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## The Interrelationship Between United Nations Law and the Law of Other International Organizations

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# THE INTERRELATIONSHIP BETWEEN UNITED NATIONS LAW AND THE LAW OF OTHER INTERNATIONAL ORGANIZATIONS

*Richard H. Lauwaars\**

## INTRODUCTION

Independent international organizations do not stand apart from the United Nations (UN). The UN Charter itself contains specific provisions governing the relationship between the UN and other "specialized agencies."<sup>1</sup> It also contains a chapter on the relationship between the UN and other "regional arrangements or agencies" (ch. VIII).<sup>2</sup> Furthermore, the constitutions of many regional organizations make explicit reference to the UN Charter. For example, the preamble of the OAS Charter provides that the Member States resolve "to persevere in the noble undertaking that humanity has conferred upon the United Nations, whose principles and purposes they solemnly reaffirm."<sup>3</sup> According to article 1(c) of the Statute of the Council of Europe, "[p]articipation in [this organization] shall not affect the collaboration of its Members in the work of the United Nations and of other international organisations or unions to which they are parties."<sup>4</sup>

The question regarding the interrelationship between UN law and the law of other international organizations acquired actual significance in the Netherlands in the spring of 1983. At that time, the Dutch Government published a Note<sup>5</sup> stating that, due to the strictures of international law embodied in the law of the European Economic Community (EEC) and European Coal and Steel Community (ECSC), the Benelux Economic Union, and the General Agreement on Tariffs and Trade (GATT), it could not impose unilateral sanctions against South Africa. In response to this

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1. U.N. CHARTER arts. 57, 63.

2. U.N. CHARTER arts. 52-54. For an analysis of the role of regional arrangements under the U.N. Charter, see L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 355-56, 360-64 (3d ed. 1969). See also I. CLAUDE, SWORDS INTO PLOWSHARES 102-17 (4th ed. 1971).

3. Charter of the Organization of American States, Apr. 30, 1948, preamble, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

4. Statute of the Council of Europe, May 5, 1949, art. 1, para. c, 87 U.N.T.S. 103 (1951); see also Charter of the Organization of African Unity, May 25, 1963, preamble, 479 U.N.T.S. 39 (1963); North Atlantic Treaty, Apr. 4, 1949, art. 7, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243.

5. Bijl. Hand. II, Zitting 1982-83, 17 895, No. 2. This Note was accompanied by an extensive report of an interdepartmental steering group with respect to unilateral economic measures against South Africa [hereinafter cited as Report].

Note, a group of public international law professors in the Netherlands issued a Commentary that reached the opposite conclusion.<sup>6</sup> It is not the purpose of this Article to detail the background of these events nor to discuss the documents as such. Rather, this Article will focus on the relationship between the law of the UN and the law of the EEC, the Benelux Economic Union and GATT. Part I of the Article will introduce the subject by analyzing article 103 of the UN Charter, which states that in case of a conflict the obligations of the Charter shall prevail over the obligations undertaken in any other international agreement. Part II will outline the general relationship between the UN and other international organizations. Finally, Part III will focus on the specific issues raised by the Dutch Government's Note and the response of the law professors, evaluating the legal value and conclusions of each.

### I. ARTICLE 103 OF THE UN CHARTER

Article 103 of the UN Charter provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."<sup>7</sup> This provision does not make the rule or the decision that embodies the conflicting obligation automatically null and void. Instead, article 103 requires that the parties to an agreement that deviates from the UN Charter take steps to resolve the conflict in favor of the Charter.<sup>8</sup>

This obligation also applies to *other international organizations*. Not only must the *treaty* establishing the organization between UN Member States be in accordance with the Charter and the obligations imposed upon the Member States by the Charter,<sup>9</sup> but the *decisions* of the new organization itself must also comply with the Charter.<sup>10</sup> Since almost all international organizations are based on treaties, some commentators argue that all international organizations have to respect the rule of article 103.<sup>11</sup>

Schermers even deems certain decisions of international organizations applicable to other international organizations because such decisions bind the members of these organizations, without invoking article 103 of the UN Charter.<sup>12</sup> The basis for Schermers's view is his theory that the binding rules of a wider legal order have priority over the legal orders of its component parts.<sup>13</sup> Although this theory, in general, probably goes too far, it may be applied to the UN Charter by virtue of article 103.

The rule of article 103 is confirmed by article 30 of the Vienna Conven-

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6. Bijl. Hand. II, Zitting 1982-83, 17 895, No. 3, Annex 6 [hereinafter cited as Commentary].

7. U.N. CHARTER art. 103.

8. A. VERDROSS & B. SIMMA, *UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS* 335 (1976). For an exception to this rule, see U.N. CHARTER art. 107.

9. A. TAMMES, *INTERNATIONAAL PUBLIEKRECHT* 37-38 (2d ed. 1973).

10. A. LEENEN, *GEMEENSCHAPSRECHT EN VOLKENRECHT* 55, 232 (Europese Monografieën No. 30, 1984).

11. H. SCHERMERS, *INTERNATIONAL INSTITUTIONAL LAW* § 1511 (2d ed. 1980).

12. *Id.* at § 1404.

13. *Id.* at § 1000.

tion on the Law of Treaties, which regulates the applicability of successive treaties concerning the same subject matter and contains an explicit exception for article 103. In this connection, Schermers argues that even States that are not members of the UN nor parties to the Vienna Convention must accept the primacy of the Charter over an older treaty due to the strong political support for the UN.<sup>14</sup>

In light of the broad language of article 103, it is important to delineate the specific types of obligations that are imposed on Member States. In view of existing literature,<sup>15</sup> one may safely assume to begin that obligations imposed upon the Member States *by the Charter itself* are included within those obligations that must be observed by all Member States under article 103.<sup>16</sup> The situation with respect to the binding decisions of UN organs is less clear. Here three categories of decisions must be distinguished: (1) externally binding decisions; (2) binding internal decisions that have external effects; and (3) external decisions that are in principle non-binding, but under certain circumstances may have binding effect.

In the UN, the only externally binding decisions are decisions of the Security Council concerned with the maintenance of international peace and security.<sup>17</sup> These decisions clearly fall within the strictures of article 103 and must be observed by Member States and international organizations. Conversely, binding internal decisions that have external effects do not fall within the purview of article 103 and are thus not binding on other international organizations. Internal decisions of an organization are binding only upon those internal bodies and staff of the organization to which such decisions apply. However, these decisions may also have important external effects. The most important internal rules with external effects are those rules that an organization makes for its own operational activities.<sup>18</sup>

The International Court of Justice (ICJ) has recognized that the General Assembly of the UN may take internal action with external effects. In the 1971 *Namibia* case, the Court stated that the General Assembly may adopt "in specific cases within the framework of its competence, resolutions which make determinations or have operative design."<sup>19</sup> Furthermore, in its Advisory Opinion, *Certain Expenses of the United Nations*, the ICJ stated that the powers of the General Assembly "are not confined to discussion, consideration, initiation of studies and the making of recommendations," but

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14. *Id.* at § 1402.

15. *See, e.g.,* A. TAMMES, *supra* note 9.

16. Examples of the obligations imposed by the UN Charter include: the obligation to settle international disputes peacefully; to refrain from the threat or the use of force; to give the UN every assistance in any action it takes in accordance with the present Charter, *see* U.N. CHARTER art. 2, paras. 3-5; to accept and carry out the decisions of the Security Council in accordance with the present Charter, *see* U.N. CHARTER art. 25; to take joint and separate action for the achievement of the purposes set forth in article 55, *see* U.N. CHARTER art. 56; and to comply with the decisions of the International Court of Justice, *see* U.N. CHARTER art. 94, para. 1.

17. *See* H. SCHERMERS, *supra* note 11, at §1176.

18. *Id.* at §1064.

19. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 50 (Advisory Opinion of June 21) [hereinafter cited as *Namibia Case*].

that it could also adopt decisions with "dispositive force and effect."<sup>20</sup> Among the decisions that the General Assembly is competent to make under article 18 of the UN Charter are " 'suspension of rights and privileges of membership, expulsion of Members and budgetary questions.' "<sup>21</sup>

It must be observed, however, that the external effects resulting from General Assembly decisions are of limited scope. Apart from decisions on organizational and budgetary matters, the General Assembly does not have the power to create external legal obligations. Were the General Assembly to attempt to exercise additional powers in this regard, it would act *ultra vires* and the distinction between action by the General Assembly and externally binding decisions by the Security Council would be blurred.

The final type of obligation imposed by UN organs involves decisions that are not binding in principle but which may have a binding effect in certain circumstances. Generally speaking, the resolutions of international organizations are nonbinding. This rule applies to recommendations (declarations or determinations) of the General Assembly or the Security Council.<sup>22</sup> However, certain circumstances may change the effect of such a recommendation. Member States may, for instance, explicitly accept a recommendation and in that way give it legal effect.<sup>23</sup> In addition, so-called "normative" resolutions (i.e., resolutions of the General Assembly embodying normative standards with respect to the behavior of States) may demonstrate, confirm and more clearly define the existence of customary international law. They may also result in the creation of public international law.<sup>24</sup> An example here is the "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U.N."<sup>25</sup>

However, apart from the cases of explicit acceptance of a recommendation (which transforms the recommendation into a legally binding agreement) and the codification of customary international law or general principles of law, recommendations (declarations or determinations) of the General Assembly and the Security Council do not create legal obligations. Therefore, the definition of "obligations under the Charter" within the meaning of article 103 must be confined to those obligations that have been laid down in provisions of the Charter and binding decisions of the Security Council. Within the framework of this Article, only those obligations falling under article 103 that affect the EEC, Benelux Economic Union, and GATT will be discussed.

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20. Certain Expenses of the United Nations, 1962 I.C.J. 151, 163 (Advisory Opinion of July 20).

21. 1962 I.C.J. at 163 (quoting U.N. CHARTER art. 18, para. 2).

22. H. SCHERMERS, *supra* note 11, at § 1076; G. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 180-81 (1983).

23. H. SCHERMERS, *supra* note 11, at § 1087.

24. P. KAPTEYN, *DE VERENIGDE NATIES EN DE INTERNATIONALE ECONOMISCHE ORDE*, 29 (Studies over internationaal economisch recht No. I.1, 1977) (referring to B. RÖLING, *VOLKENRECHT EN VREDE* 41-43 (1st ed. 1973)).

25. G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. 8082 (1970); *cf.* Inaugural Address at the Free University of Amsterdam by Dr. P. de Waart, *Volkenrecht in samenwerking* (Nov. 3, 1978).

## II. RELATIONSHIP BETWEEN UN LAW AND OTHER INTERNATIONAL ORGANIZATIONS

### A. *European Community Law*

At the outset, it is important to note that the EEC Treaty contains an express reference to the UN Charter. According to the Preamble of the EEC Treaty, the Contracting Parties desire "to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations."<sup>26</sup> The Treaty, moreover, stipulates in article 224 that "Member-States shall consult one another for the purpose of enacting in common the necessary provisions to prevent the functioning of the Common Market from being affected by measures which a Member State may be called upon to take . . . in order to carry out undertakings into which it has entered for the purpose of maintaining peace and international security."<sup>27</sup> If such measures have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaty.<sup>28</sup> In the event of an abuse by a Member State of the power granted in article 224, a direct appeal may be brought to the Court of Justice by the Commission or another Member State.<sup>29</sup>

Article 224 provides for a *reservation of sovereignty* on behalf of the Member States. There are several differences between such a reservation and a safeguard clause. First, a safeguard clause provides for temporary deviations from the Treaty, while a reservation creates a permanent exception. Second, the use of a safeguard clause must be authorized by the Community institutions, while a reservation may be automatically applied.<sup>30</sup> Article 224 makes clear that the Member States, if they wish to comply with international legal obligations in respect to the maintenance of international peace and security, may consider themselves, apart from the procedural requirements mentioned above, free from their obligations under Community law.<sup>31</sup>

This Article will first examine the meaning of the obligations mentioned in article 224. Thereafter, it will analyze the legal effect vis-à-vis the Community legal order of other "obligations under the Charter."

#### 1. *Obligations for the Purpose of Maintaining Peace and International Security*

Usually the words "obligations . . . for the purpose of maintaining peace and international security" in article 224 are interpreted as a refer-

26. Treaty Establishing the European Economic Community, Mar. 25, 1957, preamble, para. 7, 298 U.N.T.S. 11 (1958) [hereinafter cited as EEC Treaty].

27. EEC Treaty, *supra* note 26, art. 224.

28. EEC Treaty, *supra* note 26, art. 225.

29. EEC Treaty, *supra* note 26, art. 225.

30. P. GORI, LES CLAUSES DE SAUVEGARDE DES TRAITÉS C.E.C.A. ET C.E.E. 30-39 (Centre International d'Études et de Recherches Européennes No. 3, 1965).

31. Van Ginkel, in 5 THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 6-184 (H. Smit & P. Herzog eds. 1982).

ence to binding decisions of the Security Council.<sup>32</sup> In this respect, two additional observations are necessary. First, the notion of international peace and security in the UN context not only aims at so-called "negative peace," i.e., the prevention of the use of force in international relations, but also at "positive peace," i.e., a situation governed by commonly accepted norms of justice.<sup>33</sup> In this view, the refusal of a State to change an existing, intolerable status quo (e.g., colonial dominance, apartheid and other serious violations of fundamental human rights) may threaten the peace. It is interesting that the two cases where the Security Council actually adopted enforcement measures — the economic boycott of Southern Rhodesia (1966-1979) and the arms embargo against South Africa (1977 to the present) — both belong to the "positive peace" category, which was not provided for in 1945.<sup>34</sup>

The second observation to be made is that obligations in this (new) field of international peace and security can be found not only in resolutions of the Security Council, but also in provisions of the Charter itself. For example, articles 55 and 56 of the Charter provide for the obligation to take joint and separate action for the protection of human rights.<sup>35</sup>

As already mentioned, this interpretation of "international peace and security" was developed in the "UN context." Can it also be applied to article 224 of the EEC Treaty? This question must be answered by the European Court of Justice, for example, in an action brought under article 225 or by means of a preliminary ruling on the interpretation of article 224. Conceivably, under such circumstances the Court would look at article 103 of the UN Charter and conclude that the relevant part of article 224 constitutes the "translation" into Community law of that article. Member States should, therefore, be deemed to be free to comply with their "obligations under the Charter," including their obligations in this (new) field of international peace and security. However, if the Court interprets article 224 so that it only refers to a binding decision of the Security Council in respect to *negative* peace and international security, a second question becomes relevant: namely, what is the effect of other "obligations under the Charter" within the Community legal order?

## 2. Other Obligations Under the Charter

To analyze the effect of "other legal obligations under the Charter" within the EEC, the position of the Member States and the Community must be distinguished.

*a. The position of the Member States* Obligations of the Member States of the Community under the Charter, apart from the case of article

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32. See P. KUYPER, *THE IMPLEMENTATION OF INTERNATIONAL SANCTIONS* 191-92 (1978).

33. B. RÖLING, *VOLKENRECHT EN VREDE* 40, 49 (2d ed. 1982).

34. Schrijver, *Nederland en de smalle marges in de Veiligheidsraad*, 37 *INTERNATIONALE SPECTATOR* 667-77 (1983).

35. U.N. CHARTER arts. 55-56. Regarding the obligatory character of U.N. CHARTER art. 56, see, e.g., L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 2, at 380-82; Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 *AM. J. INTL. L.* 337 (1972); Wright, *National Courts and Human Rights*, 45 *AM. J. INTL. L.* 62, 69-78 (1951).

224, may be complied with by virtue of article 234. According to the first paragraph of this article, the "rights and obligations resulting from conventions concluded prior to the entry into force of th[e EEC] Treaty between one or more Member States on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty."<sup>36</sup> This provision has been interpreted rather restrictively by the Court of Justice. In the *Italian Radio Tubes* case, it held that the terms "rights and obligations" in article 234 refer to the "rights" of third countries and to the "obligations" of Member States.<sup>37</sup> The article concerns, among other things, the UN Charter and the obligations imposed upon the EEC member states by binding decisions of UN organs before January 1, 1958. The Community institutions are not allowed to prevent the member states from complying with these obligations.<sup>38</sup>

In respect to the binding decisions of UN organs that were adopted after January 1, 1958, only the decisions of the Security Council concerning the economic boycott of Southern Rhodesia are at issue.<sup>39</sup> One could argue that in this case article 234 should be applied by analogy, i.e., that the EEC Member States should be able to comply with the obligations imposed by the decision of the Security Council. This analogical application of article 234 would indeed confirm the rule of article 103 of the Charter.<sup>40</sup> Actually, however, the Member States did not invoke the latter provision. Instead, when they implemented the required national measures they apparently based them on article 224 (thereby assuming that the consultation with the other Member States, required by article 224, could wait until the functioning of the Common Market was effectively threatened).<sup>41</sup> This choice supports the view defended above that article 224 can also be applied to the field of "positive peace."

*b. The position of the EEC* It has already been observed that article 103 of the Charter also applies to other international organizations. They are not allowed to deviate from the obligations that the Charter imposes upon UN members. In the case of the EEC, and in respect of obligations

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36. EEC Treaty, *supra* note 26, art. 234(1); *see also* Act concerning the conditions of accession and the adjustments to the Treaties, Jan. 22, 1972, art. 5, reprinted in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 887 (1973) [hereinafter cited as Act of Accession].

37. EEC Commission v. Italy (Case No. 10/61), 1962 E. Comm. Ct. J. Rep. 1, 10.

38. Attorney Gen. v. Burgoa (Case No. 812/79), 1980 E. Comm. Ct. J. Rep. 2787, 2803.

39. *See* S.C. Res. 253, 23 U.N. SCOR (1428th mtg.) at 5, U.N. Doc. S/Res/253 (1968); S.C. Res. 232, 21 U.N. SCOR (1340th mtg.) at 7, U.N. Doc. S/Res/232 (1966); *see also* S.C. Res. 460, 34 U.N. SCOR (2181st mtg.) at 15, U.N. Doc. S/Res/460 (1979) (terminating the measures against Southern Rhodesia).

40. *Cf.* P. KUYPER, *supra* note 32, at 190 (arguing article 234 applies *directly*, since binding Security Council decisions taken *after* January 1, 1958, the effective date of the EEC Treaty, must be considered *antecedent* to the EEC Treaty because they are based on a treaty (the UN Charter) that precedes the EEC Treaty).

41. *See* Kuyper, *Community Sanctions Against Argentina: Lawfulness under Community and International Law*, in ESSAYS IN EUROPEAN LAW AND INTEGRATION, 141, 143-44 (D. O'Keeffe & H. Schermers eds. 1982) [hereinafter cited as *Argentina Sanctions*]; Kuyper, *Sanctions Against Southern Rhodesia: The EEC and the Implementation of General International Legal Rules*, 12 COMMON MKT. L. REV. 231, 235-36 (1975) [hereinafter cited as *Rhodesia Sanctions*].

that are outside the scope of article 224, one could even go one step further. Arguably, in cases 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.<sup>42</sup> The rule mentioned above, that the Community institutions are not allowed to prevent the Member States from complying with their obligations would, therefore, have to be modified under this view: only in the event of *concurring* powers could this rule be fully applied.<sup>43</sup>

## B. *Benelux and GATT*

### 1. *Benelux*

The Treaty establishing the Benelux Economic Union of February 3, 1958 (the "Union Treaty") does not refer to the UN Charter nor does it contain a provision like article 224 of the EEC Treaty. However, this organization was also established by a treaty and is, therefore, obliged to respect the obligations that the Charter and binding decisions under the Charter impose upon its three Member States (Belgium, the Netherlands and Luxembourg). This means that — just as in the case of article 234 of the EEC Treaty — the organs of Benelux may not prevent the Member States from complying with their obligations under the Charter. According to article 9 of the Union Treaty, the High Contracting Parties shall, in the event that commitments within the framework of other international institutions affect the aims of the Union, hold consultations "in order that these . . . commitments may be conducive to the realisation of these aims."<sup>44</sup> Although not the same as article 234 of the EEC Treaty, this provision may offer a way to reconcile the Union Treaty and the UN Charter.

### 2. *GATT*

Unlike the Benelux Union Treaty, GATT contains an explicit provision about the applicability of UN law. According to article XXI(c), "[n]othing in this Agreement shall be construed to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."<sup>45</sup>

For the implementation of other obligations under the Charter, a contracting party has several options. For example, it can invoke article XXI(b), which stipulates that nothing in GATT shall be construed to prevent a contracting party from taking any action that it considers necessary for the protection of its essential security interests taken in time of war or

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42. See Kuyper, *Rhodesia Sanctions*, *supra* note 41, at 238, 243 (referring to U.N. CHARTER art. 2, paras. 5, 48).

43. Within the framework of this article, we shall not deal with the Community sanctions against Iran, the Soviet Union (regarding Afghanistan and Poland) and Argentina, as in these cases there were no "obligations under the Charter." For a comprehensive analysis of these cases, see Kuyper, *Argentina Sanctions*, *supra* note 41, at 144-51.

44. Treaty Instituting the Benelux Economic Union, Feb. 3, 1958, Belgium-Luxembourg-Netherlands, art. 9, 381 U.N.T.S. 165 (1960) [hereinafter cited as Union Treaty].

45. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXI, para. c, 55 U.N.T.S. 187 (1950) [hereinafter cited as GATT].

any other "emergency in international relations."<sup>46</sup> Or it may appeal to article XXV(5), which establishes the power of the Contracting Parties to waive "in exceptional circumstances" an obligation imposed upon a contracting party by GATT (a so-called "waiver").<sup>47</sup>

There is not a great deal of State practice with regard to these provisions. In March 1965, the chairman of the Contracting Parties declared that the parties followed the policy expressed in article 86 of the Havana Charter, which was "to avoid passing judgment in any way on essentially political matters and to follow decisions of the United Nations on such questions."<sup>48</sup> In respect to the sanctions against Southern Rhodesia — the only example of a measure that could fall under article XXI(c) — a number of Member States followed the decision of the Security Council. The question whether recommendations of the General Assembly are also covered by this provision — a question that falls outside the scope of this article — has never been answered. It may be added, however, that the term "emergency in international relations" has been interpreted broadly.<sup>49</sup>

### III. UNILATERAL MEASURES AGAINST SOUTH AFRICA: THE DUTCH GOVERNMENT'S NOTE AND THE COMMENTARY OF THE PROFESSORS OF PUBLIC INTERNATIONAL LAW

#### A. *The Dutch Government's Note*

As noted earlier, the Dutch Government published a Note stating that, due to the strictures of international law embodied in the law of the EEC and ECSC, the Benelux Economic Union, and GATT, it could not impose unilateral sanctions against South Africa and an import prohibition on South African coal.<sup>50</sup> The dispute that prompted the Government's Note concerned the question whether the Netherlands could unilaterally impose an oil embargo against South Africa and an import prohibition on South African coal.<sup>51</sup> This article will limit its discussion of the Dutch Government's Note and the accompanying Report of the Interdepartmental Steering Group (the "Report") to the relevant issues of international law with respect to the EEC and ECSC, the Benelux Economic Union and GATT.

#### 1. *EEC/ECSC*

According to the Report, an oil embargo would be incompatible with the common commercial policy of the EEC. The Report noted that article 10 of Regulation No. 2603/69 on common rules for export excepted oil and

46. GATT, *supra* note 45, art. XXI, para. b.

47. GATT, *supra* note 45, art. XXV, para. 5.

48. GATT Doc. SR. 22/3, at 21 (1965), *quoted in* J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 125 (1969).

49. Kuyper, *Internationaal recht in plaats van politiek. Het juridisch debat over eenzijdige sancties tegen Zuid-Afrika*, 37 *INTERNATIONALE SPECTATOR* 777, 782 (1983) (referring to J. JACKSON, *supra* note 48, at 751.)

50. *See* note 5 *supra* and accompanying text.

51. That is, a prohibition on the export of oil and oil products from the Netherlands to South Africa (including a prohibition on transportation of these products).

oil products from the principle of the freedom to export.<sup>52</sup> However, this fact did not mean that the Member States could adopt autonomous trade measures. The Report noted that according to the judgment of the European Court of Justice in the *Donckerwolcke* case, autonomous trade measures would require a "special authorization" of the Community.<sup>53</sup>

Article 224 of the EEC Treaty also was of no avail according to the Report. It noted that the Court of Justice in the *Salgoil* case held that article 224 should be interpreted narrowly.<sup>54</sup> Furthermore, article 224 was not applicable, since the contemplated oil embargo did not involve an "obligation . . . for the purpose of maintaining peace and international security."<sup>55</sup>

According to article 71 of the ECSC Treaty, the "competence of the governments of member States with respect to commercial policy shall not be affected by application of the present Treaty."<sup>56</sup> One would have expected, therefore, that the Steering Group would not have perceived any obstacles from Community law for an import prohibition on coal. However, the Group invoked the "initial view" of the Dutch Government regarding the results of the Tokyo Round, i.e., that the powers of the EEC in the field of common commercial policy also applied to ECSC products.<sup>57</sup> Thus, according to the Report, a unilateral import prohibition on coal was also prohibited.

## 2. Benelux

This organization also has an established common import and export policy. Its effect is to liberalize the import of coal as well as the export of oil products for the whole Benelux territory. According to the Report, this common import-export policy required that there be a separate decision by the Benelux Committee of Ministers to abolish the common measures and to restore the powers of individual Member States to adopt autonomous measures with respect to these products. The Report also questioned whether such a decision would be in accordance with the progressive integration and the common commercial policy prescribed by the Treaty.

## 3. GATT

According to the Report, neither the exception for "essential security interests" (article XXI(b)(iii)) nor that for "obligations under the U.N. Charter" (article XXI(c)) permitted unilateral action in this case. The Re-

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52. Council Regulation 2603/69/EEC, Establishing Common Rules for Exports, art. 10, [Eng. Special Ed. 1969(II)] O.J. EUR. COMM. (No. L 324/25) 590 (Dec. 20, 1969), amended by Council Regulation 1934/82/EEC, Amending Regulation EEC No. 2603/69 establishing Common Rules for Exports, 25 O.J. EUR. COMM. (No. L 211) 1 (July 12, 1982).

53. *Donckerwolcke v. Procureur de la République de Grande Instance* (Preliminary Ruling) (Case No. 41/76), 1976 E. Comm. Ct. J. Rep. 1921, 1937.

54. *Salgoil v. Italian Ministry for Foreign Trade* (Case No. 13/68), 1968 E. Comm. Ct. J. Rep. 453, 463.

55. EEC Treaty, *supra* note 26, art. 224; see *Salgoil*, 1968 E. Comm. Ct. J. Rep. at 458.

56. Treaty instituting the European Coal and Steel Community, Apr. 18, 1951, art. 71, 261 U.N.T.S. 140 (1957) [hereinafter cited as ECSC Treaty].

57. See Report, *supra* note 5.

port stated that the only possibility for unilateral measures under GATT would be to request a "waiver" (article XXV(5)). Since the EEC has replaced the Member States in GATT representation, such a waiver would have to be applied for by the Community. Such a proposal would certainly raise objections by other Member States.

The Dutch Government, in its Note, concurred with the Report's analysis and concluded that at the present time a unilateral oil embargo against South Africa and an import prohibition on South African coal could not be imposed.

## B. *Commentary of the International Law Professors*

As noted earlier, in response to the Dutch Government's Note a group of public international law professors in the Netherlands issued a Commentary that reached an opposite conclusion.<sup>58</sup> As one of the draftsmen of the Commentary, this author can testify that the Commentary was not intended to make a statement on the *political desirability* of the measures under discussion. It only dealt with their *legal admissibility*. In this respect, the Commentary made the observations described below.

### 1. *Obligation Under the Charter*

Unlike the Report of the Interdepartmental Steering Group, the Commentary extensively analyzed the statements of UN organs, including the ICJ, regarding apartheid. The Commentary pointed to the ICJ's statement that apartheid constitutes a denial of fundamental human rights and a "flagrant violation of the purpose and principles of the Charter."<sup>59</sup> In view of this discussion, the Security Council labeled apartheid a system that "seriously disturbs international peace and security."<sup>60</sup> Apartheid was also condemned by the International Convention on the Elimination of all Forms of Racial Discrimination of 1966, to which all EEC Member States, except Ireland, are a party.

With a view to these statements and to the right that all States possess to take actions against such a gross violation of fundamental human rights,<sup>61</sup> the Commentary established that the UN Member States were *obliged*, by virtue of article 56 of the Charter, to adopt "joint and separate action" in cooperation with the UN. This obligation was elaborated in General Assembly Resolution 2625/XXV, the Declaration on Principles of International Law, mentioned earlier.<sup>62</sup>

### 2. *EEC/ECSC*

With respect to the EEC and ECSC, the Commentary — again, unlike the Report — opted for the applicability of article 224 of the EEC Treaty.

58. See note 6 *supra* and accompanying text.

59. See *Namibia Case*, *supra* note 19, 1971 I.C.J. at 57.

60. S.C. Res. 473, 35 U.N. SCOR (2231st mtg.) at 18, U.N. Doc. S/Res/473 (1980).

61. See *Barcelona Traction, Light & Power Company, Limited (Belg. v. Spain)* 1970 I.C.J. 3, 32 (Judgment of Feb. 5).

62. G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (No. 28) at 121, 123, U.N. Doc. A/2082 (1970); see text at note 25 *supra*.

First, the Commentary invoked the existence of the obligation to take "joint and separate action," which arose from the peace-disturbing nature of the violation of law posed by apartheid. Second, the Commentary stated that the measures under consideration qualified as *sanctions*. This conclusion was based on the political aim of the measures, which was termination of the policy of apartheid rather than an intent to affect trade as such.

Obviously, the Commentary assumed — in contrast to the interpretation of the author — that article 224 did not allow the Member States to take *trade measures*. But even if the measures were qualified as such, the Commentary did not see any obstacles to their unilateral adoption. As for the proposed oil embargo, the Commentary agreed with the Report's conclusion that modification of the export regime for oil products would require a special authorization by the Community. However, according to the Commentary, it was possible that article 10 of Regulation No. 2603/69 already gave such authorization.<sup>63</sup> With regard to the proposed import prohibition on coal, the Commentary referred to a number of decisions and treaties, from which it appeared that Member States believed that they had retained their powers relating to the commercial policy for coal.<sup>64</sup> As far as the Tokyo Round was concerned, the Commentary observed that the Dutch Government's "initial view"<sup>65</sup> had not been accepted: the Council had decided instead that the Tariff Protocols, to the extent that they concerned ECSC products, should be signed by the Member States.

### 3. *Benelux*

The Commentary concluded that in view of the right and obligation to adopt measures, as well as article 103 of the UN Charter, other Benelux Member States were not allowed to hinder the adoption of unilateral measures by the Netherlands. In addition, the Commentary analyzed article 9 of the Union Treaty discussed earlier.<sup>66</sup> According to the Commentary, there was no conflict with the "ideas of progressive integration and the prescribed common commercial policy," because sanctions, or at least measures of a generally political nature, are of a completely different order.

### 4. *GATT*

Recalling the declaration of the chairman of the Contracting Parties quoted above,<sup>67</sup> the Commentary argued that a request for a waiver, "if at

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63. Kuyper has confirmed that the latter view is correct, referring to Commission Answer to Question No. 1452/79 by Mrs. Lizin, 23 O.J. EUR. COMM. (No. C 126) 45 (Apr. 15, 1980). Kuyper, *supra* note 49, at 780-81. This question may soon come before the Court of Justice in a preliminary question asked by a British court.

64. *See, e.g.*, Decision 82/221/ECSC of the Representatives of the Governments of the Member States of the European Coal and Steel Community Meeting within the Council suspending imports of all products originating in Argentina, 25 O.J. EUR. COMM. (No. L 102) 3 (Apr. 16, 1982); Additional Agreement concerning the validity, for the Principality of Liechtenstein, of the Agreement between the Member States of the European Coal and Steel Community and the Swiss Confederation, 16 O.J. EUR. COMM. (No. L 350) 29 (July 22, 1972).

65. *See* text at note 57 *supra*.

66. *See* text at note 44 *supra*.

67. *See* text at note 24 *supra*.

all needed for unilateral measures in the fight against apartheid," would probably not be opposed. The Commentary further pointed to article XXI(c) and noted that on an earlier occasion, the Dutch Government itself had declared "that the word 'obligations' in that Article did not exclusively refer to formally binding obligations."<sup>68</sup>

The Commentary did not conclude that the Netherlands was legally bound to take the proposed sanctions. However, the professors concluded that there was an obligation to cooperate with other States to combat apartheid. They established that the obstacles of public international law mentioned by the Government did not materially hinder the adoption of unilateral measures.

### C. *A Legal Evaluation of the Different Viewpoints*

A legal evaluation of the different viewpoints must examine the Dutch Government's contention that no obligation to adopt unilateral economic measures existed and the professors' contention that there was an obligation to take *some* action, even if not certain measures. The latter contention will be discussed first.

#### 1. *Existence of an "Obligation Under the Charter"*

*EEC/ECSC.* Assuming that this obligation relates to the maintenance of international peace and security, as asserted by the professors, article 224 would apply and would give the Member States the right to take (unilateral) measures. It would make no difference whether these measures qualified as sanctions or trade measures. This follows from article 224's reservation of sovereignty to the Member States in this respect.

If the obligation of article 56 of the UN Charter is not considered an "obligation for the purpose of maintaining peace and international security" within the meaning of article 224 of the EEC Treaty, the latter article could not be applied. One would then have to resort to article 234 of the EEC Treaty, which specifies that preexisting treaty obligations remain in force.<sup>69</sup> The resolution of the issue of whether Member States could adopt unilateral measures would then depend on the internal division of powers between the Member States and the Community, and the classification of the measures involved. In the event that they were classified as trade measures rather than sanctions, the power to enact the measures would rest with the Community, unless the power of the Member States continued to exist by virtue of express provision of Community law, as in the case of oil and oil products.<sup>70</sup>

The ECSC Treaty does not contain a provision like article 224. Because it does not provide for a common commercial policy for "its" products, the power of the Member States to adopt measures still exists, irrespective of their character. Thus, a unilateral embargo on coal would be permissible under the ECSC Treaty.

*Benelux.* In the event of an "obligation under the U.N. Charter," the

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68. Bijl. Hand. II., Zitting 1977, 14 006, No. 8, at 2.

69. See text at note 36 *supra*.

70. See note 63 *supra* and accompanying text.

same regime would apply as in the EEC under article 234. However, in the case of Benelux it would apply directly by virtue of article 103 of the Charter. This implies that the Benelux organs are not allowed to prevent a Member State from complying with its obligations. Unless Benelux itself adopted the necessary measures, the products involved would have to be excepted from existing rules of common commercial policy.

*GATT*. Just as under the EEC Treaty, the first issue is to determine whether the obligation relates to the maintenance of international peace and security. If it does, contracting parties are free to adopt the measures by virtue of article XXI(c). If it does not, the question arises whether article XXI(b)(iii) applies. In view of existing practice,<sup>71</sup> the presence of an "emergency" that would permit unilateral imposition of the measures should not be excluded.<sup>72</sup>

## 2. *Absence of an Obligation Under the UN Charter*

Accepting the Dutch Government's contention that no obligation exists under the UN Charter to take action to remedy apartheid, what are the consequences for the EEC and ECSC, the Benelux Union and GATT?

*EEC/ECSC*. With respect to the ECSC, the situation would not differ from that discussed above.<sup>73</sup> Member States would be free to take autonomous measures. The same rule applies to the EEC to the extent that the products fall outside the common commercial policy. However, the situation is uncertain if no obligation exists and a Member State would nevertheless like to adopt measures that deviate from a rule of Community law.

Leaving the other grounds mentioned in article 224 out of account,<sup>74</sup> in principle three approaches to this problem could be taken. First, EEC law has to yield to *jus cogens*. In addition to article 103 of the Charter, *jus cogens* also contains rules that have to be respected by international organizations.<sup>75</sup> It has been argued that the observance of fundamental human rights belongs to this part of public international law.<sup>76</sup> One must recognize, however, that there is a great deal of uncertainty about the contents of *jus cogens*.<sup>77</sup> Thus, it would offer a basis to deviate from an obligatory rule of Community law only in exceptional cases.

Second, one could postulate that the Member States did not lose their international legal position by their entrance into the Community, and that they should therefore be deemed to be free to implement *sanctions*, a subject that has not been regulated by the EEC Treaty and that would still be

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71. See text at notes 45-49 *supra*.

72. Kuyper, *supra* note 49, at 782.

73. See text following note 70 *supra*.

74. According to this article, Member States could also act unilaterally "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."

75. Leenen, *supra* note 10, at 55.

76. Kuyper, *supra* note 49, at 782 (referring to A. VERDROSS & B. SIMMA, *supra* note 8, at 262); see also Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/CONF 39/27, reprinted in 63 AM. J. INTL. L. 875 (1969).

77. Cf. I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512-15 (3d ed. 1979).

covered by their powers under public international law.<sup>78</sup> Likewise, it has been observed that a Member State, in the event of large economic problems, could resort to "self-help without engagement of the Community."<sup>79</sup> Beutler denied this on the ground that such national measures "would make the graded system of exceptional factual situations, regulated by the Treaty, superfluous or would at least erase its limits, and in that way would withdraw it from supervision in the framework of the Community."<sup>80</sup> This objection also applies to the use of powers under public international law that would allegedly have been retained by the Member States, insofar as they are related to the subject matter of the Treaty. In the *Dairy Products* case, the Court of Justice rejected an appeal to the rule of public international law concerning the *exceptio non adimpleti contractus* on the ground that the EEC Treaty established a new legal order "which governs the powers, rights and obligations of the [natural and legal persons to whom it is applicable], as well as the necessary procedures for taking cognizance of and penalizing any breach of it."<sup>81</sup> The Member States were, therefore, prohibited from "taking the law into their own hands," except where otherwise expressly provided by the EEC Treaty.<sup>82</sup>

For these reasons, we shall ultimately have to find the solution *within* the Community legal order. Because the EEC Treaty does not contain a special provision on the adoption of sanctions, Member States must resort to the powers of the Community in the field of common commercial policy contained in article 113.<sup>83</sup> The broad interpretation given to this article is justified by the damage that unilateral measures of the Member States could inflict upon the functioning of the Common Market.<sup>84</sup> Under article 113, autonomous measures of the Member States would only be permissible if based on special authorization by the Community. The only other possibility within the Community legal order would be to apply article 235, either directly or in the form of an authorization for the Member States, to adopt economic sanctions towards third countries. A similar view was fi-

78. Traces of this view are perceptible in the Commentary. See Commentary, *supra* note 6, at 36.

79. Oppermann, *Schutzklauseln in der Endphase des Gemeinsamen Marktes*, 4 EuR 231, 237 (1969) (The original reads: "Selbsthilfe ohne Einschaltung der Gemeinschaft." The translation quoted in the text is that of the author of this Article.). In such cases, Oppermann proposes to apply article 235 of the EEC Treaty.

80. B. BEUTLER, R. BIEBER, J. PIPKORN & J. STREIL, *DIE EUROPÄISCHE GEMEINSCHAFT: RECHTSORDNUNG UND POLITIK* 75 (1978) (The original reads: "das abgestufte System vertraglich geregelter Ausnahmetatbestände überflüssig machen oder zumindest seine Grenzen verwischen und damit einer gemeinschaftsbezogenen Kontrolle entziehen würdne." The translation quoted in the text is that of the author of this Article.).

81. *Commission of the EEC v. Luxembourg & Belgium* (Nos. 90-91/63), 1964 E. Comm. Ct. J. Rep. 625, 631.

82. 1964 E. Comm. Ct. J. Rep. at 631.

83. EEC Treaty, *supra* note 26, art. 113.

84. The economic sanctions against the Soviet Union (regarding the Polish situation) and Argentina have been based, wholly in the case of the former and partly in the case of the latter, on article 113. See Council Regulation 596/82/EEC, amending the import arrangements for certain products originating in the USSR, 25 O.J. EUR. COMM. (No. L 72) 15 (Mar. 15, 1982); Council Regulation 877/82/EEC, suspending import of all products originating in Argentina, 25 O.J. EUR. COMM. (No. L 102) 1 (Apr. 16, 1982).

nally proposed by Oppermann with respect to domestic economic problems that are not covered by one of escape clauses in the Treaty.<sup>85</sup>

*Benelux.* Examining the same points in respect of Benelux, it should first be observed that the constitution of this organization neither contains a provision about sanctions nor a provision similar to article 235 of the EEC Treaty. In addition, positing the existence of a residual power on the part of Member States to take unilateral measures on matters covered by the Benelux Treaty would be contrary to the goal of establishing an economic union. As was the case with the EEC, the Member States would, therefore, have to apply to the commercial policy powers of the organization except in those special instances where *jus cogens* may apply. In the event of disagreement, a Member State would have to ask for an exemption from the governing rules.

*GATT.* Unlike the other two treaties, GATT might be said to offer a solution for the present problem in the form of article XXI(b)(iii). Subsidiarily, a contracting party could apply for a "waiver" by virtue of article XXV(5). In addition, of course, the possibility exists for application of *jus cogens*.

#### CONCLUSION

The interrelationship between UN law and the law of other international organizations poses difficult legal questions. Some of these questions have been examined here in relation to the Netherlands' proposed sanctions against South Africa. As this examination illustrates, arriving at the proper legal conclusion requires painstaking analysis of each relevant set of organizational laws. The importance of undertaking this analysis lies in furthering the rule of law in the international arena.

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85. Oppermann, *supra* note 79, at 237-38.