.²⁹⁰ There is no material destruction on which the European Community could base justification under Article 61(1). It is equally doubtful that it could find a satisfactory basis in *force majeure*. For it is highly dubious that the obligations imposed by the Cooperation and Trade Agreements could not be carried out. The doctrine requires that 'impossibility of performance must be absolute'.²⁹¹ In November 1991 the Yugoslav crisis was restricted to the north of the Federation (in Croatia), but this would not have practically prevented the application of the provisions of the Agreements to the rest of Yugoslavia. It would have been more plausible to claim impossibility of performance of the obligations in part of the territory, but not for the whole State. The transparency of the Community's reasoning is shown by its decisions of 2 December 1991 and 3 February 1992 to restore the benefits of the Cooperation and Trade Agreement to the individual republics except to Serbia and Montenegro. The beneficiaries included Croatia where the continuing conflict was the very ground for the purported suspension of the Agreements.

The wide ranging obligations of the Agreements also make it difficult to justify the invocation of Article 61(1). The doctrine contained in that provision and that of *force majeure* require that all obligations are impossible to perform before the whole of the treaty may be suspended.²⁹² The principle of *pacta sunt servanda* is stronger than the claim of the European Community to be justified to suspend the Agreements on the ground of supervening impossibility of performance. 'L'imagination juridique'²⁹³ of the Community was lacking in convincing arguments to use this ground in its search for a legal basis to show its political disapproval at the events in the former Yugoslavia.

The invocation of the *clausula rebus sic stantibus* is on a more solid foundation and, from the wording of the Decision, this appears to be the main reason given by the Community. It is reference to an implied clause conditioning the validity

289. Sinclair *The Vienna Convention on the Law of Treaties* p191-92.

290. Reuter *Introduction to the Law of Treaties* p145 para 284

291. Reuter p145 para 248.

292. Reuter p146 para 286.

293. Dusko Lopandic *Un Exemple de Sanctions Economiques de la CEE: Suspension/ dénonciation de l'accord de coopération entre la CEE et la Yougoslavie* *Revue D'Affaires Européennes* (1992) Vol 2 pp67; pp70.

of the treaty upon the continuance of the circumstances existing at the time when it is made. Article 62 of the Vienna Convention lays down the requirements for the proper invocation of the *clausula*.

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless

a) the existence of these circumstances constituted an essential basis of the consent of the parties to be bound by the treaty

and

b) the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty.

Article 62(3) provides that where the above conditions are fulfilled the treaty may be suspended. It is doubtful whether the suspension of the Agreements clears this two stage test. The first leg may well be satisfied in that the European Community would have been unlikely to conclude the Agreements with a disintegrating federal state which was plagued by civil war in one of its republics and with another on the verge of internal conflict. However the extent of the obligations under these Agreements can barely be said to be radically transformed.

Illustrations of the obligations contained in the Agreements prove the inappropriateness of the invocation of these two grounds by the European Community purporting to justify the suspension of those treaties. The EEC-Yugoslavia Agreement²⁹⁴ instituted a framework for cooperation in economic, technical, financial, trade and social fields:

a) the establishment of the exchange of information on agricultural policies (Art 7(2)), on transport policy (Art 8(3)), on environmental matters (Art 9), on financial policy (Art 12 (1))

b) Article 15 stipulated that, subject to specified exceptions, products originating in Yugoslavia shall be imported into the Community free of quantitative restrictions and measures having equivalent effect, and of customs duties and charges having equivalent effect.

c) Article 27 stated that in the field of trade Yugoslavia shall grant the Community treatment no less favourable than most-favoured-nation treatment.

294. Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia OJ 1983 L41/2 of 14.2.1983.

It is difficult to see how such obligations were rendered impossible to perform or radically transformed in scope by the hostilities which were at the time of the suspension of the Agreements restricted to Croatia. The operation of the customs duty regime applicable to products entering the European Community originating in Yugoslavia was hardly made impossible or radically transformed in its scope by the fighting in Croatia. The legal justification for the suspension of the Agreements is at best inadequate.

The procedural requirements of the Vienna Convention set out in Article 65 are not, as previously noted, binding on the Community. The rules of customary international law do prescribe that a reasonable period of notice has to be given before the suspension of a treaty can validly take effect. The announcement in the European Political Cooperation statement of 6 October 1991 could be seen as such notice.²⁹⁵ If this is accepted as an adequate means of giving notice, rather than direct communication of the intention to Yugoslavia, then the period of one month may be regarded as reasonable.²⁹⁶

2. Further Measures

The consequences of the suspension and denunciation of the Agreements required additional measures to be taken to effect the results desired by the Community. For otherwise Yugoslavia would have profited from other beneficial European Community trade concessions.

The European Community negotiated an Additional Protocol to the Cooperation Agreement in 1986 covering trade in textiles. The fate of the textiles agreement was, thus, directly related to that of the Cooperation Agreement. The Protocol placed quantitative restrictions on the import into the European Community of textiles originating in Yugoslavia. The effect of the demise of the Cooperation Agreement would have been for such products to fall under the regime of the common rules for imports.²⁹⁷ There would then be no restrictions on the importation of goods emanating from Yugoslavia. The Council of Ministers adopted arrangements for imports of certain textile products originating in Yugoslavia, establishing unilateral restrictions.²⁹⁸

295. *Kuyper Trade Sanctions* p26.

296. *Kuyper Trade Sanctions* p26.

297. Regulation (EEC) No 288/82 of 5 February 1982, OJ 1982 L35/1 of 9 2.82, as last amended by Regulation (EEC) No 2978/91 (OJ 1991 L284/1 of 12 10.91).

298. Regulation (EEC) No 3301/91 of 11 November 1991, OJ 1991 L315/3 of 15.11.91.

To complete the full withdrawal of trade benefits from Yugoslavia, the Socialist Federal Republic was excluded from the Generalised System of Preferences.²⁹⁹ This is a regime instituted unilaterally by the European Community allowing duty free or annually determined reduced rates of duty on imports of certain developing countries. Yugoslavia had only benefited to a limited extent under the GSP since the conclusion of the 1980 Cooperation Agreement. Yugoslavia would have been able to rely on the System had it not been withdrawn.³⁰⁰

The result of these measures was the complete break in formal institutional trading relations between the European Community and Yugoslavia. The first time that this has been effected by the Community against a trading partner.³⁰¹

By suspending the Cooperation Agreement and then restoring equivalent benefits to certain parts of the Socialist Federal Republic of Yugoslavia,³⁰² the European Community had separate trade relations with non-recognised entities. No trade treaties were concluded with the republics concerned, but the arrangements effected presented an apparent dichotomy of the European Community undertaking inter-state relations with entities which its Members did not then recognise as States. There are two ways of looking at this situation.

The first is that the Republics to whom the concessions were granted had in fact acquired statehood by that time and that the European Community was merely extending trading favours to newly established States although having not yet recognised them. Lauterpact's proposition of 1947 that 'recognition of states is not a matter governed by law but a question of policy'³⁰³ is today 'more accurate than ever before'.³⁰⁴ The attainment of statehood by the Republics would provide a satisfactory answer to an otherwise legally problematic situation. The dissolution of the SFRY has been progressive and so it is impossible to ascribe a date on which the Republics became States. The invitation of the European Community to the former Yugoslav republics to declare whether they wished to be recognised must imply some acknowledgement by the European Community that the Republics fulfilled at least some of the traditional features of statehood.

299. Regulation (EEC) No 3302/91 of 11 November 1991, OJ 1991 315/46 of 15.11.91.

300. *Kuyper Trade Sanctions* p24

301. *Lopandic Un Exemple de Sanctions Economiques de la CEE* p68

302. Certain equivalent trade concessions were granted to Bosnia-Herzegovina, Croatia, Macedonia and Slovenia on 2 December 1991, and to Montenegro on 10 January 1992, and fully restored all concessions to these Republics on 3 February 1992. See Chapter 4.

303. H. Lauterpacht *Recognition in International Law* (1947) pp1.

304. Rich "Recognition of States: The Collapse of Yugoslavia and the Soviet Union" 4 *European Journal of International Law* 1993 pp36.

The second approach is to consider that the SFRY, although 'in the process of dissolution,'³⁰⁵ it was still intact at that point and that none of the Republics had acquired statehood. This leads to a more complex explanation of the European Community measures. For if this was the case, the European Community accepted imports originating from certain parts of one State on different terms to those originating from other parts of the same State. The aim of this was to bring influence to bear on Serbia and Montenegro, but in the search to isolate two republics in a federal state, the European Community had established a legal position which it is difficult to appreciate. The explanation may be that the Community has virtual competence by virtue of the terms of Article 113 of the EEC Treaty, and there is no legal requirement for a trade treaty. The other party would be on secure legal ground to ensure that the trade concessions continued to operate, but under the present situation it is an informal arrangement unilaterally established by the Community. It is not absolutely clear that the European Community has the competence to do this under the Treaty, but without the option of a trade treaty at that point in time it appears to be the best means available of permitting goods of those republics contributing to the peace process to enter the territory of the Community at preferential rates compared to those from Serbia and Montenegro. It will require a decision of the Court of Justice of the European Communities to appreciate fully whether such a device is legally valid.

II. United Nations Sanctions

This section involves a subject analysis of the sanctions introduced by the United Nations and their implementation by the European Community and the United Kingdom.

1. Embargo on Goods

Resolution 757 (1992) of the Security Council, adopted under Chapter VII of the Charter, imposed a general embargo on imports and exports from Serbia and Montenegro³⁰⁶. All States were required to prevent the importation of all products³⁰⁷ originating in Serbia and Montenegro. They had to stop any activities by their nationals or in their territory intended to promote the export or transshipment of any goods

305. Badinter Arbitration Commission Opinion No 1, ILM Vol XXXI No 6 Nov 1992 p1497.

306. The designation 'Serbia and Montenegro' is used in the narrative, but the term 'Federal Republic' (of Yugoslavia) is to be found in some of the quotations from legislation.

307. The term 'product' in this section is used to include all commodities and products.



originating in the Serbia and Montenegro; and any dealings by their nationals or their flag vessels or aircraft or in their territories in any goods originating in the Republics and exported from it after the date of the resolution, including any transfer of funds to the Serbia and Montenegro for the purposes of such activities or dealings. States were obliged to prevent the sale and supply by their nationals or from their territories or using their flag vessels or aircraft of any products, except for those required for strictly medical purposes notified to the Committee, to any person or body in the Republics, or to any person or body for the purposes of any business carried on in or operated from Serbia and Montenegro and any activities by their nationals or in their territories designed to promote such sale or supply.

These measures did not apply to the transshipment through the Serbia and Montenegro of goods originating outside of it and temporarily present in its territory for the sole purpose of such transshipment, in accordance with guidelines established by the Security Council Committee established under Resolution 713 (1991) ('the Committee'). As with all the relevant Security Council resolutions none of these measures applied to activities related to UNPROFOR, to the Conference on Yugoslavia and the European Community Monitor Mission.

The European Community implemented its legislation on 1 June 1992. Regulation (EEC) 1432/92³⁰⁸ prohibited the introduction into the Community of all products originating in Serbia and Montenegro, and the exportation of goods to those republics of any products originating in the Community. It proscribed any activity whose object or purpose was to promote, directly or indirectly, such imports or exports. The Regulation established exceptions to these prohibitions. These did not cover exports to Serbia and Montenegro of products intended for strictly medical purposes and foodstuffs notified to Security Council Committee (subject to the prior authorisation of the competent authorities of the Member States); products entering the Community which were exported from Serbia and Montenegro before 31 May 1992; any activity designed directly or indirectly to promote either of these foregoing transactions; the transshipment through Serbia and Montenegro of products originating outside these Republics and which were temporarily in their territory for the purpose of transshipment only; and the activities of UNPROFOR, the Conference on Yugoslavia and the European Community monitor mission.

Implementation of Resolution 757 (1992) was initially achieved in the UK by the introduction of secondary legislation under the Import, Export and Customs Powers (Defence) Act 1939. Section 1(1) of the Act empowers the Secretary of State for Trade and Industry³⁰⁹ to make such provisions as he thinks expedient for

308. OJ 1992 L151/4 of 3.6.92.

309. The Act originally invested the power in the Board of Trade. The Secretary of State for Trade and Industry Order 1970 (SI No

prohibiting or regulating the importation into and the exportation from the UK (including the Isle of Man) of all goods or of specified goods. The Export of Goods (Control) (Serbia and Montenegro Sanctions) Order 1992 (hereafter the Export of Goods Order) entered into force on 31 May 1992 by virtue of the Act. The Export of Goods Order provided that, unless a licence was granted under the Order by the Secretary of State and its conditions complied with, all goods were prohibited to be exported from the UK to any destination in Serbia and Montenegro or to any destination in any other country for delivery, directly or indirectly, to a person for the purposes of any business carried on in or operated from either of those territories (Article 2(1)). Any licence granted by the Secretary of State under any other Order relating to the control of exports adopted under s1 of the 1939 Act and any licence granted pursuant to any other enactment prohibiting or restricting export was made subject to Article 2(1) of the Order. The provisions of the Export of Goods (Control) Order 1991 on customs powers for demanding evidence, on offences related to licences and on declarations as to goods and powers of search applied to the 1992 Order. The Export of Goods Order was revoked³¹⁰ on 12 June 1992 after the entry into force a week earlier of an Order in Council under the provisions of the United Nations Act 1946.

The 1946 Act enables measures passed by the Security Council under Article 41 of the UN Charter to be applied by way of Order in Council. Her Majesty may make such provision as appears necessary or expedient for enabling those measures to be effectively applied. It was by this enabling legislation that the greater part of Resolution 757 was applied in national law by Her Majesty's Government.

The Serbia and Montenegro (United Nations Sanctions) Order 1992³¹¹ ('the 1992 UN Sanctions Order') came into force on 5 June 1992. Its relevant provisions applied to any person within the UK (which for the purposes of the Order includes the Isle of Man) and to any person elsewhere who was a British citizen, a British Dependent Territories citizen, a British Overseas citizen, a British subject or a British protected person, or a body incorporated or constituted under the law of any part of the UK (hereafter 'British persons'). It would automatically cease to have effect or its operation would be suspended if the Security Council decided to cancel or suspend the operation of Resolution 757, and notice of that decision would be published in the London, Edinburgh and Belfast Gazettes.

1970/1537) transferred the functions of the Board to the Secretary of State to be exercisable concurrently with the Board.

310. The Export of Goods (Control) (Serbia and Montenegro Sanctions) (Revocation) Order 1992, SI No 1992/1419

311. SI 1992/1302.

The Order³¹² prohibited the supply or delivery, agreement to supply or deliver, or any act calculated to promote the supply or delivery of any goods without a licence ('Article 3 licence') granted by the Secretary of State under this Order or under the Export of Goods Order to persons connected with Serbia or Montenegro ('connected persons'), namely

- i) the Governments of the Federal Republic of Yugoslavia, of Serbia and of Montenegro
- ii) any other person in, or resident in, Serbia or Montenegro
- iii) any body incorporated or constituted under the law of Serbia or Montenegro
- iv) any body, whether incorporated or constituted, which is controlled by any of these Governments, any other person in, or resident in, Serbia or Montenegro, or any body incorporated in or constituted under the law of Serbia or Montenegro; and
- v) any person acting on behalf of any of the above mentioned persons.

A licence ('Article 4 licence') granted by the Secretary of State under the 1992 UN Sanctions Order or the Export of Goods Order was required for the exportation of any goods from the UK to anywhere in Serbia or Montenegro or to any destination for the purpose of delivery, directly or indirectly, to one of the above.

The importation into the UK of goods originating in Serbia or Montenegro by any person was prohibited except under the authority of a licence granted under the 1992 UN Sanctions Order ('Article 5 licence') or the Import of Goods (Control) Order 1954. If neither of these licences had been obtained, any act calculated to promote the exportation of goods from Serbia and Montenegro and any dealings³¹³ in goods exported from those Republics after 30 May 1992 were prohibited unless authorised by separate licences.

Any ship or aircraft registered in the United Kingdom or chartered to any British person and any land transport vehicle (including barges) within the UK could not, without a licence, be used to carry goods to any destination in Serbia or Montenegro or to any connected person (unless the supply or delivery or exportation

312. The order contains provisions on offences created by the order; proceedings brought for and penalties for contravention of those offences; defences to those offences; and powers of the Customs and Excise authorities in relation to investigation and enforcement of the Order.

313. Dealings covered 'by way of trade or otherwise for gain, the acquisition or disposal of such goods or of any property or interest in them or any right to or charge upon them, the processing of them, or the commission of any act by a person calculated to promote any such acquisition, disposal or processing by him or any other person.'

has been authorised by an Article 3 licence or an Article 4 licence). Nor without authorisation could they carry goods exported from Serbia or Montenegro after 30 May 1992 unless the importation of the goods was authorised by an Article 5 licence).³¹⁴

Resolution 787 (1992) was passed by the UN Security Council on 16 November 1992. The measures in the Resolution on the enforcement on the embargo were adopted under the provisions of Chapter VII. The Resolution was passed to overcome the reported diversion of goods transshipped across Serbia and Montenegro from their proper destinations such as Greece. The Security Council called on all States to take all steps necessary to ensure that none of their exports were diverted to Serbia and Montenegro and imposed a partial ban on the transport of goods through the Republics. This affected the transshipment of crude oil, petroleum products, coal, energy-related equipment, iron, steel, other metals, chemicals, rubber, tyres, vehicles, aircraft and motors of all types unless specifically authorised by the Committee on a case-by-case basis under its no-objection procedure.

No UK domestic legislation was introduced since implementation was effected through the European Community. The European Community Council of Ministers adopted Regulation (EEC) No 3534/92³¹⁵ on 7 December to give effect to Resolution 787 by amending Regulation 1432/92. It had retrospective effect to 17 November 1992. It prohibited the transshipment across Serbia and Montenegro of crude oil, petroleum products, omission energy-related equipment, metals, chemicals, rubber, tyres, vehicles, aircraft and motors of all types, unless authorised by the Security Council Committee as provided in Resolution 787.

The implementation of Resolution 787 in relation to ECSC products was achieved by Decision 92/555/ECSC of 7 December. It subjected the transshipment of products covered by the ECSC Treaty originating outside the Republics of Serbia and Montenegro and temporarily present in the territory of these Republics solely for the purpose of transshipment to authorisation by the Committee in accordance with Resolution 787. Its provisions also had effect retrospectively to 17 November 1992.

Resolution 820 (1993) of 17 April 1993 of the Security Council plugged the final holes in the embargo. The prohibitions in place were extended to cover the import to, export from and transshipment through the United Nations Protected Areas in Croatia and those areas of Bosnia-Herzegovina under the control of Serb forces ('the specified territories'), with the exception of essential humanitarian supplies including medical

314. The offences, penalties and defences for violation of these provisions were prescribed in the 1992 UN Sanctions Order.

315. OJ 1992 L358/16 of 8.12.92.

supplies and foodstuffs distributed by international humanitarian agencies unless proper authorisation was obtained from the Government of Croatia or of Bosnia-Herzegovina respectively. States were required to take steps to prevent the diversion to Serbia and Montenegro of products said to be destined for other places, particularly the UNPAs and areas of Bosnia-Herzegovina controlled by Serb forces. The transshipment of goods through Serbia and Montenegro on the Danube was permitted only on the specific authorisation of the Committee, and each vessel had to be subject to effective monitoring while passing along the Danube between Vidin/Calafat and Mohacs. The transport of goods across the land borders or to or from the ports of Serbia and Montenegro was prohibited with the exception of the importation of medical supplies and foodstuffs into Serbia and Montenegro (as provided for in Resolution 757); the importation of other essential humanitarian supplies into the Republics approved on a case-by-case basis by the Committee; and strictly limited transshipments through its territory when authorised by the Committee. States neighbouring Serbia and Montenegro were required to prevent the passage of all freight vehicles and rolling stock into or out of the Federal Republic, except at a strictly limited number of road and rail border crossings whose location were to reported to and approved by the Committee

Regulation (EEC) No 990/93³¹⁶ had the effect of implementing Security Council Resolution 820 and of codifying the existing European Community measures against Serbia and Montenegro. It revokes Regulations (EEC) No 1432/92, (EEC) No 2656/92 and (EEC) No 2655/92, but repeated their provisions in its Articles, thereby codifying the EEC sanctions. In addition new measures were added to implement Resolution 820, and only these additions are considered to avoid repetition. The Regulation was adopted on 26 April 1993 and entered into force on the same day. It applied within the territory of the Community, including its air space and in any aircraft or vessel under the jurisdiction of a Member State, and to any person elsewhere who was a national of a Member State and any body elsewhere which was incorporated or constituted under the law of a Member State. But the prohibitions were not applicable to the activities related to UNPROFOR, the Conference on the Former Yugoslavia or the European Community Monitoring Mission.

The Regulation prohibited the transit through Serbia and Montenegro of all products originating in, coming from, or having transited through the Community, and the export to Serbia and Montenegro of all products which had been transited through the Community were prohibited and any activity whose object or effect was, directly or indirectly, to promote these transactions.

316. Decision 93/235/ECSC was adopted and entered into force on the same day instituting equivalent measures in relation to goods falling under the ECSC Treaty.

The Regulation prohibited from 26 April 1993 the importation into the Community of all products originating in, or having transited through the specified territories and the export to or transit through these areas of all products originating in, coming from or transiting through the Community unless properly authorised by the Government of Bosnia-Herzegovina or the Government of Croatia respectively. This did not apply to the export to, import from or transit through these areas of essential humanitarian supplies, including medical supplies and foodstuffs distributed by international humanitarian agencies. All such importation, exportation and transits are also made subject to the prior authorisation by the competent authorities of the Member States.

The new exceptions to the original and additional prohibitions were the transit through the Community to Serbia and Montenegro of medical supplies and foodstuffs notified to the Committee; the export from (subject to the prior authorisation of the competent authorities of the Member State), or transit through, the Community to the Republics of essential humanitarian supplies approved by the Committee on a case-by-case basis; the introduction into the territory of the Community of products which originate or come from the Federal Republic and were exported from it before 31 May 1992 or which had entered legally for transit through the Republic before 26 April 1993; transits through Serbia and Montenegro authorised by the Committee and, in case of transit on the Danube, each vessel involved was subject to effective monitoring while passing along the Danube between Vidin/Calafat and Mohacs (subject to the prior authorisation of the competent authorities of the Member State); and any activity whose direct or indirect object or effect was to promote any of these activities. The export of products from the Community of medical supplies and foodstuffs notified to the Committee were also rendered subject to the prior authorisation of the competent authorities of the Member State.

HM Government granted authorised officials enhanced powers over ships, aircraft and road vehicles to enforce the embargo on goods. These are examined under the restrictions on transport section below.

The Export of Goods Order (Control) (Croatian and Bosnian Territories) Order 1993,³¹⁷ which entered into force on 26 April 1993, prohibited the exportation of all goods from the UK to any destination in the UNPAs in Croatia and those areas of Bosnia-Herzegovina under the control of Bosnian Serb forces (the specified territories) or for transit through the specified territories unless authorised by a licence granted under the Order.³¹⁸ It rendered any licence issued by the Secretary of State under any

317. SI 1993/1189.

318. A licence for importation would not normally be allowed, as a matter of policy, subject to certain exceptions, unless proper authorisation has been obtained from the governments of Croatia

Order relating to the control of exports made under s1 of the Import, Export and Customs Powers (Defence) Act 1939 or issued under any other enactment prohibiting or restricting the exportation subject to these provisions. The Order did not apply to goods exported in connection with the activities of UNPROFOR, the International Conference on the former Yugoslavia or the European Community Monitor Mission.

The effect of the Export of Goods Order (Control) (Croatian and Bosnian Territories) Order 1993 was that the dual licensing system for the whole of Bosnia-Herzegovina ceased to apply on 26 April.³¹⁹ A licence would not normally be given, as a matter of policy, subject to certain exceptions, unless proper authorisation had been granted by the governments of Croatia and Bosnia-Herzegovina and authorisation had been given by the Secretary of State.³²⁰

The Open General Import Licence was amended such that from 26 April all goods originating, consigned from or transmitted through the specified territories require an individual import licence issued against proper authorisation from the governments of Croatia and Bosnia-Herzegovina. Any licence issued prior to that date which authorised the import of such goods was rendered subject to the requirement of a new licence.

2. Prohibition on Services

Resolution 757 of the Security Council contained no restrictions on the provision of services. However the European Community in Regulation (EEC) 1432/92 banned the provision of non-financial services intended, directly or indirectly, to promote the economy of Serbia and Montenegro, and particularly those non-financial services provided:³²¹

- i) for the purpose of any activity carried out in or from Serbia and Montenegro
- ii) to one of the following persons:
 - a) any natural person in Serbia or Montenegro,
 - b) any legal person so constituted or incorporated under the law of the Republics of Serbia and Montenegro,

and Bosnia-Herzegovina and authorisation has been issued by the Secretary of State - DTI Press Notice P/93/231 of 29 April 1993.

319. DTI Press Notice P/93/231 of 29 April 1993.

320. Ibid.

321. The prohibition on the provision of non-financial services is subject to the same exceptions listed in the discussion of Regulation (EEC) 1432/92 on the embargo on goods.

c) any organisation, wherever located, exercising an economic activity controlled by persons resident in Serbia or Montenegro or by organisations constituted or incorporated under the law of these Republics.

Surprise may legitimately be expressed at the inclusion of this provision in the Regulation without a preceding Security Council resolution to that effect. As previously mentioned the European Community is not endowed by its constituent treaties with the power to impose sanctions of its own. There was no established internationally wrongful act and so counter-measures were not justified.

The Security Council did not make reference to services until Resolution 820. The Resolution precluded the provision of financial and non-financial services to any person or body for purposes of any business carried on in Serbia or Montenegro. Telecommunications, postal services, legal services, those services approved on a case-by-case basis by the Committee, and services whose supply may have been necessary for humanitarian or other exceptional purposes were excepted from this prohibition.

Regulation (EEC) No 990/93 modified the scope of the ban on the provision of non-financial services to cover their provision to *any* person or body for purposes of any business carried out in Serbia or Montenegro. Exceptions to this prohibition were made for telecommunications, postal services, legal services consistent with the Regulation and services which may have been necessary for humanitarian or other exceptional purposes and which were approved on a case-by-case basis by the Committee, and any activity whose direct or indirect object or effect was to promote any of these activities.

The Serbia and Montenegro (United Nations Sanctions) Order 1993³²² ('the 1993 UN Sanctions Order') was adopted to give national effect to Resolution 820 and came into force on 1 May 1993. It would automatically cease to have effect or its operation suspended under the same circumstances as the UN Sanctions Order. It prohibited the provision by British persons of any services to any person or body for the purposes of any business carried out in Serbia and Montenegro unless a licence had been granted by the Secretary of State. Again telecommunication and postal services were exempted.³²³

3. Non-Release and Freezing of Assets

322. SI 1993/1188.

323. A licence to provide legal services was granted from 1 May 1993 permitting legal services to be provided for any business carried on in Serbia and Montenegro where in doing so it is consistent with UN resolutions imposing the sanctions.

Resolution 757 had the dual effect of preventing the provision of resources - both previously contracted and potential future supply - to the Serbian government and business, and of restricting access to assets belonging to Serbian entities located within the jurisdiction of other States. Paragraph 5 of the Resolution provided:

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

Within the European Community implementation of this measure was left to the Member States due to the lack of competence of the Community in financial matters.

This was initially achieved in the United Kingdom by the application of the Emergency Laws (Re-enactments and Repeals) Act 1964. The Treasury may issue general or special directions under s2 of the Act when it is satisfied that action to the detriment of the economic position of the United Kingdom is being, or is likely to be, taken by the government of or persons resident in any country or territory outside the UK. The Control of Gold, Securities, Payments and Credits (Serbia and Montenegro) Directions 1992 entered into force on 1 June 1992. They provided that, except with the permission of the Treasury, any order of the government of or any person resident in Serbia and Montenegro requiring any payment or any parting with gold or securities, or requiring a change in the name under which any sum, gold or securities were held was not to be carried out. Any branch of a business in the country concerned is treated for all purposes as if it were a body corporate resident in that country.

It is difficult to identify the particular action of the Serbian and Montenegrin authorities or persons resident in the Republics which was to the detriment of the UK economy which might have caused some doubt about the *vires* of the Order. The Control of Gold, Securities, Payments and Credits (Serbia and Montenegro) Directions 1992 were revoked on 13 June 1992³²⁴ since the 1992 UN Sanctions Order contained provisions to the equivalent effect.³²⁵

The 1992 UN Sanctions Order superseded these Directions, although any permissions granted under them remained valid. It provided more thorough regulation

324. The Control of Gold, Securities, Payments and Credits (Serbia and Montenegro) (Revocation) Directions 1992, SI No 1992/1381.

325. SI 1992/1302, Article 10.

and was supplemented by the Bank of England Notice (the Notice) of 8 June 1992 which provided details of the application of the provisions of the Order. The 1992 UN Sanctions Order repeated the provisions of the Directions on payments gold and securities, and extended its effects to investments. The Notice stated that permission was required, but would not normally be given, for British persons to do anything which involved parting with any gold coin or gold bullion wherever located and held for the account of a connected person, or making any change in the persons to whose order any gold coin or gold bullion was to be held. It stated that permission had to be obtained for British persons to do anything which involved parting with any securities or investments to connected persons or making any change in the persons to whose order any securities or investments were to be held. Where securities were registered in the name of, or investments were held by, a connected person or where British persons held bearer securities for account of connected persons, no payment of capital monies, dividends or interest could be made to any person outside the UK; but permission would be granted for such payments to be made to Serbian Accounts.³²⁶ No permissions needed be sought for transfers of securities or investments issued by connected persons unless a connected person was a counterparty to the transaction.

For the purposes of the UN Sanctions Order and of the Notice, 'securities' bore the meaning given in s2 of the Emergency Laws (Re-enactments and Repeals Act) 1964, and included

- (a) shares, stocks, bonds, notes (other than promissory notes), debentures, debenture stock, certificates of deposit and Treasury and other government bills;
 - (b) a deposit receipt in respect of the deposit of securities;
 - (c) a unit or a sub-unit of a unit trust;
 - (d) an annuity granted under the Government Annuities Act 1929 or to which either Part I or Part II of that Act applies, and a life assurance policy or other contract entered into with an assurance company for securing the payment in the future of any capital sum or sums or of an annuity;
 - (e) a warrant conferring an option to acquire a security
 - (f) share in an oil royalty
- but excludes bills of exchange.

326. 'Serbian Accounts' are defined in the notice as the sterling, foreign currency and gold bullion accounts of connected persons held in the UK with institutions authorised under the Banking Act 1987 or the Building Societies Act 1986. Banks, stockbrokers, solicitors, accountants etc holding funds of connected persons must place those funds in a separate account designated as a Serbian Account.

'Investment' meant any asset, right or interest falling within any paragraph of Part I of Schedule 1 of the Financial Services Act 1986, which was not a security.

The necessary permissions were given by the Notice to make any payment or part with gold, securities or investments, and to make any change in the person to whose credit any sums to stand or to whose order any gold, securities or investments were to be held, to or on behalf of any natural person in the UK who was resident in Serbia or Montenegro provided that if that person was not so resident, such action would not otherwise be prohibited by the UN Sanctions Order. All necessary permissions were thereby also granted for exactly the same transactions to or on behalf of AY Bank Ltd (formerly Anglo Yugoslav Bank Ltd) provided that if that Bank was not a connected person, such action would not otherwise be prohibited by the Order.

The Treasury was given substantial powers over any action which was likely to make available to a connected person any funds or other financial or economic resources, whether or not by their removal from the UK, or otherwise transfer funds or resources to a connected person. Where the making of a payment or parting with gold, securities or investments,³²⁷ or the making of a change in the names under which any sum, gold, securities or investments were held constituted such action, the permission of the Treasury was required before they were made. Such permission could be granted absolutely or made subject to conditions, and could be varied or revoked at any time.

As regards money held in the UK by banks and building societies, the Bank of England Notice designated sterling, foreign currency and gold bullion accounts of connected persons held in the UK with institutions authorised under the Banking Act 1987 or the Building Societies Act 1986 as 'Serbian Accounts.' Banks and Building Societies holding such Accounts could not make payments to the holders of them without the permission of the Bank of England. The Notice provided guidelines on such payments. It granted express permission in paragraph 9 for the payment from Serbian Accounts of:

- (a) charges, including interest, to banks in the United Kingdom;
- (b) payments to reimburse banks in the United Kingdom who have made payments in respect of trade with Serbia or Montenegro under irrevocable letters of credit provided

327. For the purposes of this provision, "gold", "payment" and "securities" have the same meanings they bear in section 2 of the Emergency Laws (Re-enactments and Repeals) Act 1964; and "investments" means any asset, right, or interest falling within any paragraph of Part I of Schedule I of the Financial Services Act 1986 which is not a security.

the letter of credit was opened, and the export of goods took place, before 1 June 1992, and the letter of credit is otherwise in order;

(c) sums due to the Inland Revenue and HM Customs and Excise, provided no overdraft is thereby created on a Serbian Account;

(d) salary and pension payments to persons living in the United Kingdom.

The Notice stated that The Bank of England would consider applications for permission for payments in respect of goods dispatched to the UK on production of any necessary documentation; other payments of a current nature; and payments for charitable or humanitarian purposes.

The Notice advised that permission would not normally be granted for any payment to a connected person which involved payment to an account held outside the UK. The Notice gave permission for sterling and foreign currency payments to Serbian Accounts provided they were not payments covered by the provisions of the UN Sanctions Order on aircraft insurance and bonds and indemnities. Payments or transfers from one Serbian Account to another Serbian Account could only be made with permission, which would not normally have been given. Permission would be unlikely to have been given for any change in the person to whose credit any sum held in a Serbian Account was to stand.

Paragraph 9 of the Order was deleted by Supplement No 1 to the Notice, issued by the Bank of England on behalf of the Treasury on 26 June 1992, and permission was granted for the following payments from Serbian Accounts provided that they were not payments to be made directly or indirectly to any connected person or to any other person in any part of the territory of the former Socialist Federal Republic of Yugoslavia³²⁸:

(a) the payment represents charges, including interest, to banks in the United Kingdom, or

(b) the payments is to reimburse a bank in the United Kingdom who has made a payment in respect of trade with Serbia or Montenegro under irrevocable letters of credit provided the letter of credit was opened, and the export of goods took place, before 1 June 1992, and the letter of credit is otherwise in order, or

(c) the payment is in respect of salary and pension payments to persons living in the United Kingdom, or

(d) where the payment is in respect of a transaction requiring authorisation by a licence issued by the Department of Trade and Industry, such a licence has been issued, or

328. Permission will normally be given for payments to territories other than Serbia or Montenegro

(e) in respect of any other payment, the institution making payment is satisfied that it is not a payment in respect of the provision of goods or services, either directly or indirectly, to a connected person.

Supplement No 1 stated that the Bank of England would consider applications for permission to debit Serbian Accounts for other purposes, including payments between connected persons, payments to any part of the territory of the former Socialist Federal Republic of Yugoslavia, excluding Serbia and Montenegro, and payments for charitable or humanitarian purposes.

Supplement No 1 to the Notice also granted automatic permission for payments by British persons to a connected person whether in sterling or foreign currency to a Serbian Account provided it was not a payment covered by the provisions of the 1992 UN Sanctions Order on aircraft insurance and bonds and indemnities.

Under the Serbia and Montenegro (United Nations Sanctions) Order 1992 obligations under bonds³²⁹ given in respect of a contract the performance of which was rendered wholly or partly unlawful by the provisions of the 1992 UN Sanctions Order or of the Export of Goods Order were made subject to prior authorisation. Unless authorised by a licence granted by the Secretary of State, payments³³⁰ to any connected person in respect of such a bond, and all acts to obtain payment or the making of a payment under a right to indemnity in respect of any such bond, where payment under the bond was unlawful, or would have been if paid by a British person, were prohibited.

The Notice provided guidelines on payments under particular agreements. Permission would not normally be granted to enable existing lenders who were British persons to make any further payment by way of credit, loan or overdraft to connected persons, and no new drawings could be made without permission under existing facilities. No new arrangements could be entered into, no bills of exchange drawn by a connected person could be accepted, and no credits, discount or acceptance facilities of any sort could be issued, confirmed or advised for a connected person. The Notice authorised the payment by the acceptor on the maturity of a maturing bill of exchange

329. 'Bond' for the purposes of the Article is defined as 'an agreement under which a person ("the obliger") agrees that if called upon to do so, or if a third party fails to fulfil contractual obligations owed to another, the obliger will make payment to or to the order of the other party to the agreement.'

330. 'Make any payment', for the purposes of this provision, means 'make payment by any method, including but not restricted to the grant, or any agreement to the exercise, of any right to set off, accord and satisfaction and adjustment of any account, or any similar means.'

drawn by a connected person and accepted before 1 June 1992 by a British person. But Serbian Accounts could not be debited in reimbursement without permission.

Banks acting as agents for syndicated loans and credits to connected persons would normally be granted any permission necessary to distribute capital repayments and interest payments to participants in the syndicates provided that the necessary funds were received from outside the UK. British persons who had made loans to connected persons before 1 June 1992 and who wished to roll-over such loans in accordance with the terms of the loan agreement had to refer to the Bank of England. Authorisation would not normally be given to enable the drawn down amount of the loan or credit to be increased on roll-over.

The Notice gave all necessary permissions for any bargains entered into in the money, foreign exchange, commodities (other than physical oil) and securities markets, including derivatives, or any payment instructions received for immediate execution, involving counterparties connected with Serbia and Montenegro, prior to 0.01 am BST on 1 June 1992, to be completed. The permissions did not extend to the repayment of term or other deposits.

Resolution 820 included a provision, which was an unprecedented step for the Security Council, going beyond the measures taken to freeze Iraqi assets. Prior to this Resolution the assets could not leave the jurisdiction in which they were located, but the owners still had access to them within that jurisdiction. Resolution 820 went the step further by barring even that limited access:

States in which funds, including any funds derived from property, (a) of the authorities in the Federal Republic, or (b) of commercial, industrial or public utility undertakings in the Federal Republic, or (c) controlled directly or indirectly by such authorities or undertakings or by entities, wherever located or organised, owned or controlled by such authorities or undertakings, are compelled to require all persons and entities holding such funds to freeze them to ensure that are not made available, directly or indirectly, to or for the benefit of the authorities in the Federal Republic or to any commercial, industrial or public utility undertaking in the Federal Republic.

This provision was implemented by Supplement No 2 to the Bank of England Notice issued on 26 April 1993. Permission for certain payments out of Serbian Accounts without reference to the Bank of England and permissions given in respect of pre-zero transactions and in respect of AY Bank were withdrawn. The amended paragraph 9 of the Notice was again deleted and replaced with permission for payments from Serbian Accounts of:

- (a) charges, including interest, to banks in the United Kingdom,
- (b) salary and pension payments to persons living in the United Kingdom,
- (c) sums due to the Inland Revenue and HM Customs and Excise, provided no overdraft is thereby created on a Serbian Account,
- (d) payments in respect of the export of humanitarian goods to Serbia and Montenegro from the United Kingdom provided that :
 - (i) authorisation by a licence issued by the Department of Trade and Industry, and
 - (ii) the written approval of the UN Sanctions Committee,
 are exhibited to the Bank making the payment.

Permission would not normally be given to debit Serbian Accounts with banks in the UK in payment for the export of goods of any description from a third country.

4. Restrictions on Transport

The measures on transport were in addition to the restrictions placed on the transport of goods. Resolution 757 required all States to:

[d]eny permission to any aircraft to take off from, land in or fly over their territory if it is destined to land in or has taken off from the territory of the Federal Republic . . . unless the particular flight has been approved, for humanitarian or other purposes consistent with the relevant resolutions of the Council, by the Committee . . .

The prohibition on non-financial services in Regulation (EEC) No 1432/92 applied to air transport. But the legal basis of the Regulation, stated to be Article 113 of the EEC Treaty, provided problems in this regard. The terms of prohibition on the provision of air services were set out in the Annex to the Regulation:

Permission shall be denied to any aircraft to take off from, land in, or overfly, the territory of the Community if it is destined to land in, or has taken off from, the territory of the Republics of Serbia and Montenegro.

The problem was not of lack of competence, but of possible incorrect legal basis. Articles 75 and 84 empowers the Council to lay down common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States. This, *prima facie*, appeared to be the proper

basis for the prohibition defined in the Annex rather than the common commercial policy. Community practice shows that Article 84(2) is the basis which is used for measures relating to the regulation of international air transport services.³³¹ Kuyper suggests that there was no 'viable alternative' and that time pressure made consultation with the European Parliament, which is required under Article 84 but not under Article 113, impracticable.³³² It is regrettable that the Council of Ministers saw fit to ignore procedures laid down in the Treaty especially given the existence of an emergency procedure for consultation with the European Parliament.

The Serbia and Montenegro (United Nations Prohibition of Flights Order) 1992, adopted under the United Nations Act 1946, entered into force on 5 June designed to apply the air transport restrictions of Resolution 757. No aircraft, wherever registered, could, without the permission of the Secretary of State, take off from, land in or fly over the territory of the UK (including the Channel Islands and the Isle of Man), if its destination was Serbia or Montenegro, or it had taken off from the Republics. If this prohibition was violated both the airport operator and the commander of the aircraft were guilty of an offence. The Order required the airport operator to take such steps as might have been necessary to prevent an aircraft from taking off if he knew or had reason to suspect that the destination of the aircraft was in Serbia or Montenegro or that the aircraft had taken off from those Republics since 30 May 1992 unless the required permission had been granted for take off.

In addition the provision of engineering and maintenance services to aircraft registered in the Serbia or Montenegro or operated by or on behalf of entities in the Republics, or the provision of components, airworthiness certificates, payment of new claims against existing insurance contracts or new direct insurance for such aircraft by the nationals or from the territory of UN Members was prohibited by Resolution 757.

The Serbia and Montenegro (United Nations Sanctions) Order 1992 prohibited any person from providing engineering or maintenance servicing for any aircraft of Serbia or Montenegro or for any component of such aircraft unless authorised by a licence granted by the Secretary of State. The Order regulated contracts of insurance, other than one of reinsurance, on aircraft of Serbia or Montenegro or on machinery, tackle, furniture, or equipment of such an aircraft. It proscribed payment in full of any claim under such a contract of insurance in respect of an incident occurring after the

331. The Community has adopted legislation on the basis of Article 84(2) concerning the noise of civil subsonic jet aircraft (of any State) (Directive 92/14/EEC of 2 March 1992, OJ 1992 L76/21 of 23.3.92); on the setting up of a consultation procedure on relations between Member States and third countries in the field of air transport and on action relating to such matters within international organisations (Decision 80/50/EEC of 20 December 1979, OJ 1980 L18/24 of 24.1.80).

332. Kuyper *Trade Sanctions* pp9.

entry into force of the Order, or the conclusion of any such new contract of insurance or agreement to any variation or extension of any such existing contract unless authorised by way of licence. For the purposes of the Order an 'aircraft of Serbia or Montenegro' meant any aircraft registered in Serbia or Montenegro and any other aircraft for the time being chartered to a connected person.

The 1992 UN Sanctions Order provided the means for the enforcement of the embargo on goods. It granted powers to authorised officers who had reason to suspect that any ship registered in the UK was being, had been, or was about to be used to carry goods to any destination in Serbia or Montenegro or to a connected person or to carry goods exported from Serbia or Montenegro after 30 May 1992 in breach of its provisions. In such a case the official could board and search the ship and demand to inspect documents relating to the ship and its cargo. The official was given powers to require that cargo was not landed at any specified port. He could request the master of the ship to cause his vessel not to continue on its current or proposed voyage until allowed to proceed, to keep the ship from leaving a port in the UK without permission (if the ship was already in port), to take the ship to a UK port and cause her to remain there if not already so located, and to take her to any other destination with the agreement of the master. If any of these requests were not adhered to, steps, including entrance onto the ship concerned and the use of reasonable force, were authorised to secure compliance.

In the same circumstances, an authorised official could demand to be provided with information on and be shown documents relating to an aircraft registered in the UK or chartered to a British person and to its cargo. He was empowered to board and search the aircraft using reasonable force if required. Officials could request the charterer, operator and commander of an aircraft in the UK to remain in the country until authorised to leave, and could detain the aircraft and use reasonable force to ensure compliance with the request.

The 1993 UN Sanctions Order extended these powers to ships or aircraft in the United Kingdom which the authorised official had reason to suspect had been or was being operated in violation *any of the Security Council resolutions* concerning sanctions on Serbia and Montenegro.

As well as banning the transshipment of goods across Serbia and Montenegro in Resolution 787 to prevent the diversion of goods, the Security Council addressed the problem of sanction busting, which was particularly prevalent on the Danube, by imposing a blockade on the river and authorising the inspection of all shipping. All States, acting individually or through regional agencies or arrangements, were required, by virtue of the invocation of Chapter VII, to use such measures commensurate with the specific circumstances as may have been necessary to halt all

inward and outward maritime shipping in order to inspect and verify their cargoes and destinations, and to ensure strict implementation of the provisions of resolutions 713 and 757. The Security Council reaffirmed the responsibility of riparian States to ensure that shipping on the Danube was in accordance these resolutions, including the halting of ships for inspection and verification of cargoes and destinations. States were requested to provide such assistance as was required by those States acting nationally or through regional agencies to implement the above two paragraphs.

For the purpose of the implementation of relevant Security Council resolutions, any vessel in which a majority or controlling interest was held by a person or undertaking in or operating from the Serbia or Montenegro was to be considered as a vessel of those Republics regardless of the flag under which the vessel sails.³³³

Resolution 820 confirmed that no vessels (a) registered in the Federal Republic or (b) in which a majority or controlling interest was held by a person or undertaking in or operating from the Federal Republic or (c) suspected of having violated or being in violation of resolutions 713, 757 and 787 or the present resolution were to be permitted to pass through installations, including river locks or canals within the territory of UN Member States. Riparian States were called on to ensure adequate monitoring was provided to all cabotage traffic involving points that were situated between Vidin/Calafat and Mohacs. The Security Council repeated the responsibility of riparian States to take necessary measures to ensure shipping on the Danube was in accordance with Council resolutions, and reiterated its request³³⁴ for all States to provide such assistance as was required, notwithstanding the restrictions on navigation set out in the international agreements which apply to the Danube.

By virtue of Resolution 820 all States were to impound all vessels, freight vehicles, rolling stock, and aircraft found in their territories in which a majority or controlling interest was held by a person or undertaking in or operating from Serbia or Montenegro, and such carriers could be forfeited to the seizing State upon a determination that they had violated Resolutions 713, 757, 787 or the present resolution.

States were obliged to detain, pending investigation, all vessels, freight vehicles, rolling stock, aircraft and cargoes found in their territory and suspected of having violated or been in violation of the same resolutions, and upon determination of violation, such carriers or cargoes were to be impounded and, where appropriate the

333. Regulation (EEC) No 3534/92 defined a vessel of the Republics of Serbia and Montenegro, for the purposes of implementing Regulation (EEC) 1432/92, in this way.

334. The request was previously made in paragraph 15 of Resolution 787.

cargo forfeited to the detaining State. The costs of impounding could be charged to the owners.

Regulation (EEC) No 990/93 required the competent authorities of the Member States to impound all vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest was held by a person or undertaking in or operating from Serbia and Montenegro. The expenses of the impounding could be charged to their owners. In addition, all vessels, freight vehicles, rolling stock, aircraft and cargoes suspected of having violated, or been in violation of, Regulation (EEC) No 1432/92 or of the present Regulation had to be detained by the authorities pending investigation. Member States were to determine the penalties for contravention of the terms of the Regulation, and any vessels, freight vehicles, rolling stock, aircraft and cargoes found to have violated it could be forfeited to the Member State whose authority impounded or detained them.

The 1993 UN Sanctions Order placed a duty on harbour authorities to implement the impounding provisions of Resolution 820. The authority concerned had to take all necessary steps to impound any ship at its harbour which the authority had reason to believe was either majority owned or effectively controlled by a connected person, or in respect of which one of the above requests had been made and which the Secretary of State determined has been used or operated in breach of UN resolutions. The impounding of goods vehicles was the responsibility of the traffic commissioner for any traffic area in Great Britain and of the Department of the Environment for Northern Ireland for that country. The traffic commissioner could impound any goods vehicle which he had reason to believe was either majority owned or effectively controlled by a connected person or which had been detained under Article 3 and which the Secretary of State determined has been used in violation of UN resolutions.

Aircraft operators had the responsibility to impound any aircraft at their airport which the aircraft operator had reason to believe was either majority owned or effectively controlled by a connected person, or which had been detained in accordance with the above powers and which the Secretary of State determined is in violation of UN resolutions.³³⁵

The Secretary of State could order that any ship which was impounded and any cargo which had been the subject of a direction as to landing and which he had determined had been carried in violation of UN resolutions be forfeited to him. It had to be sold for the price which could reasonably be obtained. The Order provided for the application of the proceeds of sale. Impounded goods vehicles and aircraft and detained cargo carried on goods vehicles and aircraft which the Secretary of State

335. A certificate given by the Secretary of State is conclusive evidence of such a determination.

determined had been carried in violation of UN resolutions could equally be forfeited by him.

All commercial maritime traffic was prohibited by Resolution 820 from entering the territorial sea of Serbia and Montenegro, except when authorised on a case-by-case study by the Committee or in case of *force majeure*. This was translated into Community law by Regulation (EEC) No 990/93, which equally prohibited any activity whose object or effect was, directly or indirectly, to promote this transaction.

The Serbia and Montenegro (United Nations Sanctions) Order 1993 prohibited any ship registered in the UK or any ship which was not registered in any country but was majority owned by a British citizen or a body corporate incorporated in the UK and which in either case was being used for commercial purposes from entering the territorial sea of Montenegro unless authorised by a licence issued by the Secretary of State. It was a defence that either that the ship owner, operator or master did not know or could not reasonably have known that the ship was entering the territorial sea of Montenegro, or that the ship only entered it by reason of stress of weather or other case of *force majeure*.

5. Arms Embargo

Resolution 713 (1991) of 25 September 1991 imposed 'a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia' under Chapter VII of the UN Charter. This was applied in the UK by revocation and modification of licences granted under the Import, Export and Customs Powers (Defence) Act 1939.

6. Other Measures

Resolution 757 also contained diplomatic, sporting and cultural measures. States had to reduce the level of their staff at diplomatic missions and consular posts in Serbia and Montenegro.³³⁶ The requirement to prevent the participation in sporting events on their territories of groups or persons representing the Republics led to the exclusion of the Yugoslav national football team from the European Championships in Sweden in 1992. States were also required to suspend scientific and technical cooperation and cultural exchanges with the Federal Republic.

336. The UK expelled the Yugoslav ambassador from Britain on 1 June. A 'Yugoslav' mission staffed by 'Yugoslav' diplomats continued to operate in London in an uncertain legal capacity: Warbrick "Recognition of States Part Two" 42 *International and Comparative Law Quarterly* (1993) pp433, at pp439.

7. Effects on Contracts

The Security Council followed its precedent in the Iraq sanctions of dealing with the consequences of its decisions on the obligations of parties to contracts affected by the resolution. Paragraph 9 of Resolution 757 stated that:

all States, and the authorities in the Federal Republic shall take the necessary measures to ensure that no claim shall lie at the instance of the authorities in the Federal Republic . . . or of any person or body in the Federal Republic . . . or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures imposed by this resolution and related resolutions.

At the time of writing neither the European Community nor HM Government had taken any measures to give effect to this provision. However such legislation is very likely to take the form of Regulation (EEC) No 3541/92 on prohibiting the satisfying of Iraqi claims with regard to contracts and transactions the performance of which was affected by United Nations Security Council Resolution 661 (1991) and related resolutions. It was adopted on the basis of Article 235 of the EEC Treaty which empowers the Community to adopt measures in fields not covered by the Treaty provided the measures are agreed unanimously following consultation of the European Parliament. The Regulation provides an interesting development in the competences of the Community. The Member States have employed the European Community to deal with the private law consequences of the trade measures. As a result Community legislation determines the effects on transactions the subject-matter of which is not necessarily even within Community competences. For the Regulation covered

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

The Regulation defined 'claims' made on contracts as any claim, whether asserted by legal proceedings or not, made before or after 7 December 1992, under or in connection with contracts covered by it. 'Person or body in Iraq' meant (a) the Iraqi State or any Iraqi public authority, (b) any person in, or resident in, Iraq, (c) any body

having its registered office or headquarters in Iraq, and (d) any body controlled, directly or indirectly, by one or more of these persons or bodies.

The Regulation prohibited, subject to certain exceptions such as insurance and employment contracts, the satiating or the taking of any step to satisfy a claim made by

- (a) a person or body in Iraq or person acting through a person or body in Iraq;
- (b) any person or body acting, directly or indirectly, on behalf of or for the benefit of one or more persons or bodies in Iraq;
- (c) any person or body taking advantage of a transfer or rights of, or otherwise claiming through or under, one or more persons or bodies in Iraq;
- (d) any other person or body referred to in paragraph 29 of UN Security Council Resolution 687 (1991);
- (e) any person or body making a claim arising from or in connection with the payment of a bond or financial guarantee or indemnity to one or more of the abovementioned persons or bodies

under or in connection with a contract the performance of which was affected, directly or indirectly, wholly or in part, by the measures decided on pursuant to Resolution 661 and related resolutions.

The prohibition applied within the Community and to any national of a Member State and any body which was incorporated or constituted under the law of a Member State. The major advantage of such legislation was that it established exactly the same mandatory rules for the purposes of the Rome Convention in all the Contracting States. This prevented any claimant under a contract covered by the Regulation from forum shopping in attempt to bypass the effects of the sanctions.

Claims under contracts to which Paragraph 29 did not apply would be unsuccessful since the agreement would become unenforceable on the grounds of illegality (for contracts purportedly made after the relevant Security Council resolution), or *force majeure* and frustration (for contracts concluded beforehand).³³⁷

337. Fox and Wickremasinghe "British Implementation of UN: Sanctions Against Iraq" 41 *International and Comparative Law Quarterly* (1992) pp920-938, pp935.

CONCLUSION

The exercise of the powers of the UN Security Council in the post Cold War era is no better illustrated than in the increase in the use of economic sanctions as a tool for restoring or maintaining international peace and security. The application of Article 41 of the Charter in this manner is an important development in any reassertion of the authority of the United Nations to enable it to act as an effective universal organisation. The pyramidal system of the application of sanctions against Serbia and Montenegro illustrates the transformation of international obligations into domestic law. The necessarily general statements of the Security Council are given more effective application with the increase in the use of sanctions as an instrument in the field of international peace and security.

The economic effectiveness of the range of sanctions imposed against Serbia and Montenegro is undeniable. Following their introduction by December 1992 unemployment had increased by 60%, inflation was at 50% per month, industrial output was down 75% since 1989, and trade down by 50-75%.³³⁸ The political success of the measures is open to much questioning. The Serb intransigence towards the Vance-Owen plan was not overcome, the human rights abuses were not curbed and the conflict continued unabated. HM Government has publicly accepted the lack of total effectiveness of sanctions.³³⁹ Commentators generally agree that the effectiveness of sanctions is restricted and that examples of outright success in achieving the objective pursued by their imposition are rare. In the Yugoslav crisis they have been coupled with other political carrots, such as promises of recognition and economic assistance, to secure peace.

It is undeniable that the machinery at the international level has gained greater efficiency in the choice of measures and implementation of sanctions. The increase in the instances of the imposition of comprehensive trade sanctions has enabled more gaps to be filled and so lessons are learnt for the next occasion. The implementation of the UN resolutions has become smoother and the monitoring by the Committee of the Security Council has developed into an extensive state reporting system. The resolutions have also brought about unprecedented co-operation between international organisations and States to ensure effective implementation. Examples may be cited of the CSCE Sanctions Assistance Missions and NATO and WEU patrols in the Adriatic Sea to enforce the measures taken against Serbia and Montenegro.

338. Douglas Hogg, Minister of State of the Foreign and Commonwealth Office, Foreign Affairs Committee, *The Expanding Role of the United Nations and its Implication for UK Policy*, Minutes of Evidence, 2 December 1992 p94 para 153.

339. *Ibid* para 153.

For the European Community the field of sanctions has enabled it to develop its competence in international relations. The passage of the Single European Act in 1986 led the way to closer consultations in foreign policy and to a more uniformed response through the adoption of Community Regulations. This in turn has brought about a demise in reliance on Article 224 EEC. An examination of the development of the implementation of sanctions and counter-measures by the Community reveals less resort is had to Article 224 EEC and the adoption of a Community Regulation has become the standard means of applying Security Council resolutions in the Member States. This has enabled the response of the EC and its Members to be more efficient.

The constitutional arrangements by which the European Community presently implements sanctions will be considerably transformed by the Treaty on European Union (TEU). This change will take place on a number of fronts.

The first is in the development of a common foreign policy. Included in the objectives of the foreign and security policy is the preservation of peace and strengthening of international security, in accordance with the principles of the United Nations Charter as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter.³⁴⁰ The objectives are to be pursued by 'systematic cooperation' involving consultation and adoption of common positions³⁴¹, or by the gradual implementation of joint action.³⁴² The Treaty does not institutionalise common foreign policy within the EC structure but provides the mechanism for the inclusion of agreed areas within the framework.³⁴³ Following guidelines of the European Council, the Council will be able to decide by unanimous agreement to make a matter the subject of joint action and when doing so determine the specific scope, the general and specific objective of the action, if necessary its duration, and the means, procedures and conditions for its implementation. When it adopts the joint action and at any stage in its development the Council act by qualified majority. Member States will be committed to the joint action in their positions and in the conduct of their activities. Member States may take national measures only in cases of imperative need arising from changes in the situation and failing a Council decision.

The balance which the TEU strikes in maintaining inter-governmental cooperation but providing the means for an institutionalised foreign policy initially leaves the decision to impose sanctions outside the Community structure. But the Treaty provides a procedure for their application within the Community system. It introduces into the Treaty of Rome Article 228a which states:

340. Article J.1 TEU.

341. Article J.2 TEU.

342. Article J.3 TEU.

343. Article J.3 TEU.

Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on the 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 from the Commission.

This has the effect of changing the legal base on which the European Community will implement UN sanctions or apply its own counter-measures. This is a most welcome development. The entry into force of this provision will eliminate the strained legal reasoning previously required to justify Article 113 EEC as the basis for measures such as restrictions on air services. Article 228a will be used to cover all fields falling within EC competences. It is an indication of the growth in the importance and recognition of sanctions as tools of foreign policy and law enforcement that an international body has amended its constituent treaty to provide for their application against *non-member* States.

A further ground of development is the considerable increase in competence which the TEU confers on the Community in the field of monetary affairs culminating in economic and monetary union. It does not, however, remove the competence of Member States to freeze foreign assets within their jurisdiction. One can envisage a greater degree of supervisory conduct by the EC in this matter. For the Central Banks of the Member States³⁴⁴ comprise the European System of Central Banks (ESCB) together with the European Central Bank (ECB).³⁴⁵ The primary objective of the ESCB will be to maintain price stability.³⁴⁶ Its basic tasks are to define and implement the monetary policy of the Community, to conduct foreign exchange operations, to hold and manage the official foreign reserves of the Member States and to promote the smooth operation of payment systems.³⁴⁷ The ESCB is required to 'contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.'³⁴⁸ This supervisory role is the extent of the EC's competences in freezing foreign financial assets located within the Community. The power of freezing remains within the control of national central banks which may perform functions other than those specified in the Statute of the ESCB and ECB unless the Governing Council of the ECB finds by a

344. Article 106(1) EC.

345. Both the ESCB and the ECB are established by Article 4A EC.

346. Article 105(1) EC.

347. Article 3 Statute of the ESCB and ECB.

348. Article 105(5) EC.

majority of two thirds of the votes cast that they interfere with the objectives and tasks of the ESCB.

The Community is given the express power in Article 73g in the cases set out in Article 228a, to take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned. This does not, however, increase the competence of the Community in relation to freezing assets.

It is pertinent to consider the possibility that the freezing of foreign financial assets might be sought to be based on the new Article 228a EC. The ability of the Community to claim competence under that provision will rest on the interpretation of 'economic relations with one or more third countries.' But this does not confer greater competences on the Community merely because urgent measures are to be taken. It will be restricted to measures within the areas it has competence, which do not include regulation of foreign bank accounts.

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